COPYRIGHT BOARD

ANNUAL REPORT 1997–1998

Copyright Board
Canada

CANADA

Commission du droit d'auteur
Canada

The Honourable John Manley, P.C., M.P.
Minister of Industry
Ottawa, Ontario
K1A 0A6

Dear Mr. Minister:

It is my pleasure to transmit to you, pursuant to section 66.9 of the *Copyright Act*, the tenth Annual Report of the Copyright Board, covering the period from April 1, 1997 to March 31, 1998, for submission to Parliament.

Yours sincerely,

Michel Hétu
Vice-Chairman and
Chief Executive Officer

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BOARD MEMBERS AND STAFF
as of March 31, 1998

Chairman:	Vacant
Vice-Chairman and Chief Executive Officer:	Michel Hétu, Q.C.
Members:	Adrian Burns
	Andrew E. Fenus
Secretary:	Claude Majeau
General Counsel:	Mario Bouchard
Researcher-Analyst:	Pierre-E. Lalonde
Assistant to the Secretary:	Lise St-Cyr
Administrative Officer:	Jaï Bellehumeur
Assistant:	Michel Gauthier

MANDATE OF THE BOARD

The Copyright Board was established on February 1, 1989, as the successor of the Copyright Appeal Board. Its responsibilities under the *Copyright Act* [the *Act*] are to:

- adopt tariffs for the public performance or the communication to the public by telecommunication of musical works and sound recordings [sections 67 to 69];
- adopt tariffs, at the option of a collective society referred to in section 70.1, for any act protected by copyright, as mentioned in sections 3, 15, 18 and 21 of the *Act* [sections 70.1 to 70.191];
- set royalties payable by a user to a collective society, when there is disagreement on the royalties or on the related terms and conditions [sections 70.2 to 70.4];
- adopt tariffs for the retransmission of distant television and radio signals as well as for the reproduction and public performance by educational institutions, of radio or television news or news commentary programs and all other programs, for educational or training purposes [sections 71 to 76];
- adopt tariffs for the private copying of recorded musical works [sections 79 to 88];
- rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals, when the copyright owner cannot be located [section 77];
- examine, at the request of the Director of Research appointed under the *Competition Act*, agreements between a collective society and a user which have been filed with the Board, where the Director considers that the agreement is contrary to the public interest [sections 70.5 and 70.6];
- set compensation, under certain circumstances, for formerly unprotected acts in countries that later join the Berne Convention, the Universal Convention or the Agreement establishing the World Trade Organization [section 78].

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

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

ORGANIZATION OF THE BOARD

Detailed information on the Board's resources, including financial statements, can be found in its Expenditure Plan for 1998-99 (Part III of the Estimates), which was tabled in Parliament on March 26, 1998.

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

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

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

Chairman

The position of the Chairman is vacant since October 4, 1994. Until that date, the **Honourable Donald Medhurst**, a justice of the Alberta Court of Queen's Bench, was the Chairman of the Board. His was a part-time appointment.

Vice-Chairman & Chief Executive Officer

Michel Hétu, Q.C., was 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 and was appointed in February 1989 and reappointed in 1994 for five years.

Members

Andrew E. Fenus, C. Arb., is a full-time member appointed in July 1994 for a five-year term. He was a Board member and Provincial Adjudicator with the Rent Review Hearings Board of Ontario from 1988 to 1994 where he served as Senior Member of the Eastern Region. Mr. Fenus is a Chartered Arbitrator and member of the Arbitration and Mediation Institute of Canada. He is a graduate of Queen's University (Honours BA in 1972 and Master of Public Administration in 1977) and McGill University (Master of Library Science in 1974).

Adrian Burns was appointed a full time member of the Copyright Board on September 1, 1995 for a five-year term. Mrs. Burns has a degree in Art History from the University of British Columbia and has done graduate studies at the British Academy in Rome. Mrs. Burns served as a Commissioner of the Canadian Radio Television Telecommunications Commission (CRTC) for seven years. Before being appointed to the CRTC, she worked in television as the Business Editor for CFCN (CTV) Calgary. During her years at CFCN and at CBC prior to that, she also worked as a news Anchor/Writer and Producer. Mrs. Burns is presently a Director of Western Limited and of The Canadian Athletic Foundation, Trustee of the National Symphony Orchestra in Washington, D.C., as well as Governor of Ashbury College and of the Stratford Festival Senate. She has served on several other corporate and community boards.

