



COPYRIGHT BOARD



**ANNUAL REPORT
1999-2000**

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:

I have the honour of transmitting to you for tabling in Parliament, pursuant to section 66.9 of the *Copyright Act*, the twelfth Annual Report of the Copyright Board for the financial year ending March 31, 2000.

Yours sincerely,

Stephen J. Callary
Vice-Chairman and
Chief Executive Officer

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**BOARD MEMBERS AND STAFF
as of March 31, 2000**

Chairman: The Honourable
Mr. Justice John H. Gomery

*Vice-Chairman and
Chief Executive Officer:* Stephen J. Callary

Members: Adrian Burns

Sylvie Charron

Andrew E. Fenus

Secretary General: Claude Majeau

General Counsel: Mario Bouchard

Researcher-Analyst: *Vacant*

Clerk of the Board: Lise St-Cyr

Administrative Officer: Ivy Lai

Informatics Officer: Michel Gauthier

Members' Secretary: Joëlle Laflamme

CHAIRMAN'S MESSAGE

The twelve-month period covered by this report was one of the busiest ever for the Board. It rendered six decisions which are described in detail in the report. Four of them required long hearings, the examination and solution of complex issues of fact and law, and are of particular importance, meriting special mention:

1. On August 13, 1999, the Board's decision dealt for the first time with the issue of neighbouring rights and fixed the royalties payable by commercial radio stations to the makers and performers of sound recordings for the use of their works;
2. On October 27, 1999, the Board analysed the legal questions arising from the transmission of music over the Internet, opening the door to the possibility of a future tariff to regulate this use;
3. On December 17, 1999, it rendered a decision certifying, for the first time, a tariff which requires the payment of levies (to the Canadian Private Copying Collective) on the sale of blank audio recording media to compensate authors and composers, performers and makers of eligible sound recordings for the private copying of their works;
4. On February 25, 2000, it certified tariffs for three years covering the retransmission of distant radio and television signals by cable companies and other retransmitters.

During the same period, the Board has dealt with other matters and has heard other contested cases, some of them involving protracted hearings, which will be the subject of decisions to be rendered in the next financial year. It has also prepared itself, in preliminary hearings and by preliminary rulings, for pending cases which are scheduled to come before it in the months to come.

The Board has created a Web site (www.cb-cda.gc.ca) from which interested persons may learn of all proposed and certified tariffs, obtain the full text of the *Copyright Act and Regulations*, and other information concerning the Board's activities. Judging from comments received and by the number of visits to the site, this innovation is greatly appreciated by those for whom the Board's work is of interest.

The intense level of activity by the Copyright Board would not be possible without the skilled and diligent contributions made by its members, past and present, and personnel. I take advantage of this opportunity to thank them publicly for their devotion and fine work.

John H. Gomery

MANDATE OF THE BOARD

The Copyright Board was established on February 1, 1989, as the successor of the Copyright Appeal Board. The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society. Moreover, the Board has the right to supervise agreements between users and licensing bodies, issues licences when the copyright owner cannot be located, and may determine the compensation to be paid by a copyright owner to a user when there is a risk that the coming into force of a new copyright might adversely affect the latter. 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 the doing of any protected act 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 or 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];
- ◆ set levies 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 Commissioner of Competition appointed under the *Competition Act*, agreements made between a collective society and a user which have been filed with the Board, where the Commissioner 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 a licence with 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].

OPERATING ENVIRONMENT

Historical Overview

In 1925, PRS England set up a subsidiary called the Canadian Performing Rights Society (CPRS). In 1931, the *Copyright Act* was amended in several respects. The need to register copyright assignments was abolished. Instead, CPRS had to deposit a list of all works comprising its repertoire and file tariffs with the Minister. If the Minister thought the society was acting against the public interest, he could trigger an inquiry into the activities of CPRS. Following such an inquiry, Cabinet was authorized to set the fees the society would charge.

Inquiries were held in 1932 and 1935. The second inquiry recommended the establishment of a tribunal to review, on a continuing basis and before they were effective, public performance tariffs. In 1936, the *Act* was amended to set up the Copyright Appeal Board.

On February 1, 1989, the Copyright Board took over from the Copyright Appeal Board. The regime for public performance of music was continued, with a few minor modifications. The new Board also assumed jurisdiction in two new areas: the collective administration of copyright and the licensing of uses of published works whose owners cannot be located. Later the same year, the *Canada-US Free Trade Implementation Act* vested the Board with the power to set and apportion royalties for the newly created compulsory licensing scheme for works retransmitted on distant radio and television signals.

Bill C-32 (An Act to amend the *Copyright Act*) which received Royal Assent on April 25, 1997, modifies the mandate of the Board by adding the responsibilities for the adoption of tariffs for the public performance and communication to the public by telecommunication of sound recordings of musical works, for the benefit of the performers of these works and of the makers

of the sound recordings (“the neighbouring rights”) and for the adoption of tariffs for private copying of recorded musical works, for the benefit of the rights owners in the works, the recorded performances and the sound recordings (“the home-taping regime”).

General Powers of the Board

The Board has powers of a substantive and procedural nature. Some powers are granted to the Board expressly in the *Act*, and some are implicitly recognized by the courts.

As a rule, the Board holds hearings. No hearing will be held if proceeding in writing accommodates a small music user that would otherwise incur large costs. The hearing may be dispensed with on certain preliminary or interim issues. No hearings have been held yet for a request to use a work whose owner cannot be located. The process has been kept simple. Information is obtained either in writing or through telephone calls.

Guidelines and Principles Influencing the Board's Decisions

The decisions the Board makes are constrained in several respects. These constraints come from sources external to the Board: the law, regulations, judicial pronouncements. Others are self-imposed, in the form of guiding principles that can be found in the Board's decisions.

Court decisions also provide a large part of the framework within which the Board operates. Most decisions focus on issues of procedure, or apply the general principles of administrative decision-making to the peculiar circumstances of the Board. However, the courts have also set out several substantive principles for the Board to follow or that determine the ambit of the Board's mandate or discretion.

The Board itself also enjoys a fair amount of discretion, especially in areas of fact or policy. In making decisions, the Board itself has used various principles or concepts. Strictly speaking, these principles are not binding on the Board. They can be challenged by anyone at anytime. Indeed, the Board would illegally fetter its discretion if it considered itself bound by its previous decisions. However, these principles do offer guidance to both the Board and those who appear before it. In fact, they are essential to ensuring a desirable amount of consistency in decision-making.

Among those factors, the following seem to be the most prevalent: the coherence between the various elements of the public performance of music tariff, the practicality aspects, the ease of administration to avoid, as much as possible, tariff structures that make it difficult to administer the tariff in a given market, the avoidance of price discrimination, the relative use of protected works, the taking into account of Canadian circumstances, the stability in the setting of tariffs that minimizes disruption to users, as well as the comparisons with “proxy” markets and comparisons with similar prices in foreign markets.

