



Copyright Board

Annual Report
2002-2003



Copyright Board
Canada



Commission du droit d'auteur
Canada

CANADA

The Honourable Allan Rock, 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 fifteenth Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2003.

Yours sincerely,

Stephen J. Callary
Vice-Chairman and
Chief Executive Officer

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BOARD MEMBERS AND STAFF
as of March 31, 2003

Chairman: The Honourable Justice John H. Gomery

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

Members: Sylvie Charron
Brigitte Doucet
Andrew E. Fenus

Secretary General: Claude Majeau

General Counsel: Mario Bouchard

Director of Research: Gilles McDougall

Clerk of the Board: Lise St-Cyr

Assistant-Clerk: Lorraine Strasbourg

*Financial Officer
and Administrator:* Ivy Lai

Informatics Officer: Michel Gauthier

Registry Clerks: Nadia Campanella
Tina Lusignan

Members' Secretary: Manon Huneault

CHAIRMAN'S MESSAGE

I am again pleased to present the Annual Report of the Copyright Board of Canada. It documents the Board's contribution to the protection of the interests of Canadians by setting royalties intended to be fair and equitable to both copyright owners and users of copyright-protected works.

During this reporting year (2002-2003), the Board held two extensive hearings and issued six decisions.

The first hearing, which took place in April and May 2002, dealt with the reproduction of musical works by commercial radio stations. The tariffs had been proposed by the two collective societies which administer those rights in Canada, i.e., the Canadian Musical Reproduction Rights Agency (CMRRA) and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC). A decision was issued on March 28, 2003 and is described in detail in the report. The second hearing dealt with private copying for 2003-2004. The Board convened a pre-hearing conference on May 23, 2002 to address issues such as the timetable for the proceedings, the possible consolidation of objections (101 official objections were filed, as well as nearly 1,000 comments) and other relevant matters which had been identified by the participants and the Board. A 15-day hearing was held in January and February 2003; a decision should be rendered later in 2003.

Apart from the decision pertaining to reproduction rights, the Board issued two decisions with respect to private copying. On April 9, 2002, it varied the 2001-2002 tariff so as to facilitate tariff enforcement and inspections. On December 19, 2002, it issued an interim tariff for the period between January 1, 2003 and the date on which the final tariff will be certified for 2003-2004.

With respect to educational rights, two decisions were rendered. The first, dated October 25, 2002, certified the royalties that educational institutions are required to pay for the taping of radio and television programs and the performance of those tapes in the classroom for the years 1999 to 2002. The second, dated December 18, 2002, set an interim tariff for the years 2003 to 2006.

Finally, on March 21, 2003 the Board certified the tariffs for the retransmission of distant radio and television signals for the years 2001 to 2003.

In 2002-2003, the Board also issued 16 non-exclusive licences for the use of works whose copyright owner could not be located.

Even though the Board is, first and foremost, a regulatory tribunal, the complexity of legal issues it is required to address seems to increase with time. This is illustrated by the questions raised during the private copying hearings and by the decision of the Supreme Court of Canada to hear an appeal from the recent judgment of the Federal Court of Appeal dealing with the tariff of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for music over the Internet. The extent of the Board's powers will continue to be the subject of significant debate, as demonstrated by the decision of the Neighbouring Rights Collective of Canada (NRCC) to challenge the Board's decision to certify a single digital pay audio tariff.

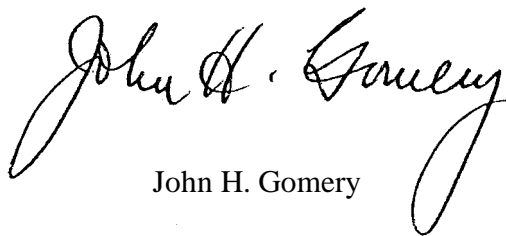
In 2002-2003, the Board also played, both nationally and internationally, a leadership role with respect to the continuing education of members of Canadian administrative tribunals and the identification of best practices by members of national copyright administrative institutions.