The Board's staff

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

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 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.

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.

In order to reduce cost, the Board has entered into a support services agreement with the Department of Industry. The department provides support services and expert advice in personnel, administrative and financial matters.

PUBLIC PERFORMANCE OF MUSIC RIGHTS

Background

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) must file a statement of proposed royalties with the Board on or before March 31 preceding 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 can file an objection with the Board within 60 days of publication. SOCAN and the objectors are provided with an opportunity to present evidence and argument to the Board. Once the Board has completed its inquiry, it certifies the tariff, publishes it in the *Canada Gazette*, and provides written reasons in support of its decision.

Decisions of the Board

The Board issued two decisions regarding SOCAN's tariffs during 1997-98. The ***first*** one, issued May 23, 1997, certified undisputed tariffs which, in some cases, reflected agreements reached between SOCAN and users:

For the years 1996 and 1997

Tariff 1.B (Non-Commercial Radio);
Tariff 3.B (Cabarets, Cafes, Clubs, etc. – Recorded Music Accompanying Live Entertainment);
Tariff 3.C (Adult Entertainment Clubs); and
Tariff 11.A (Circuses and Ice Shows).

For the year 1997

Tariff 2.B (TVOntario);
Tariff 2.C (Télé-Québec);
Tariff 3.A (Cabarets, Cafes, Clubs, etc. – Live Entertainment);
Tariff 4 (Concerts);
Tariff 5 (Exhibitions and Fairs);
Tariff 7 (Skating Rinks);
Tariff 9 (Sports Events);
Tariff 11.B (Comedy Shows and Magic Shows);
Tariff 12 (Theme Parks, Ontario Place Corporation and Similar Operations; Canada's Wonderland and Similar Operations);
Tariff 13 (Public Conveyances);
Tariff 14 (Performance of an Individual Work);
Tariff 15 (Background Music);
Tariff 16 (Music Suppliers);
Tariff 18 (Recorded Music for Dancing);
Tariff 20 (Karaoke Bars and Similar Establishments); and
Tariff 21 (Recreational Facilities Operated by a Municipality, School, College or University).

No objections were filed to proposed Tariffs 2.B, 2.C, 5.A, 7, 9, 11.B, 12, 13, 14, 15, 18, 20 and 21 for 1997. Tariff 9 reflected an agreement reached between the Canadian Alliance of Music Presenters and SOCAN for the years 1992 to 1997. Tariff 18 reflected an agreement reached between the Hotel Association of Canada, the Canadian Restaurant and Foodservices Association and SOCAN covering the years 1992 to 1997. These tariffs were consequently certified as filed.

The ***second*** decision, issued January 30, 1998 (Vice-Chairman Hétu dissenting), pertained to Tariff 2.A (Commercial Television Stations) for the years 1994 to 1997.

The hearings required fourteen days, between April 8 to 24, 1997 and on June 6, 1997. Filings of arguments and replies were completed on July 11, 1997.

The Parties' Positions and Arguments

SOCAN asked that the Board maintain the *status quo ante*. For its part, the Canadian Association of Broadcasters (CAB) wanted the rate base to remain a station's "gross income", but asked that the rate be reduced from 2.1 per cent to between 0.86 per cent and 1.63 per cent. CAB also asked for a "modified blanket licence" (MBL) that would allow stations to further reduce the amount of royalties they pay to SOCAN when they air programs for which they do not need a SOCAN licence.

In support of its position, SOCAN invoked a number of arguments. First, there is presently a balance between the (unregulated) front-end and (regulated) back-end markets. It may not be the best balance, but chances of discovering a better one are very low, since this would require more information than the Board would ever be able to collect. It is best to let the front-end market make the small changes required to reflect market conditions. Second, any reduction in the rate would increase the widening gap between performing rights and other creative inputs. Third, the proposed MBL is flawed in principle as well as in practice. It constitutes a frontal assault on the very notion of collective administration, would force composers to either leave SOCAN or seek changes to SOCAN's internal operations and structure, and would favour foreign composers, namely members of the American Society of Composers, Authors and Publishers (ASCAP). The MBL would favour buyout arrangements, as opposed to remuneration for use. The MBL as proposed by CAB would generate unnecessary disputes about reporting and acquisition of rights. Finally, the approach put forward by CAB would encourage cherry-picking: broadcasters would be able to derive large discounts by clearing music in programs which generate important revenues but use little SOCAN music.