Outline of the Board’s Areas of Jurisdiction

In short, the Board’s jurisdiction extends to the following four areas (the manner in which the Board is seized of a matter is indicated between brackets):

1. Copyright in works

- Public performance of music (compulsory filing of tariffs);
- Retransmission of distant signals (compulsory filing of tariffs);
- Other rights administered collectively (optional filing of tariffs);
- Other rights administered collectively (arbitration of conditions of licences, upon request from a collective society or a user);

- Issuance of licences when the rights owner cannot be located (upon request by the potential user).
- ##### 2. Copyright in performers’ performances and sound recordings
- Public performance of recorded music (compulsory filing of tariffs);
 - Other rights administered collectively (optional filing of tariffs);
 - Other rights administered collectively (arbitration of conditions of licences, upon request from a collective society or a user);
 - Issuance of licences when the rights owner cannot be located (upon request by the potential user).
- ##### 3. Home taping of recorded musical works, recorded performers’ performances and sound recordings
- Reproduction for private use (compulsory filing of tariffs).
- ##### 4. Off-air taping and use of radio and television programs for educational or training purposes (works, performances, sound recordings and communication signals)
- Reproduction and public performance (compulsory filing of tariffs).

Royalty Proposal and Review Mechanism

The *Copyright Act* requires that the Board certify tariffs in the following fields: the public performance or communication of music, the public performance or communication of sound recordings of musical works, the retransmission of distant television and radio signals, the reproduction of television and radio programs by educational institutions and private copying.

The *Act* also allows any other collective societies to proceed by way of tariffs rather than individually negotiated agreements.

The examination process is always the same. The collective society must file a statement of proposed royalties (on or before the 31st of March prior to its expected date of coming into effect) which the Board publishes in the *Canada Gazette*. The users targeted by the proposal (or in the case of private copying, any interested person) or their representatives may object to the statement within sixty days of its publication. The collective society in question and the opponent will have the opportunity to argue their case. After investigating, the Board certifies the tariff, publishes it in the *Canada Gazette*, and explains the reasons for its decision in writing.

ORGANIZATION OF THE BOARD

Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2000-01 (Part III of the Estimates), which was tabled in Parliament on March 30, 2000.

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 **Honourable John H. Gomery**, a justice of the Quebec Superior Court since 1982, has been appointed part-time Chairman of the Board for a three-year term commencing in March 1999. Prior to his appointment to the Bench, Mr. Justice Gomery practised law with the firm Martineau Walker for 25 years. He obtained his B.A. in 1953 and graduated in law from McGill University in 1956. He was an active member of the Canadian Bar Association as National Secretary of the Commercial Law Section and as a member of the special committee on "Uniformity on Personal Property Security Law."

Vice-Chairman & Chief Executive Officer

Stephen J. Callary is a full-time member appointed in May 1999 for a five-year term. Mr. Callary has served as Managing Director

of consulting firms, RES International and IPR International; as Executive Director of TIMEC - the Technology Institute for Medical Devices for Canada; and as President of Hemo-Stat Limited and Sotech Projects Limited. He has extensive international experience dealing with technology transfer, software copyrights and patents and the licensing of intellectual property rights. From 1976 to 1980, Mr. Callary worked with the Canadian Radio-Television and Telecommunications Commission (CRTC), the Privy Council Office (PCO) and the Federal-Provincial Relations Office (FPRO). He has a B.A. degree from the University of Montreal (Loyola College) and a B.C.L. degree from McGill University. He was admitted to the Quebec Bar in 1973 and pursued studies towards a Dr.jur. degree in Private International Law at the University of Cologne.

Members

Adrian Burns is a full-time member appointed 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 Member of the Boards of Trustees of the Canadian Athletic Foundation, as well as Governor of Ashbury College Foundation and of the Stratford Festival Senate. She has also served on several other corporate and community boards.

Sylvie Charron is a full-time member appointed in May 1999 for a five-year term. She

was an Assistant Professor with the University of Ottawa's Faculty of Law (French Common Law Section) and worked as a private consultant in broadcasting, telecommunications and copyright law. Prior to her law studies, she worked with the Canadian Radio-Television and Telecommunications Commission for 15 years. Ms. Charron is a graduate of the University of Ottawa (B.Sc. Biology in 1974, M.B.A. in 1981 and LL.B. - Magna cum laude in 1992). Ms. Charron is a member of the Canadian Association of Law Teachers, of the *Association des juristes d'expression française de l'Ontario* (AJEFO), former Vice-Chair of the Ottawa Chapter of Canadian Women in Communications and past Executive Director of the Council of Canadian Law Deans.

Andrew E. Fenus, C. Arb., is a full-time member appointed in July 1994 and reappointed in 1999 for five years. 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).

BOARD'S ACCOMPLISHMENTS

HIGHLIGHTS

In 1999-2000 the Board held two hearings. The first one dealt with private copying and lasted 17 days through the months of August and September 1999. The second dealt with the Neighbouring Rights Tariff 1.C (CBC Radio) for the years 1998 to 2002 and lasted nine days over the months of November 1999, January and February 2000.

During the course of the year in review, the Board issued four major decisions. The first one dated August 13, 1999, certified Neighbouring Rights Tariff 1.A (Commercial Radio) for the years 1998 to 2002. The second one dated October 27, 1999, dealt with the legal issues pertaining to SOCAN Tariff 22 (Music over the Internet). The third one dated December 17, 1999 certified a tariff on private copying. The fourth one dated February 25, 2000, certified the radio and television retransmission tariffs for 1998, 1999 and 2000. The Board also issued 11 non-exclusive licences for the use of works of unlocatable copyright owners. Finally, 489 agreements were filed with the Board.

During the same period, the Board dealt with other matters and heard other contested cases, some of them involving protracted hearings, which will be the subject of decisions to be rendered in the next financial year. It has also prepared itself, in preliminary hearings and by preliminary rulings, for pending cases which are scheduled to come before it in the months to come.

In December 1999, the Board launched its Web site (www.cb-cda.gc.ca) from which interested persons may learn of all proposed and certified tariffs, obtain the full text of the *Copyright Act and Regulations*, and other information concerning the Board's activities.

PUBLIC PERFORMANCE OF MUSIC

Background

The provisions under sections 67 onwards of the *Act* apply to the public performance of music or the communication of music to the public by telecommunication. Public performance of music means any musical work that is sung or performed in public, whether it be in a concert hall, a restaurant, a hockey stadium, a public plaza or other venue. Communication of music to the public by telecommunication means any transmission by radio, television or the Internet. Collective societies collect royalties from users based on the tariffs approved by the Board.

Hearings

In 1999-2000, the Board held one hearing on the public performance of music, which lasted nine days over the months of November 1999, January and February 2000. It dealt with Neighbouring Rights Tariff 1.C (Canadian Broadcasting Corporation – Radio) for the years 1998 to 2002.

Decisions of the Board

The Board issued three decisions during 1999-2000. The first one dated July 30, 1999, certified undisputed tariffs which, in some cases, reflected agreements reached between the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and users. The second one dated August 13, 1999, certified Neighbouring Rights Tariff 1.A (Commercial Radio) for the years 1998 to 2002. The third one dated October 27, 1999, dealt with the legal issues pertaining to SOCAN Tariff 22 (Music over the Internet).

NEIGHBOURING RIGHTS TARIFF 1.A (COMMERCIAL RADIO)

For the first time, the Board dealt with the

so-called neighbouring rights regime set up in 1997. Makers and performers now jointly enjoy a right to share equally in an equitable remuneration for the public performance and communication to the public by telecommunication of eligible published sound recordings. In the case of recorded music, that right is exercised through a collective society subject to the rate regulation regime already in place for the performance or telecommunication of musical works.