On the national scene, the Board's Vice-Chairman and CEO, Stephen J. Callary, assumed the chairmanship of the annual FORUM for members of federal administrative tribunals during 2002 and 2003. With his Organizing Committee, which includes Board Member Sylvie Charron, and with administrative and human resources provided by the Board, he organized two highly successful day-long meetings for over 50 members of federal administrative tribunals, on April 30, 2002 and March 31, 2003. I participated in the first meeting as one of the invited speakers and the other members of the Board attended both meetings. The success of these meetings resulted in the creation of a non-profit Centre for Professional Development of Canadian Administrative Tribunal Members; Mr. Callary, as one of the founders, acts as Treasurer and member of the Board of Directors. The Centre is devoted to developing and managing a continuing education curriculum for members of administrative tribunals.

The international activity originated in the Board's efforts to arrange an informal meeting of national copyright administration institutions during an International Conference on Copyright Administration, hosted by the University of Montreal in October 2001. Unfortunately, this Conference was held three weeks after the tragic events of September 11 in the U.S.A., and many expected delegates were unable to attend. However, the seeds were sown for a further meeting and Mr. Callary was asked to assume the chair of an international working group, which has carried out an extensive survey of copyright institutions around the world and determined that sufficient interest exists to call for a conference to be held in Ottawa from October 8 to 11, 2003. It is expected that this conference will lead to the formation of the International Association of Copyright Administrative Institutions (IACAI), to be devoted to the improvement of copyright administration throughout the world. A virtual "Who's Who" of the copyright world has accepted to speak at this conference, hosted by the Copyright Board with the participation of the Departments of Industry Canada, Canadian Heritage and Foreign Affairs and International Trade.

Finally, the House of Commons Standing Committee on Canadian Heritage will be launching its statutory review of the *Copyright Act* in the fall of 2003, as mandated by section 92 of the *Act*. This review follows on the Government's Report, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*, released in October 2002. The Board will be submitting a brief to the Committee in the fall and will ask to appear before the Committee during the course of its work.

On a personal level, I wish to thank my colleagues on the Board and its staff and personnel for their sustained efforts, diligence and expertise in dealing with the above matters during the past year.



John H. Gomery

MANDATE OF THE BOARD

The Copyright Board of Canada 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:

- ◆ certify tariffs for the public performance or the communication to the public by telecommunication of musical works and sound recordings [sections 67 to 69];
- ◆ certify 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];
- ◆ certify 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 of Canada 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 rights other than the performing rights of musical works 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, modified 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”), 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”), and for the adoption of tariffs for off-air taping and use of radio and television programs for educational or training purposes (“the educational rights”).

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. This 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).

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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 musical works and 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

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, was appointed part-time Chairman of the Board for a three-year term commencing in March 1999, renewed in March 2002 for an additional three years. 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 was also active as a member of committees of the Montreal Bar Association, of which he was an elected councillor for several years.

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 in Germany.

Members



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), of the Council of Canadian Administrative Tribunals, and is former Vice-Chair of the Ottawa Chapter of Canadian Women in Communications and past Executive Director of the Council of Canadian Law Deans.



Brigitte Doucet is a full-time member appointed in November 2001 for a five-year term. Prior to her appointment, Ms. Doucet was Legal Counsel, Labour Relations with *l'Association des producteurs de films et de télévision du Québec* since October 1999. She has also been active in the copyright and music fields as well as in business law. Furthermore, she lectured at the *Institut Trebas* on *Les affaires de la musique*. Prior to her law studies, Ms. Doucet was an information technology consultant for more than eight years. Ms. Doucet is a graduate of the University of Montreal (LL.B. in 1993).



Andrew E. Fenus, MCI Arb, 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 Member of The Chartered Institute of Arbitrators and a Chartered Arbitrator in The ADR 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).

Note: Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2003-2004 (Part III of the Estimates) and the Performance Report for 2002-2003. These documents are or will soon be available on the Board's Web site (www.cb-cda.gc.ca).

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.

In 2002-2003, no hearings were held nor any decision rendered pertaining to the public performance of music.

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.