For its part, CAB suggested that new market realities, including the increased pace of competition, a new public policy framework and the increased pace of technological and business change, as well as new expert evidence presented to the Board which supplemented and complemented evidence provided in 1993, all combine into a powerful case in support of its request for a reduction in the rate and the introduction of a MBL. A rate reduction would be responsive to new competitive pressures, while the MBL would recognize the ability of producers to deal with music in the up-front markets. Both changes would encourage greater reliance on negotiated arrangements, which in turn would increase the efficiency of the system and benefit Canadian composers as well as broadcasters. CAB also maintained that composers are able to wield effective bargaining power in the front-end markets, if only because they can resort to collective bargaining. Finally, CAB argued that the MBL is totally compatible with collective administration.

CAB also asked that the rate be reduced to specifically account for: the fact that CTV Television Network now pays royalties; the fact that CTV affiliates pay royalties on the amounts they receive from CTV; and the fact that television stations in the province of Quebec pay reproduction royalties to the *Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada* (SODRAC).

Analysis and Decision

The Level of Royalties

The Board agreed with CAB's conclusion that the rate should be lowered. A combination of reasons, rather than any single, compelling argument, led the Board to believe that the rate is too high in the environment in which Canadian broadcasters currently operate.

The Board found that the environment in which conventional broadcasters operate today is quite different from what it was 15 or 20 years ago. Most importantly, the competition they face has increased considerably and a new public policy framework has evolved. The market in which conventional broadcasters operate is more competitive than in the past. Competition has increased at an accelerated rate. The sources of that competition are also more diverse. Fragmentation has occurred, with the introduction of 19 new Canadian programming pay and specialty services over the last decade alone and 15 Canadian new ones in the Fall 1997. The television advertising pie may be getting slightly larger, but more players are taking a slice out of it. At the same time, new information and entertainment alternatives, including direct broadcast satellites and the ubiquitous Internet, have started to emerge, generating further competition and fragmentation. Nothing indicated that the pace of change could slow down in the years to come; the evidence is to the contrary.

The Board further found that these competitive pressures have taken their toll in at least three respects. First, private conventional television broadcasters lost more than 9 per cent of their audience share between 1991 and 1996. Second, the financial performance of the industry has deteriorated. The industry has not recovered the profitability levels exhibited in the mid-1980's; SOCAN's own expert witness readily admitted that those levels are not being projected for the future. Third, revenue growth is slower for conventional broadcasters than for new players in that market. Thus, over the last five years, air-time sales of conventional broadcasters increased at a compound annual growth rate of 3 per cent; during the same period, air-time sales of specialty services increased at a rate of 14 per cent. Meanwhile, SOCAN derives direct benefits from this arrival of new players who compete with conventional television broadcasters. For example, SOCAN should receive close to $9 million in royalties on account of music use on pay and specialty television services in 1995.

"Increased competition necessarily brings about a re-examination of all expenses: only in this way can a player in a market remain competitive. In the case of expenses for which the price is set by an outside agency, such as SOCAN royalties, only the regulating agency can carry this re-examination, with the help of the affected players. Increased competition also affects broadcasters' profitability and, with it,

their ability to pay. Ability to pay is a factor which the Board has repeatedly held to be relevant, although not determinant, in deciding what constitutes a fair tariff under all the circumstances."

The Board also found that the public policy framework applicable to broadcasters has changed significantly. Most importantly, new Cabinet and Canadian Radio-television and Telecommunications Commission (CRTC) policies have resulted in an increasing reliance on market forces and an aggressive encouragement of Canadian programming. This has profoundly affected the environment in which conventional broadcasters operate. The Board is not bound to take these changes in public policy into account unless required to do so in a directive issued pursuant to the *Act*. Nevertheless, these changes are relevant to the task of setting a fair and equitable tariff, so long as the policies which brought about the changes do not run counter to those which the Board is bound to promote. The Board considered that the relevant Cabinet and CRTC policies are consistent with the Board's constating statute, if only because they define, to a large extent, the "world" within which broadcasters operate. Just as it did in its first retransmission decision, the Board finds that it should keep in mind the relevant areas of public policy, and the changes thereto, in setting the tariff.