The *Act* sets out three limits on the Board's power to certify a tariff. The tariff must apply only in respect of eligible recordings; must not put at a disadvantage users that are subject to different linguistic and content requirements as a result of Canada's broadcasting policy; and must provide for the payment of royalties in a single payment. Special conditions apply to radio stations notwithstanding the tariffs approved by the Board.

The Neighbouring Rights Collective of Canada (NRCC) and the *Société de gestion des droits des artistes-musiciens* (SOGEDAM) filed proposed tariffs with the Board, one of which targeted commercial radio stations. The Canadian Association of Broadcasters (CAB) objected to that tariff item and participated in hearings which took place over 16 days. On August 13, 1999, the Board certified the tariff dealing with commercial radio stations for the years 1998 to 2002.

The Extent of the Eligible Repertoire and of its Use by Commercial Radio Stations

The right to remuneration is contingent on a recording being eligible and being part of the repertoire of a collective society that has filed a tariff. Almost all American recordings are not eligible. Consequently, the Board had to decide

whether NRCC and SOGEDAM are collective societies and whether they represent those they say they represent. It was then necessary to determine the extent to which commercial radio uses the eligible repertoire. The real issue was the extent, if any, to which NRCC represented its claimed share of the eligible repertoire. This in turn required looking at the status of NRCC's own member societies.

From the record, it was safe to assume that NRCC brought with it almost all of the makers' rights. The situation was far from that simple with respect to performers' rights. NRCC only has in its repertoire what its members and affiliates have authorized it to manage. The *Société de gestion collective de l'Union des artistes* (ArtistI) systematically secures assignments of the remuneration right from the performers it represents. The American Federation of Musicians (AFM) relied on amendments to its by-laws. ACTRA Performers' Rights Society (APRS) referred to three amendments to its "parent's" by-laws, though it had sought and obtained some agency contracts. NRCC pointed to no principle in the law of agency empowering an association to obtain, through a change in its by-laws, the agency for its members' remuneration rights; the Board even expressed doubt that this may be possible. Consequently, the Board concluded that the only performers' rights that NRCC had secured through APRS and AFM were those of persons who have executed an instrument (be it an assignment or a membership form) which expressly deals with the remuneration right.

NRCC nevertheless administers the remuneration right of all eligible performers. Makers and performers are joint and several creditors and each have the right to seek payment for the whole debt. Consequently, NRCC could claim the entire remuneration for the use of a sound recording whose maker it represents. Given the Board's earlier finding that NRCC brought with it the makers' share of virtually all the eligible recordings, the performers' share of this repertoire was equally

properly before the Board in these proceedings.

NRCC filed a study which concluded that eligible sound recordings account for 49.3 per cent of all use of sound recordings by commercial radio stations. CAB did not succeed in discrediting its methodology and findings. Given the results of the study and evidence tending to establish that NRCC represents the makers' share of at least 95 per cent of eligible recordings, the Board found that NRCC's repertoire accounts for 45 per cent of all use of sound recordings by commercial radio stations.

The Canadian Broadcasting Policy

The *Act* requires that the tariff does not, because of linguistic and content requirements of Canada's broadcasting policy, place some users that are subject to the *Act* at a financial disadvantage. French language radio stations use the eligible repertoire for more than three-quarters of their airtime, while their English counterparts do so for less than half of the time. CAB argued that this meant stations could use the eligible repertoire for free when they use more than other stations in order to comply with that policy. The Board rejected that interpretation. The *Act* does not require that the Board ignore the impact of the regulatory environment on use patterns. Instead, it mandates that users not be put at a *greater* financial disadvantage *than others* because of requirements of Canada's broadcasting policy. This is achieved if all users in a given group share equally the financial burden imposed as a result of the policy, as long as imposing that burden is fair. The regime does not require that rights owners subsidize the radio industry on account of regulatory requirements.

The Value of Rights in Sound Recordings

The Board first set aside a number of pricing models offered by NRCC which, it argued, supported the assertion that the combined value of rights in sound recordings is, at a minimum, 12 per cent. A comparison based on the relative

programming costs of music stations and low music use stations was rejected since the notion that the value of non-exclusive recorded music would be close to the value of talk and information programming, if negotiated in a market situation, is unsustainable. Comparisons with what performers and makers receive for compilation CDs or for supplying recorded music to disc jockeys were rejected because they value the right to reproduce, not the right to broadcast.

CAB would have used SOCAN's tariff as a starting point, but would have reduced the rate to 0.7 per cent for several reasons, all of which the Board rejected. The Board disagreed that neighbouring rights are intrinsically worth less than copyrights; for one thing, the *Act* does not set any order of priority. It also rejected CAB's arguments that neighbouring rights are generally valued at a lower level than authors' rights. It refused to account for the value that performers and makers derive from air play; this is but one case of a symbiotic relationship between different industries with no direct bearing on the price. For the same reasons, it did not take into account the radio industry's other contributions to the record industry.

The Board nevertheless used SOCAN's present tariff as its starting point. Both tariffs involve a similar use and a similar right in a similar market. SOCAN's tariff has been in place for a long time; it is a price that the Board simply cannot ignore. The current tariff reflects an agreement, even though SOCAN still maintains that the current rate is too low while CAB still argues that it is too high.

The only issue remaining was whether the 3.2 per cent rate ought to be adjusted. Having already ruled out a reduced rate, the Board also concluded that evidence tending to establish that performers may provide radio stations with more value than authors was at best anecdotal and impressionistic and could pull either way. As a result, the Board set the rate to be paid by

most commercial radio stations at 45 per cent of what they pay to SOCAN, or 1.44 per cent generally and 0.63 per cent for low music use stations for the purposes of the SOCAN tariff. It also set a \$100 a month tariff for stations which do not use any eligible sound recordings other than production music.

The tariff as certified would have yielded royalties of \$11.29 million in 1997 (the only figures available at the time of the hearing). Given the preferential treatment afforded to each station's first \$1.25 million of annual advertising revenues, royalties would have been reduced to \$5.68 million. In addition, the phasing in of the regime over three years, would further reduce that amount to \$1.89 million in 1998 and to \$3.78 million in 1999.

Single Collection Entity

NRCC wanted to collect all royalties payable under the tariff while SOGEDAM wanted the share attributable to its repertoire. The Board granted NRCC's request for practical as well as legal reasons. It first ruled that the single payment requirement directed the Board to identify a single entity to collect royalties on account of all the repertoire entitled to remuneration. SOGEDAM worried that NRCC might use its status to impose upon SOGEDAM certain distribution practices. Any complaint of that nature is within the purview of the Commissioner of Competition.

Given the Board's interpretation of the single payment requirement, it was impossible for it to direct users to pay SOGEDAM its share of the remuneration right. The Board also ruled that it cannot decide how co-creditors are to apportion the royalties among themselves, since nothing in the *Act* would allow the reader to infer a power of the Board to determine SOGEDAM's share of royalties as a necessary incident to setting the neighbouring rights tariff.