Decision of the Board

On March 31, 2000, the Border Broadcasters' Collective (BBC), the Canadian Broadcasters Rights Agency (CBRA), the Canadian Retransmission Collective (CRC), the Canadian Retransmission Right Association (CRRRA), the Copyright Collective of Canada (CCC), the Major League Baseball Collective of Canada (MLB), FWS Joint Sports Claimants (FWS) and the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed joint statements of proposed royalties for the retransmission of distant radio and television signals for the years 2001 to 2003.

Objections were received from JumpTV and Bell ExpressVu. JumpTV withdrew its objection on October 10, 2001. The purpose of Bell ExpressVu's objection was solely to seek a Francophone market discount for direct-to-home satellite retransmitters in the event that the *Local Signal and Distant Signal Regulations* (SOR/89-254) were to be amended during the relevant period. There has been no indication that such an amendment may be forthcoming. In all other respects, Canadian retransmitters reached an agreement with the collectives which was tabled with the Board on March 26, 2001.

The Canadian Screenwriters Collection Society filed a statement in respect of distant television signals for 2002 and 2003 but withdrew it on July 8, 2002, upon reaching an agreement with CRC, CBRA and CRRRA for the representation of the Society's works.

As no objection or issue remained, on March 21, 2003 the Board certified the tariffs for the years 2001 to 2003.

The wording of the tariffs is similar to that of the *Television Retransmission Tariff 1998-2000* and the *Radio Retransmission Tariff 1998-2000*, in all but three respects. Some changes were made so as to

account for the Canadian Radio-Television and Telecommunications Commission (CRTC) Exemption Order for Small Cable Undertakings. The definition of Low Power Television Station (LPTV) was amended to take into account a change in the relevant rules. At the request of the collective societies, the royalty shares of two of them were adjusted.

On March 13, 2003, the Canadian Cable Television Association (CCTA) requested that the Board postpone the certification of the tariffs pending the adoption by the CRTC of regulatory amendments allowing it to implement a regional system of licensing for broadcast distribution undertakings (BDUs). Other retransmitters concurred with CCTA. As the implementation of a regional system of licensing would not change the substantive obligations of each BDU within each licensed area, the Board saw no reason to delay the certification of the tariffs any further.

PRIVATE COPYING

Background

The private copying regime entitles an individual to make copies [a “private copy”] of sound recordings of musical works for that person’s personal use. In return, those who make or import recording media ordinarily used to make private copies are required to pay a levy on each such medium. The Board sets the levy and designates a single collecting body to which all royalties are paid. Royalties are paid to the Canadian Private Copying Collective (CPCC) for the benefit of eligible authors, performers and producers.

The regime is universal. All importers and manufacturers pay the levy. However, since these media are not exclusively used to copy music, the levy is reduced to reflect non-music recording uses of media.

Private copying levies are paid only in respect of the right to reproduce sound recordings and the other underlying copyright subject-matters they contain. It is important for that reason to always keep in mind that the final product (the recorded CD) and each of the components used to create this product (blank medium, reproduction right, CD burner, time and effort required to make copy, etc.) are not the same.

Hearing

The Board convened a pre-hearing conference on May 23, 2002 and a 15-day hearing was held in January and February 2003.

Decisions of the Board

Application to vary

On December 14, 2001, the Canadian Storage Media Alliance (CSMA) and the Canadian Private Copying Collective (CPCC) jointly asked that the Private Copying Tariff for 2001-2002 be varied.

The applicants asked that CPCC be provided with more information on the types, brand names and other characteristics according to which supports are sold or inventoried. They also asked that CPCC clearly be allowed to share with others, in the course of its investigations, information such as the importers’

corporate name, the trade names under which they do business and the description of the various types of media sold.

The applicants argued that the blank media market is much more complex now and that those who market blank media do not constitute a reasonably stable and identifiable group. Since the Board's decision of December 16, 2000 pertaining to the 2001-2002 private copying tariff, a large number of small suppliers have surfaced. These are difficult to trace and they provide lesser known brands to retailers, often with the view of knowingly avoiding paying the levy set in the tariff. The identity of these suppliers is "fluid," as are the brand names they use, which makes the enforcement of the tariff even more difficult.