The Board also took into consideration that the American broadcasters pay a much smaller share of their revenues for music performing rights. SOCAN challenged the relevance of this fact, without disputing it. Thus, according to SOCAN, the rate was the product of a court ruling, and not, as CAB maintained, of arms' length negotiations. For three reasons, the Board found that the fact that American broadcasters pay a smaller share of their revenues than Canadian broadcasters for their music performing rights is relevant. First, over 60 per cent of Canadian broadcasters' royalties are paid on account of revenues generated by American programming primarily prepared for and used in the American market. Moreover, half of all the royalties paid by Canadian broadcasters are distributed to American composers in respect of that same programming. In other words, whether one looks at revenue-generation or distribution, ASCAP and Broadcast Music Inc. (BMI), through SOCAN, provide Canadian broadcasters with anywhere between 50 and 60 per cent of the "music" product they use. The Board found that players with such an important share of a market must have influence on that market. More importantly, it is not unreasonable to expect that the price paid for a good in its principal market will determine, to an extent, the price paid for the same good in a secondary market. Therefore, the price for American music in the American market can be relevant to the determination of the royalties to be paid for the same music, in the same programs, by similar users, in a secondary market.

Second, and whatever its characteristics, the American price can be a relevant consideration, for the mere reason that it exists. That remains true regardless of whether the way it was reached is "better" or "worse", whether it is the result of negotiations, or whether the manner in which it was derived makes no sense to some economists. A price can be relevant without regard to the manner in which it was originally generated.

American border stations and the top U.S. channels are the Canadian broadcaster's main competitors for audience. That, in itself, makes the American price a factor in a global, North American marketplace.

Conversely, the Board could not simply overlook the fact that "when the current tariff was developed, the parties and the Copyright Appeal Board intended that there be a consonance between American and Canadian rates." That correlation can, and should, play a role in setting the rate for the tariff.

The Board found that a decrease in the rate paid by broadcasters will not necessarily have negative effects on composers' revenues. This is due to a combination of three factors: Canadian programming spending requirements which the CRTC imposes on broadcasters; the absolute necessity of foreign sales for Canadian programming to be profitable; and the relative importance of foreign revenues to Canadian composers. Payments to SOCAN are accounted for as part of the broadcasters' Canadian programming expenditures. Therefore, any reduction in the tariff will result in more money being spent on Canadian programming. That programming, in order to make money, must generate foreign sales. In turn, those sales lead to foreign broadcasts, which generate more revenues for the composers. Consequently, a reduction in the rate may very well, in the long term, benefit authors as well as broadcasters.

The Board also found that the alleged balance between the so-called "front-end" and "back-end" markets is irrelevant to the issue at hand. The Board deals with the valuation of music use in television programming only in so far as it concerns the performing right. It is not overly concerned with the interrelationship, if such an interrelationship does exist, between back-end payments and front-end arrangements. To a large extent, any such relationship that might exist is irrelevant to the task of setting a value for the use of the performing right.

SOCAN argued that there is a widening gap between performing rights and other creative inputs. The Board found that the gap SOCAN refers to relates to the use of the copyright, not to the provision of the creative services that are used in the production of a program. "The Board does not know whether there is a widening gap between music creative services and other production inputs. Nor does it know how the relationship between performing rights and, say, residuals received by the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) members has evolved. The record seems to suggest that music is reasonably well compensated in both respects."

"It is important to keep in mind that although music may be pervasive within a television program, it is rarely, if ever, more than an input into a complex entertainment product that comprises other inputs whose drawing power is much more significant. It is the final product that generates the revenues in this medium, not its individual components. Music, as one component in a television program, has benefitted well from this revenue and its significance over valued relative to the final product. This can readily be contrasted with the situation of radio, where music can, and often is, the central input that drives audiences to listen."

Overall, the Board determined that a reduction of the rate in the order of 15 per cent, to 1.8 per cent, was reasonable and that the measure of the correction was one which, in the long run, SOCAN was quite capable of absorbing. "This is all the more true since, during the relevant period, inflation was very low. The correction, therefore, recognizes the new economic environment while possibly having a positive effect on affected composers and authors."

The Board declined to make any of the other adjustments which CAB requested to the level of royalties.

The Modified Blanket Licence (MBL)

The Board was persuaded that the tariff should expressly enable broadcasters to reduce the amount of royalties they pay to SOCAN when they air programs that do not use music for which they need a SOCAN licence, either because that music is not in SOCAN's repertoire or because the rights have otherwise been cleared. For the following reasons, the Board found that television broadcasters should have access to a MBL.