SOCAN's TARIFF 22 (MUSIC OVER THE INTERNET)

SOCAN's proposed tariffs for 1996 to 1998 include an item 22, the primary target of which is the Internet. Since some of the objections to this item raised issues of a preliminary nature, the Board opted to conduct the hearings in two phases. On October 27, 1999, following eleven days of hearings, the Board issued its legal conclusions on activities relating to Internet transmissions that may give rise to liability, the applicability of the exemption set out in paragraph 2.4(1)(b) of the *Act* and the circumstances in which any communications over the Internet may occur in Canada.

Those who support Tariff 22 argued that a communication to the public occurs when the end user can access a musical work from a computer connected to a network and that virtually everyone involved in the Internet transmission chain is liable for the communication. Those who oppose the tariff contended that Internet transmissions involve a reproduction of data, not a communication by telecommunication, that non-simultaneous, on demand transmissions are not communications to the public, that what is communicated is not a musical work or a substantial part of the work and that in any event, some participants would be able to rely on the immunity provided in paragraph 2.4(1)(b) of the *Act*.

In essence, the Internet is a telecommunications network. Its purpose is to transmit files containing data, including music as that term is commonly understood. In order for a transmission to occur, the following events must take place. First, the file is incorporated to an Internet-accessible server. Second, upon request and at a time chosen by the recipient, the file is broken down into packets and transmitted from the host server to the recipient's server, via one or more routers. Third, the recipient, usually using a computer, can reconstitute and open the file upon reception or save it to open it later;

either action involves a reproduction of the file, again as that term is commonly understood.

The Board's decision analyses what occurs on the Internet from a legal perspective. Its conclusions can be summarized as follows:

- A musical work is not communicated when it is made available on a server; it is communicated when a server containing the work responds to a request and packets are transmitted;
- A communication can be to the public without being instantaneous or simultaneous;
- By making a work available, a person authorizes its communication; that same person communicates it when it is transmitted from any server;
- Persons exempt from liability under paragraph 2.4(1)(b) of the *Act* do not communicate the work; these persons generally include ISPs as well as persons who operate routers, caches or mirrors. They cannot claim the benefit of the exemption if they do not confine themselves to the role of an Internet intermediary;
- Embedded hyperlinks involve an authorization to communicate; user-activated links do not;
- Communications occur at the site of the server from which the work is transmitted. Communications triggered by an embedded hyperlink occur at the site to which the link leads.

These conclusions flowed from the following propositions.

Internet transmissions are communications. To communicate is to make known or convey information. A musical work is information that

is conveyed when packets of data are transmitted so that once reassembled, they allow the work to be conveyed or made known to the recipient.

Internet transmissions are communications by telecommunication. A telecommunication is any transmission of intelligence by electromagnetic system.

The public or private character of a communication over the Internet can be determined according to established legal principles. Expressions such as “in public” and “to the public” are to be interpreted by taking a realistic view of the impact and effect of technological developments and in a manner consistent with their plain and usual meaning that is to say openly, without concealment and to the knowledge of all. Consequently, a communication intended to be received by a segment of the public in individual private settings.

A communication can be to the public without being instantaneous or simultaneous. To communicate is to convey information, simultaneously or otherwise. The focus is on the intended target, not the time frame. The Board refused to read into a decision of Federal Court a requirement for simultaneousness; such an interpretation might render nugatory all Canadian copyright legislation in the world of telecommunications, by putting future advances in interactivity, addressability and transmission on demand outside of the realm of copyright protection.

Musical works can be communicated by telecommunication over the Internet. The various operations and technologies involved in making music available over the Internet (compression, breaking down into packets) do not mean that musical works are not communicated over the Internet. Any other interpretation would make it impossible to communicate a musical work through a digital transmission; radio stations would only have to

switch to digital technology in order to avoid paying royalties to SOCAN. What is done occurs solely to respond to the technical exigencies of the Internet; the end user’s experience is not affected.

A work is communicated not when it is made available, but when it is transmitted. Earlier court decisions allowed the Board to establish the following propositions. First, a communication to the public occurs over the Internet each time that any member of the public uses a browser to access the work from the source computer. Second, a work is communicated to the public even if it is transmitted only once, as long as it is accessible to a segment of the public. Third, the communication occurs at the time the work is transmitted whether or not it is played or viewed upon receipt, is stored for use at a later date or is never used at all.

The person who posts a work is the one who communicates it. The fact that this is achieved at the request of the recipient or through an agent neither adds to, nor detracts from the fact that the content provider effects the communication. The fact that the communication is automated is a function of design only and is also irrelevant. The person who programs a facsimile to transmit a message while he/she is asleep nevertheless effects the communication.

Persons who can avail themselves of paragraph 2.4(1)(b) of the Act do not communicate the work; these generally include ISPs as well as persons who operate routers, caches or mirrors. A person whose only act consists of providing the means of telecommunication necessary for another person to so communicate a work does not communicate the work to the public. Opponents of Tariff 22 argued that only the sender and recipient are legally involved in the communication, while proponents contended that the exemption applies only to the provision of physical facilities used by others to

communicate a work to the public. The Board concluded that “means” include all software connection equipment, connectivity services, hosting and other facilities without which such communications would not occur, just as much as the switching equipment, software and other facilities that are used as part of the infrastructure of a common carrier for the transmission of information. The exemption applies to ISPs who provide services that are ancillary to providing the means of communication or perform certain steps (such as caching) to improve performance. As long as one’s role in respect of any given transmission is limited to providing the means necessary to allow data initiated by other persons to be transmitted, and as long as the ancillary services provided fall short of involving the act of communicating the work or authorizing its communication, the exemption applies. Generally speaking, only the person who posts a musical work communicates it.

Having said this, *ISPs cannot always avail themselves of the exemption.* They can do so only with respect to communications in which they limit themselves to acting as intermediaries. The liability of ISPs that post content, associate with others to offer content, create embedded links, moderate a newsgroup or interfere with any means of obtaining information as to the number of “hits” or “accesses” to the cached material, will be assessed according to the general rules dealing with copyright liability.

By making a work available to the public on a server, a person authorizes its communication. “Authorization” constitutes a separate protected right. To authorize is to sanction, approve and countenance. Persons who make a work available over the Internet do more than merely provide the means to communicate it; they ask that their ISP transmit it at the request of end users. They purport to have authority to put the work to the use for which it is intended. Court decisions have refused to find that the supply of

equipment or facilities that may be used to infringe copyright constitutes authorization. However, content providers do not provide tools for the use to occur; they provide the work. They dictate content. They determine whether the site will contain musical works. They select those works. They know and expect that the materials they post will serve to effect a use which is protected if the work is not in the public domain; in fact, once posted, protected music cannot be used without infringing copyright.

The person that creates an automatic or embedded hyperlink to a work authorizes the communication of the work from the site to which the link leads. The person that merely supplies a link which must be activated by the user does not. In itself, the creation of hyperlinks does not involve a communication to the public of any works contained at the linked sites. In their simplest form, hyperlinks represent an electronic directory of addresses. However, the person who includes an automatic link which effects the transmission of a musical work without the need for further action by the end user holds itself out as responsible for the material at the linked sites and therefore, authorizes its communication.