The Board acknowledged that lesser known brands now account for a much larger share of sales than could have been reasonably anticipated a year ago. The most likely explanation for this change is a series of attempts to avoid paying the levy.

This in itself was sufficient for the Board to conclude that a material change has occurred.

The application to vary the *Private Copying Tariff, 2001-2002* was granted.

Interim Tariff

At the request of CPCC, the Board adopted for a one year period starting January 1, 2003, an interim tariff of levies to be collected by CPCC on the sale of blank audio recording media, in Canada, in respect of private copying.

This interim tariff is in substance identical to the tariff the Board certified on December 16, 2000 for the years 2001 and 2002 and as modified by the Board's decision of April 9, 2002, in all but one respect. The tariff provides that it will remain in force until the final Private Copying tariff for the years 2003 and 2004 is certified.

The Board did not accept CSMA and the Retailers' request for a transition period between the date of the final decision and the date the certified tariff becomes effective. This was not an issue for this interim tariff. The Board also rejected the Retailers' request that the interim tariff should contain no reference to CPCC's current zero-rating scheme. The interim tariff must be identical to the 2001-2002 tariff. In addition, the reference to the zero-rating scheme is part of the notes but not of the tariff. If it was useful for understanding the 2001-2002 tariff, it is as useful for the interim tariff.

REPRODUCTION OF MUSICAL WORKS

Background

Sections 70.12 to 70.191 of the *Copyright Act* give collective societies that are not subject to a specific regime the option of filing a proposed tariff with the Board. The review and certification process for such tariffs is the same as under the specific regimes. The certified tariff is enforceable against all users; however, in contrast to the specific regimes, agreements signed pursuant to the general regime take precedence over the tariff. During the year under review, the Board certified the first tariff pursuant to those provisions.

Hearing

In 2002-2003, one hearing was held pertaining to the reproduction of musical works by commercial radio stations. It lasted 9 days over the months of April and May 2002.

Decision of the Board

The Canadian Musical Reproduction Rights Agency (CMRRA) and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) are collective societies which administer the reproduction right of musical works. SODRAC represents the repertoire of the vast majority of rights holders in Quebec and most works written in French by Canadians. It also administers in Canada the repertoire of many foreign collectives. CMRRA represents the repertoire of a large number of Canadian and foreign English-language music publishers.

On May 29, 1999, May 13, 2000, and April 21, 2001, SODRAC and CMRRA filed proposed tariffs for the reproduction in Canada of musical works by commercial radio stations. The Canadian Association of Broadcasters (CAB) exercised its right to object to the proposed tariffs.

The Board granted a request from the CAB to examine all of these proposals at the same time. SODRAC and CMRRA subsequently requested that the Board approve a joint tariff for the years 2001 to 2005. SODRAC and CMRRA also created CMRRA/SODRAC Inc. (CSI) to administer the joint tariff that the collectives were asking the Board to certify.

The collectives proposed a tariff structure that is a function of annual income and music use. Stations that draw on their repertoire for less than 20 per cent of their air time would pay 0.28 per cent on their first \$625,000 of annual income, 0.56 per cent on the next \$625,000 and 0.84 per cent on all other income. Stations that do not copy any music onto a hard drive would be subject to the same rates. The rates for other stations would be 0.65 per cent, 1.30 per cent and 1.95 per cent respectively.

The CAB requested that the royalty be capped at 0.32 per cent, or 10 per cent of what stations pay to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) to broadcast its repertoire.

In support of its arguments, the CAB made the point that music is only one of the factors that determine the success of radio programming, and that copies of musical works made by radio stations are used solely to facilitate programming. These copies do not reduce costs. In addition, a high tariff would have an adverse effect on the efficiency of radio stations and on competition in the commercial radio market.

The collectives argued that a copy made in the course of broadcasting operations has intrinsic value, although that value is difficult to quantify. The benefits of reproduction are significant and identifiable. They include reduced staff and space requirements, improved productivity, improvements to the station's competitive position, improved product quality and the ability to better meet the needs of clients.

The collectives used as the starting point for their proposal, the agreements that SODRAC reached with TVA and TQS television networks. The Board expressed reservations about this approach and did not adopt it.