First, the Board accepted the evidence that the current "all or nothing" institutional arrangements was no longer appropriate to the context in which broadcasters operate. The Board also found that a licence which enables broadcasters to opt out of the SOCAN licence for certain programs can co-exist with the traditional blanket licence without undermining the blanket protection that the current regime offers. Second, an important proportion of music used in television programs is composed for that precise purpose: producers already deal with composers for synchronization rights. Since broadcasters are also producers of television shows, this makes it even easier for them to strike deals with composers. "All of this leads to a determination in favour of allowing broadcasters to approach composers directly with a view to striking deals in the open market." Third, the introduction of a MBL will give composers more options for remuneration, including the option of continuing to resort to current institutional arrangements. "Continuing the current regime imposes on composers a *one-size-fits-all* approach."

SOCAN put forward a number of arguments against the introduction of the MBL. The Board was not persuaded by any of these arguments. Contrary to what SOCAN maintained, the Board determined that the MBL is consistent not only with public policy in general, but also with the underlying policies of the *Act*. The MBL does not undermine the concept of a blanket licence, since it is itself a blanket licence. Composers are not forced to strike deals directly with broadcasters for their performing rights. They can refuse to deal and they can continue to rely on SOCAN to collect royalties. The MBL does not deprive composers of their right to resort to collective administration of their performing rights; only SOCAN itself, by continuing to insist on exclusive assignments, could limit the composers' access to collective administration.

SOCAN also argued that the MBL could hurt Canadian composers by bringing about a bifurcated system in which music in Canadian programs would be cleared at source and only foreign music would be administered collectively. "The Board finds that this

overstates the potential impact of the MBL. The *Act* gives composers the option to administer most of their rights, including performing rights, directly or collectively, without taking any account of how foreign composers have decided to manage the same rights. Therefore, a composer's decision to directly manage his or her performing rights in a given market ought not to depend on how foreign composers go about administering their rights in Canada. Moreover, there is nothing fundamentally wrong with the scenario described by SOCAN, should its members decide to take that approach."

The Board found that SOCAN's expressed fears about a measure which merely allows agreements to be reached is in conflict with its oft-repeated position with respect to the agreements it reaches with users and groups of users. SOCAN often asks that the Board endorse such agreements. In some cases, SOCAN relies on agreements without having filed a tariff. Sometimes, it goes so far as to abide by the terms of an agreement even if they are in contradiction with a certified tariff. Implementing the MBL merely allows agreements of a different kind to have an impact on the amount of royalties SOCAN is allowed to collect. "It is difficult to understand why SOCAN would wish to deny its members the benefit of a transaction mechanism it itself so often uses."

Relying on the testimony of its composer witnesses, SOCAN also expressed some concern about the ability of composers to deal on an equal footing with broadcasters in front-end negotiations. The Board found these concerns to be unfounded as a matter of economic theory, and inconsistent with the broadcasters' interest in negotiating fairly and establishing long-term relationships. These concerns also ignore the models for collective bargaining developed by others and which are now more broadly available under the *Status of the Artist Act*.

From the record of these proceedings, the Board drew the following conclusions. First, bilateral dealings between broadcasters and composers already take place for the purposes of commissioning music and (at least outside the Province of Quebec) acquiring synchronization rights. Second, the balance of power in the relevant market is fairly even, with buyers having slightly more market power than the sellers. Nothing indicates the existence of undue market power or a market imbalance in these dealings; more specifically, the ability of broadcasters to secure the publisher's share of performing rights is not an indication of market imbalance. Third, broadcasters do perform an important role in promoting programs, with their embedded music, around the world.

The Board took note of CAB's assurances that its members will deal fairly with composers. While these assurances have no evidentiary weight, the Board mentioned it had an expectation that broadcasters will respect those assurances. The Board would not allow a situation to develop in which composers deal from a position of weakness.

The Board determined that in any event, allowing negotiations to occur in the front end should not leave composers at a disadvantage. Composers already deal in several markets where collective administration is non-existent: the "grand rights" market is an example of this. Composers can form unions. They can use the services of agents or legal representatives. The Board also added that the negotiating power of

composers is obviously greatly enhanced if they bargain collectively. In some jurisdictions, status of the artist legislation is in place: this is the case at the federal level and in the Province of Quebec. In others, composers may be able to obtain certification as a labour union. More importantly, the experience clearly shows that collective bargaining can successfully take place even in the absence of any such legislation.