To occur in Canada, a communication must originate from a server located in Canada on which content has been posted. A communication occurs where the transmission originates. The place of origin of the request, the location of the person posting the content and the location of the original Web site are irrelevant. The right to authorize must be obtained from the person administering the right in Canada only when the information is posted on a Canadian server, and the right to communicate must be obtained from that same person only when the transmission originates from a server located in Canada. Communications triggered by an embedded hyperlink occur at the site to which the link leads. As a result, the person who creates an

embedded link to a foreign site from a Canadian site does not require a licence from SOCAN. When a transmission involves a cache, the communication occurs at the location of the site from which the cache originally obtained the information. The cache, just as the router, is but an intrinsic element of Internet. The information, and the means taken to communicate it, reside elsewhere. This is in contrast to mirror sites, which exist with the knowledge and consent of the content provider.

Participants also raised other issues that the Board addressed separately. Among other things, the Board concluded that SOCAN administers the right to authorize a communication as well as the right to communicate. The Board also ruled that it could proceed with the examination of the tariff as filed. The Board must certify a tariff if any of the contemplated activities constitutes a communication to the public by telecommunication or the authorization of such a communication. Moreover, a tariff need not specify who shall pay it. It is sufficient that it specify the use being targeted and the price for that use, which is the case here.

[NOTE: On November 26, 1999, SOCAN filed an application in the Federal Court of Appeal for judicial review of that decision.]

RETRANSMISSION OF DISTANT SIGNALS

Background

The *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.

Decisions of the Board

At the request of the Copyright Collective of Canada, with the concurrence of all the other parties, the Board adopted, in an interim decision dated December 21, 1999, as interim tariffs to be paid for the retransmission of distant radio and television signals during 2000, tariffs similar to the ones certified by the Board for 1999, also on an interim basis.

On February 25, 2000, the Board certified the radio and television retransmission tariffs for 1998, 1999 and 2000. The matter required 12 days of hearings in October 1998, which addressed only television signals, an agreement having been reached with regard to radio signals. The decision was delayed by various factors, including a reopening of the matter triggered by the February 12, 1999 decision of the Canadian Radio-Television and Telecommunications Commission (CRTC) requiring all Canadian retransmitters to carry the French-language TVA service.

Many aspects of the television tariff were themselves the object of an agreement. As a result, the issues raised in these proceedings were relatively few.

A. Discounts for DTH Systems

Retransmitters that serve Francophone markets are entitled to a 50 per cent discount. The

subscribers receive on average fewer distant signals, that most of those are in the English language and that distant signal viewing in Quebec is lower than in the rest of Canada. Even though all the signals DTH systems retransmit are distant to all their subscribers, Bell ExpressVu asked that they be entitled to a similar discount for subscribers who only take the basic Francophone package, essentially for the reason that the four Montreal-based stations offered in the basic Francophone package are “virtual” local signals to most Quebec subscribers.

The Board ruled that a case had not been made for a discount. DTH systems already benefit from the tariff structure which ensures that systems carrying many distant signals are not prejudiced. Also, since the basic DTH package is smaller and cheaper than the basic cable package, it can be said that DTH subscribers purchase packages that contain mainly signals that are valuable to them; the fact that some signals may be “virtually local” does not reduce their value to Bell ExpressVu or its subscribers.

The Board also rejected a request for a rate reduction on account of amounts Bell ExpressVu pays to local broadcasters, ruling that these payments compensate local broadcasters for their loss of programming exclusivity and help maintain the value to Bell ExpressVu of distant signals.

B. Broadcasters' Compilation

The Board revisited the full range of issues raised by the status and value of broadcast days as protected compilations. It first rejected all legal challenges to the validity of the claim, finding that recent changes to the *Act* granted broadcasters rights over their signals distinct from the rights that they continue to have over

their works and dismissing other legal arguments for reasons already set out in earlier decisions. Again for reasons set out in earlier decisions, the Board dismissed arguments in favour of accounting for the value of compilations through an increase in the rates.

On the issue of valuation, the compilers urged the Board to abandon its 1996 formula and adopt a new approach which would have increased their share from 0.67 per cent to between 10 and 15 per cent of the total royalty.

The compilers argued that, since compilation viewing and program viewing are coextensive, then the same proportion of available compilations and available programs are being consumed. The Board responded that compilations and programs cannot be compared and assessed on the same basis because compilations are different in nature and small in number. The compilers also noted that as the number of compilations increases, the compilers' share decreases. The Board did not feel uncomfortable with this result, given that as the number of compilations increases, their importance to viewers relative to programs diminishes and viewers' attention becomes more and more focussed on individual programs.

Witnesses for the compilers developed a proxy in order to measure what they viewed as the value of the two key components of broadcast compilations: selection and scheduling. That proxy was derived from earlier research into the effect of inheritance (i.e., the contribution of lead-in viewers to the ratings of the next program in the schedule) and promotion on individual program ratings. The Board found significant deficiencies with this analysis. Thus, the data used related only to prime-time programs, in the United States, on local and distant signals carrying the six US networks, while the Board must establish a value for the entire broadcast day, in Canada, on US and Canadian network and non-network distant signals only. Again, no one could say whether

value derived from inheritance should accrue to the first program, to the second program or to the compilation, and no one knew whether promotion is of the same value as either selection or scheduling. Finally, since viewing has for years remained more or less constant, any impact that a compiler's efforts may have is first and foremost at the detriment of another compiler – something that is completely immaterial to cable operators carrying a multiplicity of channels.

C. A Proposal for a New Allocation Methodology

The retransmission tariff generally allocates royalties according to a "hybrid approach". The Board first divides the royalty into two pools, based on the supply of Canadian and American distant signals. It then apportions royalties within the pools based on the share of viewing attributable to each program. Over the years, attempts have been made to convince the Board that certain programs should be allocated a premium for "value-beyond-viewing", all of which have failed.

FWS, which represents all major league sports organizations except baseball, proposed that royalties be divided up into pools representing each program genre, based on a survey of cable operators on the relative values of various programming genres on distant signals. Each pool would then be divided on viewing data. Under that methodology, the share of FWS would be approximately 14 times higher than under the existing formula.

FWS relied on a survey intended to provide insight into the value that cable operators place on different programs available on distant signals. FWS also submitted evidence of the higher prices paid for sports programs in other markets, of the impact of FOX's acquisition of National Football League rights for 1994 on cable operators' willingness to carry the FOX network and on the decisions of the US

Copyright Arbitration Royalty Panel, which allocate to sports a value higher than its share of viewing.

The Board rejected the survey results for a variety of reasons. Cable operators do not normally engage in this sort of valuation and have virtually no choice over which signals to carry on the basic tier. The survey was based on invalid assumptions. Simultaneous substitution requirements were not taken into account. The survey also generated some clearly absurd results, with religious programs receiving 20 times the royalties of drama per unit of viewing, and basketball receiving 17.5 times the royalties of hockey per viewing unit.

The Board rejected, as in the past, evidence of prices paid for programming as a factor to be considered in the allocation exercise, and rejected for similar reasons the use of evidence dealing with the impact of the purchase of NFL rights by FOX in 1994. The Board reiterated that American experience is of little use if only because of the fundamental differences between the American and Canadian retransmission regimes.