The collectives also tabled, at the Board's request, a document evaluating the relevance of other possible substitute prices or points of comparison. The collectives concluded from their analysis that none of those alternatives was adequate in the circumstances. The Board agreed with this conclusion.

In setting a new tariff, the Board often tries to find proxies or other points of comparison that can be used as a starting point to determine the amount of the royalty. Where it is unable to find any reference that is especially appropriate in the circumstances, the Board then tends to identify a range within which it will set the tariff.

In the case at hand, the Board found that the rates proposed by the collectives and the CAB (1.95 per cent and 0.32 per cent) allowed it to establish a useful range.

The Board then identified a number of factors that have a bearing on where the tariff falls within that range.

First, the reproduction right is a self-standing right separate from the communication right. Its very existence tends to plead in favour of a royalty that is more than nominal, even though its use in the course of broadcasting operations is secondary to broadcasting.

Second, the use of new broadcasting techniques lowers costs for radio stations. Rights holders are entitled to a fair share of those efficiencies.

Third, the Board must take into account the fact that the licence is optional. Once they have assessed the benefits of reproduction relative to the cost of the licence, broadcasters could choose not to make copies. If the tariff were too high, many broadcasters might choose not to purchase the licence, which would hamper the adoption of new broadcasting techniques. On the other hand, if the tariff were too low, the collectives might stop filing tariffs and opt instead for individual negotiations.

In view of all these factors, the Board set the base rate at 1 per cent. This base rate needed to be adjusted to take into account the repertoire that the collectives represent. The collectives estimated that the proportion of the relevant repertoire they represent was 65.51 per cent in October 2001 and 82.31 per cent in April 2002. The Board assumed, in setting the tariff, that the collectives will represent 80 per cent of the repertoire on average for the duration of this tariff. The full rate was therefore set at 0.8 per cent.

The collectives as well as the CAB requested that stations which make little use of the collectives' repertoires pay approximately 44 per cent of the royalties that other stations pay. As this is the same proportion used in other radio tariffs, it was appropriate to use it again in these proceedings.

The collectives also offered to extend this favourable treatment to stations that do not use hard drive copies. The CAB, for reasons that the Board did not understand, objected to that offer. The Board accepted the collectives' suggestion.

Stations that do not copy musical works at all need not pay any royalties, as they do not need a reproduction licence.

The two collectives and the CAB requested that the tariff be adjusted based on the income segments identified earlier. This constituted a significant change in position for the CAB; in the past, it took the view that the same rate should apply to all stations regardless of their income.

Consequently, stations where works from the repertoire account for less than 20 per cent of their broadcasting time and stations that neither make nor keep hard drive copies will pay 0.12 per cent on the first \$625,000 of gross annual income, 0.23 per cent on the second \$625,000 and 0.35 per cent on all other income. The rates applicable to all other stations will be 0.27 per cent, 0.53 per cent and 0.8 per cent respectively.

The Board has always acknowledged that a fair tariff must take into account the ability of users to pay. In this instance, the Board concluded that the commercial radio industry has the means to pay the certified tariff even though the transition to digital audio broadcasting will require a significant outlay by broadcasters. The record clearly established that the radio industry as a whole is very profitable and that setting a tariff even double what the Board was certifying would have had a limited impact on the industry's bottom line.

To allow for an eventual joint hearing of all tariffs applicable to commercial radio, should the Board determine that such a hearing is appropriate when the CAB's request is reviewed with all of the stakeholders involved, the Board certified this tariff for the years 2001 to 2004 only.

SODRAC and CMRRA had filed separate tariff proposals. They asked that the proposals be merged into a single certified tariff that also recognizes the establishment of CSI as the collection agent. The Board so ordered.

EDUCATIONAL RIGHTS

Background

Sections 29.6, 29.7 and 29.9 of the *Copyright Act* came into force on January 1, 1999. Since then, educational institutions and persons acting under their authority can, without the copyright owner's authorization, copy programs when they are communicated to the public and perform the copy before an audience consisting primarily of students. In a nutshell, institutions can copy and perform news and news commentaries and keep and perform the copy for one year without having to pay royalties; after that, they must pay the royalties and comply with the conditions set by the Copyright Board in a tariff. Institutions can also copy other programs and subject-matters, and keep the copy for assessment purposes for thirty days; if they keep the copy any longer, or if they perform the copy at any time, the institution must then pay the royalties and comply with the conditions set by the Board in a tariff.