"Finally, and most importantly, nothing stops SOCAN from adapting to new market realities. It can adjust its mandate to allow it to do what is necessary to protect and advance its members' interests in areas other than performing rights. This is clearly illustrated by SOCAN's recent entry into the field of reproduction rights with respect to the upcoming home-taping levies."

SOCAN believed that the introduction of the MBL will encourage producers, including broadcasters, to hire American composers who are members of ASCAP, since this society is the only one in the world which secures from its members non-exclusive assignments for the entire world. The Board was of the opinion that the record of the proceedings did not support that assertion.

First, Canadian composers represent one "point" toward Canadian content thresholds under CRTC policy and thus there is a significant regulatory incentive to use Canadian composers. Second, the fact that SOCAN currently secures exclusive assignments is irrelevant, and certainly not determinant. Even if this situation were to continue, broadcasters would be able to obtain Canadian music in several other ways. The most probable scenario would be that some new composers would decline to join SOCAN, and some of its members would decide to leave SOCAN at the end of their membership. They would then join ASCAP, which has no residency requirements. These composers would then enjoy all the benefits of collective administration even though SOCAN continued to insist on obtaining exclusive assignments from its members.

"Other possibilities exist. Canadian composers might become employees of organizations which are not themselves members of SOCAN. Broadcasters might also resort to music libraries. This variety of options mitigates any concern, such as the one expressed in an earlier decision of the Board, that the proposed scheme «could conceivably create an advantage for American composers»."

"The introduction of the MBL might create an advantage to Canadian members of ASCAP. This will arise only if SOCAN continues to forbid its own members from directly licensing their television performing rights... [there] is, at least theoretically, a scenario under which the blanket licence would start unravelling. In order for this to occur, SOCAN would have to continue to insist on exclusive assignments while at the same time, Canadian composers would leave SOCAN without joining ASCAP. This sort of concerted behaviour would be either irrational or in bad faith. More importantly, it requires the conscious, willing participation of both SOCAN and composers."

The Board held that SOCAN was correct in pointing out that the MBL may create certain

difficulties in the beginning. However, the evidence filed with respect to the American experience with the "per-program licence" (PPL) seems to indicate that these difficulties should not be major ones. Available technology, combined with usual accounting practices, make it relatively easy, for example, to allocate revenues to specific programs. Most Canadian broadcasters already use electronic traffic systems and programming management systems that can perform the required tasks. Indeed, the fact that SOCAN's distribution system for television is much more sophisticated than ASCAP's means that some of the startup difficulties experienced in the United States will be avoided.

Conclusion

Finally, the Board found that the measures outlined in its decision provided broadcasters with a number of benefits, while at the same time guaranteeing the continued role of SOCAN in the area of television music performing rights. Thus, the reduction of the rate from 2.1 per cent to 1.8 per cent, while reducing broadcasters' payments, will still leave SOCAN with the same amount of Tariff 2.A royalties in 1996 as it received in 1994, a period over which inflation was very low.

The Board also stated: "As to the MBL, it will also have a number of beneficial effects. The market will be allowed to play a stronger role than is currently possible. Broadcasters and composers will have available new, alternative ways of transacting in performing rights, ways that are designed in such a manner as to ensure that neither collective administration, nor the blanket licence will be put at risk. The manner in which the MBL is designed will afford broadcasters a further benefit, without jeopardizing SOCAN's financial situation."

The Board said it was convinced that, in the long run, these measures will benefit Canadian composers, if only because of their increasing reliance on foreign royalties. "No one can predict the precise impact that these measures will have on front-end payments to individual composers or on the overall amounts received by all composers. If, as others maintain, there is a relationship between one and the other, then in the long run and overall, the amount being paid at the back-end probably has some impact on the amount being paid in the front-end, and a lowering of the rate combined with the MBL will put more emphasis on negotiated deals in the market. This is a consequence of an evolving marketplace and one which the Board believes it is time to accept."

[NOTE: On March 4, 1998, SOCAN filed an application in the Federal Court of Appeal for judicial review of that decision.]

RETRANSMISSION RIGHTS

Background

The *Copyright Act* provides for royalties to be paid by cable companies and other retransmitters for the carrying of distant television and radio signals. The Board sets the royalties and allocates them among the collective societies representing copyright owners whose works are retransmitted.