The Board stayed with the hybrid approach. It measures actual viewing of programs carried on distant signals in Canada; it is an objective and equitable way of allocating royalties among rights holders; and it avoids the pitfalls and potential inaccuracies of attempting to measure cable operators' subjective valuation of these programs. In the Board's view, within the two pools of Canadian and US signals, viewing represents the most equitable measure of use and thus of value.

The Board added that efforts aimed at allocating royalties based on the value of distant signal programming to cable operators may flow from a misunderstanding of a passage in the Board's 1990 decision that could have left some with the impression that ideally, value of distant signal programming to cable operators ought to be the

measure of choice. The Board clearly stated the contrary, reiterating that subscriber valuation is the most appropriate measure for purposes of allocation.

In the end, the Board rejected FWS' valuation approach for three reasons of principle, rather than methodology. First, the price paid for sports programming is a function of economic factors that have little to do with retransmission rights. Second, sports programs attract a premium price because they deliver a coveted demographic in the local, not the distant, market. Third, viewers' purchasing power is not an appropriate way of allocating royalties; viewing by all demographics should count equally.

D. TVA Signal Discount

Some 12 systems faced an increase in their royalties as a result of being ordered by the CRTC to carry the TVA signal. These systems receive the so-called TVA East signal, which is essentially CFTM's terrestrial signal, modified by TVA at the request of advertisers and to change some public service announcements. Western systems have the option of receiving the so-called TVA West signal which is identical to the TVA East signal but delayed three hours. The question was whether the TVA service delivered in this manner constitutes a "signal" within the meaning of the retransmission regime.

In an earlier decision, the Board had ruled on four aspects of the retransmission regime that were relevant here. Firstly, in order to be subject to the retransmission regime, a signal must be available for free reception by the public in its local market. Secondly, a signal never ceases to be a signal, without regard to the technology being used to deliver it outside its local market. Thirdly, it is also irrelevant that the retransmitted signal is not identical to the signal transmitted by the terrestrial station. Fourthly, the conditions specified in the retransmission

regime relate to the retransmission of the signal by the cable operator and not to the condition of the signal at the time when it is received by the cable operator.

The Board concluded that this earlier analysis remained correct. Consequently, the TVA East and TVA West services are “signals” for the purpose of the retransmission regime, whether or not any alterations are made by anyone (including the broadcaster) to those signals, and whether or not the signal is received by the retransmitter at the same time as the original broadcast occurs. The Board rejected as unconvincing a number of policy and legal arguments to the contrary.

The Board then noted that the economic consequences of the CRTC order favoured TVA’s national network licence strategy and burdened the affected retransmitters. TVA had enlisted unwilling and uncompensated retransmitters as surrogates to local affiliates.

In the Board’s view, the discount for carrying TVA as the sole distant signal in non-Francophone markets had to be significantly greater than the Francophone market discount. Firstly, the TVA discount would apply only to the TVA signal and not to a whole market. Secondly, Francophones represent two per cent or less of the population in the affected areas. Thirdly, since a significant amount of TVA’s programming is produced and owned by TVA, it was appropriate to offset its value with the value that TVA obtains from having its signal distributed in its extended markets. Taking these factors into account, the Board set the discount at 95 per cent.

The rest of the decision dealt with an agreed reduction in SOCAN’s share of royalties, the final allocation of royalties, the establishment of transitional provisions to address changes in allocation and various administrative provisions. On this last point, the Board accepted to modify the tariff’s confidentiality provisions but

declined to make most other changes to the tariff’s wording that had been jointly submitted by all parties, for the reason that these appeared either misinformed or unnecessary.

[NOTE: On March 29, 2000, FWS filed an application in the Federal Court of Appeal for judicial review of that decision.]

PRIVATE COPYING

Background

On March 19, 1998, Part VIII of the *Act* dealing with private copying came into force. Until that time, copying any sound recording for almost any purpose infringed copyright, although, in practice, the prohibition was largely unenforceable. The amendment to the *Act* legalized copying of sound recordings of musical works onto audio recording media for the private use of the person who makes the copy (referred to as “private copying”). In addition, the amendment made provision for the imposition of a levy on blank audio recording media to compensate authors, performers and makers who own copyright in eligible sound recordings being copied for private use.

Manufacturers and importers of blank audio recording media pay a levy when they sell or otherwise dispose of such media in Canada. That levy is set by the Board and collected by a single collecting body designated by the Board. Entities that represent persons with a perceptual disability do not pay the levy.

Hearing

In August and September 1999, a 17-day hearing was held on the private copying matter.

Decision of the Board

On December 17, 1999, the Board certified a tariff after having received over 3,000 objections and letters of comment. Participants at the hearings were the Canadian Private Copying Collective (CPCC), acting on behalf of all collectives that had filed proposed tariffs; the Canadian Storage Media Alliance (CSMA), representing major importers of blank media; the Independent Canadian Recording Media Coalition (ICRMC), a coalition of smaller suppliers of blank audio media, together with

churches and individuals objecting to the levy being applied to media used by churches in their outreach ministry; and a number of other persons interested in the matter.

CPCC asked that the levy be set, for each 15 minutes of available recording time, at 20¢ for analog media, 39¢ for MiniDiscs, digital audio tapes (DATs), CD-Rs Audio and CD-RWs Audio, and 9¢ for CD-Rs and CD-RWs. CSMA asked that the levy be set at no more than three per cent of the wholesale price for audio cassettes and one per cent for recordable CDs (though it objected to any levy being imposed on ordinary recordable CDs). Two objectors argued that the legislation was unconstitutional. Others objected to the levy applying to them on several counts which are reviewed later.

Legal Issues

The Board first ruled that it could deal with constitutional and *Charter* issues because it has the implicit power to decide general questions of law. It then concluded that the private copying regime constitutes valid copyright law. The regime provides compensation for an activity that involves the use of a subject matter that is properly within the purview of copyright. There is a clear link between the activity, the amount of the compensation and the goods being levied. The Board’s involvement makes the nexus between activity, media and levy as strong as realistically possible.

The Board also concluded that the private copying levy is not an improperly enacted tax, but a compulsory charge imposed pursuant to a regulatory scheme. It provides for a payment, in lieu of a royalty, as compensation for the copying of copyright works as a result of the legalization of private copying.

The Board finally disagreed with the argument that the regime hinders the dissemination of the Gospel by adherents to the Evangelical Christian movement and is discriminatory. The impact of the levy on religious organizations is likely to be insubstantial. It does not impose any burden on one group that it does not impose on others, nor does it limit anyone's opportunities. Finally, the regime is not likely to threaten anyone's full membership in Canadian society.

The Validity of CPCC's Claim to All of the Eligible Repertoire

What was sometimes referred to as the "chain of title" issue raised two questions. First, is the Board properly seized of the private copying matter? Second, to what extent is the eligible repertoire entitled to remuneration?

The answer to the first question depended on whether the proposed tariffs had been filed by private copying collectives. The Board found that this was the case. Unless a collective acts for the benefit of rights owners who have already authorized it to act on their behalf when it files the proposed tariff of royalties, the filing is invalid. However, the necessary authorization can be secured by any implicit or explicit means available at common law, including rules governing implicit contract agency or agency by ratification.