A collective society must file a statement of proposed royalties with the Board on or before the March 31 preceding the year in which the tariff is to apply. This proposed tariff is then published by the Board in the *Canada Gazette*. Any retransmitter or its representative can file an objection with the Board within 60 days of publication. The collective societies and the objectors are provided with an opportunity to present evidence and argument to the Board. Once the Board has completed its inquiry, it certifies the tariff, publishes it in the *Canada Gazette*, and provides written reasons in support of its decision.

Decision of the Board

At the request of the Copyright Collective of Canada, the Board adopted, in an interim decision dated December 19, 1997, as interim tariffs to be paid for the retransmission of distant television and radio signals during 1998, the text of the tariffs certified for the years 1995 to 1997. Only a few adjustments were required to reflect the coming into force of various provisions of Bill C-32 (S.C. 1997, c. 24) and of new *Broadcasting Procedures and Rules*. These adjustments are found at section 2 (definitions of "*LPTV*", "*retransmitter*", "*signal*" and "*small retransmission system*") of the television and radio tariffs.

UNLOCATABLE COPYRIGHT OWNERS

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

Since its inception, in 1989, up to the year 1996-97, the Board issued 39 licences. In 1997-98, the Board issued 18 licences to the following applicants:

- *Gina Bausson*, Montreal, Quebec, authorizing the reproduction of a poem by René Chopin in a guide for the interpretation of poetic and theatrical texts.
- *Éditions d'Acadie*, Moncton, N.B., authorizing the reproduction of three photographs taken by Henri Paul in 1962-63, in a textbook to be used to teach French in New Brunswick at the Grade 11 school level.
- *Canadian Institute for Historical Microreproductions*, Ottawa, Ontario: the Institute is an organization which locates, preserves, catalogues and distributes early Canadiana in print form, microfiches or CD-ROMs. Its objectives are to improve access to printed Canadiana, to make rare and scarce Canadiana more widely available to bring together fragmented collections of Canadiana and to ensure the preservation of Canadiana in Canada and elsewhere. Three licences were issued: the first one authorizing the reproduction of 516 works, the second one for 300 works and the third one for 583 works.
- *Fifth House Publishers*, Saskatoon, Saskatchewan: two licences were issued; the first one authorizing the reprint, in no more than 4,000 copies, of the book entitled "Gully Farm" written by Mary Hiemstra and originally published in 1955 by McClelland and Stewart. The second one authorizing the applicant to reprint no more than 10,000 copies of the same book.
- *Éditions CEC inc.*, Anjou, Quebec: two licences were issued; the first one authorizing the reproduction, in a textbook to be used to teach French at the Secondary I school level, three excerpts of a text co-written by Alain Serres and Yan Thomas, published by Éditions Messidor/La Farandole in 1992. The second licence authorized the reproduction of the same excerpts in the grammar teaching guide accompanying the textbook and also permitted the photocopying of the excerpts for the use of the students.
- *The May Street Group Film, Video & Animation Ltd.*, Victoria, B.C., authorizing the reproduction and incorporation, in a documentary film, of two newspaper articles written by John Gillespie and published in the Globe & Mail newspaper in 1971.
- *Epitome Pictures Inc.*, North York, Ontario, authorizing the use of 19 various framed prints/posters as set dressing in a television series.

- *Dr. Gerri Sinclair, Director, Exemplary Center for Interactive Technologies in Education (ExCITE)*, Faculty of Education, Simon Fraser University, Burnaby, B.C., authorizing the reproduction of an additional number of copies of seven photographs and a cartoon on a CD-ROM entitled "The Prime Ministers of Canada on CD-ROM". The Board had already issued a licence in 1996/97 authorizing the reproduction of 20,000 copies of the same works.
- *Kitchen Sink Entertainment Inc.*, Vancouver, B.C., authorizing the reproduction and incorporation, in a documentary film, of an article written by Sheila Ward, published in the September 1960 issue of the Chatelaine Magazine.
- *National Film Board*, Moncton, N.B., authorizing the reproduction and incorporation of two photographs (with titles) in a documentary film. One photograph was published on January 19, 1972 in the Bathurst Tribune and the other one on October 25, 1972 in Tribune Chaleur.
- *Manitoba Genealogical Society*, Winnipeg, Manitoba, authorizing the reproduction, in an article, of a map depicting Indian Treaties (Map 81) published in 1975 by Thomas Nelson & Sons (Canada) Limited in D.G.G. Kerr's Historical Atlas of Canada.
- *The Friends of Algonquin Park*, Whitney, Ontario, authorizing the reprint of the book entitled "Incomplete Anglers" written by John D. Robins and published by Wm. Collins & Sons (Canada) Limited in 1943.
- *University of Ottawa Media Library*, Ottawa, Ontario, authorizing the transfer of a 16MM film on a VHS video cassette. The educational film entitled "Les voyelles du français" was created and produced by Gilbert Taggart and distributed by Ciné Dessins Enrg. in 1980.
- *McGraw-Hill Ryerson*, Whitby, Ontario, authorizing the reproduction, in the fifth edition of a college-level textbook, of a letter by Rita Schindler published in the Toronto Star of December 30, 1990.