On the second question, the Board ruled that the tariff should cover all works, performer's performances and sound recordings for which a proposed tariff had been filed. The Board was satisfied that at the time of filing, the collectives had secured a sufficient number of authorizations to administer private copying rights in each and every possible type of subject matter, performer's performance and sound recording comprising the eligible repertoire.

The Importance of the Eligible Repertoire in Private Copying

Only Canadian performers and makers are

entitled to share in the levy until the Minister issues a statement widening the eligibility list. In order to establish the eligible share of those repertoires, the Board used a simple average of the results obtained from a radio airplay survey and an analysis of record sales. The Board concluded that 28 per cent of private copies use the repertoire of eligible performers, 23 per cent use the repertoire of eligible makers, and 96 per cent use the repertoire of eligible authors.

The Meaning of "Ordinarily Used by Individual Consumers"

Only recording media that are of a kind ordinarily used by individual consumers to make private copies are subject to the levy. To CPCC, this meant any medium that is regularly, commonly or normally used for private copying. CSMA would have applied the levy only to the media that are most often used for private copying, excluding media (e.g., MiniDiscs) whose share of the market is marginal, even if most or all are used to make private copies.

"Ordinary" describes anything from that which is regular, normal or average, to what is merely recurring or consistent. Therefore, the ordinary character of an occurrence is more a matter of consistency than a function of quantity. The use of a secondary residence needs to be consistent, not frequent, in order for it to be ordinary. The purpose of the regime is of primary importance in interpreting as fluid a notion as "ordinary". One of the purposes of the regime is to legalize private copying. Another is to adequately compensate eligible rights holders. Too restrictive an interpretation will strip the regime of any meaning.

This yielded a number of principles. First, ordinary use includes all non-negligible uses. Second, a medium can have more than one ordinary use. Third, since the definition speaks of ordinary use *by individual consumers*, the analysis must focus on that person to the exclusion of others.

As a result, the Board concluded that all audio cassettes with a playing time of 40 minutes or more are subject to the levy, anything shorter being not convenient to make private copies. No distinction was made between Type I (low bias) and other cassettes. The Board also refused to distinguish between standard length and custom length cassettes or cassettes with other characteristics that may make them less suited to private copying, concluding that much specificity may open the door to levy avoidance.

MiniDisc, CD-R Audio and CD-RW Audio qualify. They account for only one per cent of total sales, but are mostly, if not exclusively, targeted at consumers and sold for the purpose of copying music. CD-R and CD-RW also qualify. The Board estimated that some two million private copies were made onto these media in 1999, a number that definitely meets the Board's threshold of ordinariness.

The definition of what is a blank audio recording medium is an open one. As markets evolve, new types may be identified if the Board is satisfied that consumers have found other ways to make private copies of their favourite music.

Economic Evidence

Evidence about the nature and structure of the recording media industry, the economic impact of the proposed levy and the impact that an emerging grey market might have on the relevant market led the Board to conclude that the tariff as certified should not have a significant negative effect on the industry.

Market trends for audio cassettes and digital media are fundamentally different. While most Canadian households own a tape recorder, demand for audio cassettes has been shrinking. On the other hand, penetration for CD burners is currently low but should grow rapidly and with it, the demand for recordable CD media. The share of other forms of digital recording media is much smaller, and probably will remain so.

Anecdotal evidence was provided about the impact of downloading music from the Internet using MP3 and other similar formats.

The Amount of the Levy

In setting the amount of the levy, the Board developed a tariff structure, selected a valuation methodology and made certain adjustments.

The Board first rejected as unfair a tariff set as a percentage of the wholesale price, given that those prices are expected to fall significantly while the value of the underlying intellectual property will not. For administrative ease and simplicity and to minimize the cost of determining the levy payable, a set price for each type of medium was deemed preferable to a tariff based on 15-minute intervals; furthermore, types were established only where the proportion of media used for private copying varies significantly.

CPCC offered the only complete valuation model, based on how much rights holders typically receive on the sale of prerecorded CDs. Subject to certain adjustments, the Board concluded that this could be used as a starting point.

The Board first determined how much rights holders typically get for the sale of a top-line prerecorded CD. The author's share was set using the current CD price and estimating the number of selections on average compact disc. The performers' and makers' share was derived from the royalty payable to the recording artist who pays the costs of a sound recording and approaches a record company to manufacture and distribute it.

The next step removes the non-eligible repertoire. This involves establishing the share of private copies that use the eligible repertoire (which had already been done) and setting relative weights for the three groups or colleges of rights owners. For the latter, the Board used the ratio of author remuneration to combined

performer and maker remuneration, and then split the performer/maker share equally. These figures were used to calculate the weighted share of all private copies for each college which, added up, gave the weighted share of all private copies attributable to all the eligible repertoire, non-eligible rights holders accounting for the rest.

Next, the Board concluded that the underlying intellectual property contained in private copies is worth less than in top-line recordings, as consumers would not be willing to pay as much for the underlying rights in a private copy of a CD they already own, and because it cannot be assumed that there is a one-to-one correlation between lost sales and private copying activity. The recording market already sets lower prices in secondary markets such as record club and budget line sales. The Board discounted the proxy by 50 per cent.

Finally, the Board made adjustments to account for the market share of media actually used for private copying and for differences between analog and digital media. It refused to adjust the rate on account of the longer playing time of recording media than that of a typical prerecorded CD. It also refused to adjust the rate on account of medium reuse.

The Board derived the levy for audio cassettes directly from the rate set for digital media, halving it to account for the fact that the retail and wholesale prices of top-line prerecorded cassettes are approximately half of those of top-line CDs. The Board then assumed that 80 per cent of audio cassettes are sold to individual consumers, and that consumers use 80 per cent of the cassettes they purchase to copy sound recordings. As audio cassettes are reusable, there was no need to provide for an adjustment for wasted media. This yielded a tariff of 23.3¢. Similar calculations yielded tariffs of 60.8¢ for CD-Rs Audio, CD-RWs Audio and MiniDiscs and 5.2¢ for CD-Rs and CD-RWs. The Board estimated that the levy would generate approximately \$8.85 million in 2000, without

taking into account any grey market activity or CPCC's proposed zero-rating scheme.

Other Matters

The Board designated CPCC as the collecting body for the private copying tariff. It also refused to follow the terms of an agreement reached by the collectives on the issue of apportioning the royalties among them. The formula used to set the levy was the logical reflection of the valuation of the three repertoires, and should be reflected in the apportionment. Authors received 60.8 per cent, performers 21.5 per cent, and makers 17.7 per cent.

The Zero-Rating Scheme

To help alleviate the effect of the levy on certain groups, CPCC had proposed to enter into agreements allowing manufacturers and importers to sell audio recording media to certain categories of users without having to pay the levy. The Board noted that the existence or absence of such a mechanism may well have an impact on the amount that constitutes a reasonable rate. For example, a rate so high that it threatens a manufacturer's existing relationship with large institutional clients could well be inherently unreasonable, irrespective of the value of the underlying intellectual property, unless CPCC found a way to accommodate the manufacturer so that it can maintain that relationship. Fortunately, the rates set in the decision were at a level such that they need not be examined from that angle.

[NOTE: On January 14, 2000, CSMA filed an application in the Federal Court of Appeal for judicial review of that decision.]

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.

In 1999-2000, the Board issued the following 11 licences, totalling 79 licences issued since the Board's inception in 1989.

- Ontario Ministry of Education, authorizing the reproduction of the work entitled "Mr. Gilligan's Goat" written by Joan Weston, in an anthology entitled *The Ontario Curriculum Exemplars: Reading* (The "Reading Anthology").
- *Regal Recordings Limited*, Mississauga, Ontario, authorizing the reproduction of nine photographs of jazz pianist Oscar Peterson on a CD-ROM on his life.
- *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 preservation of Canadiana in Canada and elsewhere. Two licences were issued: the first one authorizing the reproduction of 588 works and the second one for 560 works.
- *National Film Board of Canada*. Two licences were issued as follows:
 - (1) authorizing the reproduction of the work entitled *Le cinéma direct et ses prolongements* written by Agathe Martin-Thériault published in *Cinéma Québec* magazine in 1972, in a brochure included in a video package on the film *L'Acadie, l'Acadie?!?* of Canadian film maker Pierre Perrault; and (2) authorizing the reproduction and incorporation of a photograph of a demonstrator published in the *Soleil de Québec* on June 21, 1969, in a documentary film entitled *Mai en décembre*.
- *L'Information Essentielle inc.*, Lachine, Quebec, authorizing the reproduction and incorporation of two photographs, three film images, a song extract and a short musical score, in a television documentary series entitled *Histoire d'un Canadien / The Maurice "Rocket" Richard Story*.
- *Donald Rutherford*, Abbotsford, B.C., authorizing the reproduction of various articles published in the *Wainwright Star* newspaper during the years 1908 to 1918 in a reference book on the history of Wainwright, Alberta.
- *Harcourt Brace and Company, Canada*, authorizing the reprint of the following works for inclusion in a textbook anthology of short stories for high school English classes: (1) *Barney* written by Will Stanton, originally published in "Fifty Short Science Fiction Tales" in 1951 by MacMillan Publishing; (2) *The Inheritor* written by Frank Roberts, originally published in the Australian magazine "Man" in 1963; and (3) *The Curlew's Cry*, written by J. Leslie Bell, originally published in "Alberta Bound: Thirty Stories by Alberta Writers", edited by Fred Stenson and published in 1986 by NeWest Press as originally published.
- *Les Éditions du Vermillon*, Ottawa, Ontario, authorizing the reproduction of a newspaper

article excerpt written by Roger Cyr and entitled *Jean Duceppe dénonce les sociétés secrètes* published in *La Patrie* («*La Patente se meurt*») in May 1964, in the novel entitled *Ottawa, P.Q.* written by Jean Taillefer.

- *Les Éditions Triptyque*, Montreal, Quebec, authorizing the production and publication of a translation of Juan Butler's work entitled *Cabbagetown Diary: A Documentary* published by Peter Martin Associates Limited in 1970.

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 1999-2000, two applications were filed by the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) pursuant to that section. On June 6, 1999, it asked the Board to set, on an interim and final basis, the terms of a licence authorizing record companies that are members of the *Association québécoise de l'industrie du disque, du spectacle et de la vidéo* (ADISQ) to copy musical works in SODRAC's repertoire for the years 1999, 2000 and 2001. On August 31, the Board issued an interim decision reflecting the terms of an earlier agreement between the parties. A timetable that was to lead to hearings in April 2000 was then issued. On January 19, 2000, the Board denied a request from SODRAC that the terms of the interim licence be changed, being unconvinced that this was necessary to protect SODRAC's interests. On February 24, 2000 the Board granted a joint request that the terms of the interim licence be modified to reflect an agreement reached between them and that the proceedings be suspended until August 11, 2000 in order to allow further negotiations between the parties.

On August 31, 1999, SODRAC asked the Board to set, on an interim and final basis, the terms of a licence authorizing MusiquePlus inc. and its services *Musimax* and *MusiquePlus* to copy works in SODRAC's repertoire for the period of September 1, 1999 to August 31, 2002. On November 22, 1999, the Board issued an interim decision. A timetable leading to a hearing in May 2000 was issued in December 1999.

COURT DECISIONS

In June 1999, some of the objectors to the private copying tariff asked the Federal Court of Appeal to stop the proceedings before the Board, claiming that the Board could not hear and decide the matter for a number of reasons, including that the private copying regime was invalid copyright law, invalid taxation law and contrary to the *Canadian Charter of Rights and Freedoms*. On June 30, the Court ruled that the application for interim and final stay of the proceedings was properly brought before it. On August 18, the Court dismissed the application.

The Court held that since the authority of a law enforcement agency was being constitutionally challenged, the interest of the public in having the law being enforced had to be balanced against the interests of the private litigants. The Court had little difficulty concluding that the balance of inconvenience on the issue of irreparable harm favoured the public interest. It took into account the fact that the applicants could have acted earlier as well as the Board's stated intention to consider any constitutional question raised before it, commenting (without deciding) that the legal and practical arguments in favour of letting the Board first deal with such issues appeared very strong.

AGREEMENTS FILED WITH THE BOARD

Pursuant to the *Act*, collective societies and users of copyrights can agree on the royalties and related terms of licences for the use of a society's repertoire. Filing an agreement with the Board, within 15 days of its conclusion, shields the parties from prosecutions pursuant to section 45 of the *Competition Act* [s. 70.5 of the *Copyright Act*]. The same provision also grants the Commissioner of Competition appointed under the *Competition Act* access to those agreements. In turn, where the Director considers that such an agreement is contrary to the public interest, he may request the Board to examine it. The Board then sets the royalties payable under the agreement, as well as the related terms and conditions.

During 1999-2000, 489 agreements were filed with the Board, totalling 2,526 agreements filed since the Board's inception in 1989.

The Canadian Copyright Licensing Agency (CANCOPY), which licenses reproduction rights, such as photocopy rights, on behalf of writers, publishers and other creators, filed 446 agreements granting various institutions and firms a licence to photocopy works in its repertoire. Amongst these agreements, there were those concluded with Ministries of Education, Provincial governments, public libraries, corporations, non-profit associations and copy shops.

The Audio-Video Licensing Agency (AVLA), which is a copyright collective that administers the copyright for the owners of master and music video recordings has filed, for its part, 30 agreements.

The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) filed 12 agreements. COPIBEC is the collective society which authorizes in Quebec the reproduction of works from Quebec, Canadian (through a bilateral agreement with CANCOPY)

and foreign rights holders. COPIBEC was founded in 1997 by *l'Union des écrivaines et écrivains québécois* (UNEQ) and the *Association nationale des éditeurs de livres* (ANEL).

Finally, the *Association québécoise des auteurs dramatiques* (AQAD), a non-profit organization which defends the socio-economic, moral and professional rights and interests of French Quebec and Canadian playwrights, librettists, adapters and translators, has filed one agreement. This agreement, which has been reached with Quebec Ministry of Education, is managed by the *Société québécoise des auteurs dramatiques* (SOQAD) which was created by AQAD to collect and distribute to copyright owners whose works are performed in public or private teaching institutions of the pre-school, primary and secondary levels, royalties provided for in the financial agreement between the Ministry of Education and AQAD. It must be noted that this agreement does not apply to performances of dramatic works of the *Société des auteurs et compositeurs dramatiques* (SACD) repertoire.