ARBITRATION PROCEEDINGS

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

In 1997-98, one application was filed, pursuant to that section, on September 30, 1997, by Caisse, Chartier et Associés Inc. and Mediascan Canada Inc. asking the Board to set the royalties and other relevant terms and conditions for a licence that would allow the applicants to make copies of works within the repertoire of the Canadian Copyright Licensing Agency (CANCOPY) and *L'Union des écrivaines et écrivains québécois* (UNEQ) for the purposes of their press clipping services. On November 17, 1997, the parties advised the Board that they had reached an agreement. In compliance with subsection 70.3(1) of the *Act*, the Board did not proceed with the application and the interested parties were so advised on December 8, 1997.

COURT DECISIONS

An application for judicial review was filed against the Board's decision of April 19, 1996 dealing with SOCAN's Tariff 17 (Transmission of Pay, Specialty and Other Cable Services) [see the 1996-1997 Annual Report]. Les Réseaux Premier Choix argued that the Board erred in not allowing Canadian pay and American specialty services to benefit from the 15 per cent reduction in tariff granted to Canadian specialty cable services delivered in Francophone markets. According to Les Réseaux Premier Choix, since the Francophone pay services are subject to the same economic handicaps, the same rationale existed for granting the adjustment. Furthermore, in not extending it, the Board created a regime whereby English-language specialty services receive the discount but Francophone pay services do not.

The Federal Court of Appeal agreed with the Board. In a decision dated December 11, 1997, the Court ruled that on this issue, the Board was entitled to considerable deference. This is an expert Board, called upon to consider complicated evidence in the area of economics, cable technology and statistics. The *Copyright Act* created the Board to regulate royalty payments for the collective administration of performing rights. In that way, it is more of an economic or commercial institution than it is a legal one.

The Court concluded that the purpose for the Francophone market adjustment was to correct statistical anomalies that were created by the tariff formula used by the Board to calculate the amount to be paid for the portfolio services. Since the tariff formula used for Canadian pay and American specialty services did not create those anomalies, there was no reason for any correction. In short, it could be said that it was not patently unreasonable for the Board to decline to correct a problem that did not exist.

The application for judicial review was dismissed.

AGREEMENTS FILED WITH THE BOARD

Pursuant to section 70.5 of the *Act*, agreements concluded between collective societies, 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. Section 45 of the *Competition Act* does not apply in respect of any royalties or related terms and conditions arising under an agreement that is filed in this manner. However, 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*.

Eight hundred and twelve (812) agreements were filed with the Board during 1997-98, compared to a total of 453 filed since the Board's inception in 1989 up to 1996-97.

The Canadian Copyright Licensing Agency (CANCOPY), which licenses reproduction rights, such as photocopy rights, on behalf of writers, publishers and other creators, filed 782 agreements granting various institutions and firms a licence to photocopy works in its repertoire. Amongst these agreements, there were those concluded with the Departments of Education of the Northwest Territories, Yukon and Newfoundland & Labrador.

The Audio-Video Licensing Agency (AVLA), which is a copyright collective that administers the copyright for the owners of master audio and music video recordings has filed, for its part, 26 agreements.

L'Union des écrivaines et écrivains québécois (UNEQ), which represents and administers copyright on behalf of poets, authors and writers in Quebec, has filed three agreements.

Finally, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) has filed one agreement with the Board. SODRAC administers royalties stemming from reproduction of musical works. It represents some 4,000 Canadian songwriters and music publishers aside from the musical repertoire of over 65 countries.