Decisions of the Board

In 2002-2003, the Board rendered two decisions pertaining to Educational Rights.

The first one deals with the royalties that educational institutions will pay for the taping of radio and television programs and performance of those tapes in the classroom for the years 1999 to 2002. The Educational Rights Collective of Canada (ERCC), which filed the proposed statement of royalties, was

established in 1998. It currently is the only collective society that is entitled to ask for the payment of the royalties. Its repertoire comprises every type of work or subject-matter which educational institutions are likely to copy.

Several representatives from the education sector filed objections to the proposed tariff. They formed the Education Coalition, whose members are the Association of Canadian Community Colleges, the Association of Universities and Colleges of Canada, the Canadian Association of University Teachers, the Canadian School Boards Association, the Canadian Teachers' Federation and the Copyright Consortium of the Council of Ministers of Education, Canada.

ERCC and the Education Coalition agreed that educational institutions should be allowed to choose between two rate formulas or tariffs. Under the transactional tariff, institutions will pay a set amount per minute of program copied; they will then be entitled to keep the copy and perform it as long as it lasts. Under the comprehensive tariff, in exchange for paying a set amount per year per student full-time equivalent (or FTE), institutions will be allowed to copy as many programs as they wish and perform them as often as long as they opt for the comprehensive tariff (and for some time thereafter).

The transactional tariff

A market currently exists in Canada where distributors sell prerecorded videocassettes to educational institutions, along with the right to perform the videocassette in the classroom. ERCC and the Education Coalition agreed that the transactional rate for television programs should be a function of the price paid in that market. They also agreed that that price was roughly \$2 per minute in 2000.

ERCC rejected virtually all adjustments to this figure, while the Education Coalition would have brought it down to somewhere between 51 and 63 cents per minute. According to the Education Coalition, the tariff should account only for the "copyright royalty portion" of the price of a prerecorded videocassette. The tariff should also discount all distributors' revenues from sources other than the sale of video programs. Finally, the rate should be discounted to reflect significant costs associated with the taping of broadcast programs.

In the Board's view, the tariff cannot only account for the copyright royalty portion of the price of a prerecorded videocassette. Because the tariff must coexist with the existing distribution market, and not act as a substitute for it, the Board must ensure that it is set at a sufficiently high level that it does not constitute a threat for the existing market.

The Board believed that the transactional rate should be set at a 20 per cent discount relative to the current per-minute rate charged for prerecorded programs and set the ERCC transactional rates at \$1.60 per minute for elementary/secondary schools and \$2 for post-secondary schools.

ERCC and the Coalition agreed that the rate for making a copy of a radio program should be 1/12th of the rate for making copies of television programs. Consequently the Board set the rate at 13 cents per minute for elementary and secondary schools and 17 cents per minute for post-secondary schools.

The comprehensive tariff

The approaches put forward by ERCC and the Education Coalition in this respect differed markedly. ERCC proposed rates of \$2.40 per FTE in elementary and secondary schools and of \$4.80 per FTE in post-secondary institutions.

The Education Coalition proposed to determine the comprehensive rate by dividing the copyright royalty portion of revenues from the sale of prerecorded videocassettes by the current number of FTEs. This would yield a rate of 37 cents per FTE. The Board found neither proposal satisfactory.

The Board opted instead to use current consumption patterns in setting the tariff. By calculating the average number of prerecorded videos currently purchased by schools, it was possible to determine the amount at which the comprehensive tariff would need to be set in order for a school, making that number of taped copies, to pay the same amount of royalties under the transactional and comprehensive tariffs. In addition, the comprehensive rate should be designed to appeal to institutions that use more video programs than average.

The Board thus set a comprehensive rate of \$1.73 per elementary or secondary FTE and of \$1.89 per post-secondary FTE.

Cost of converting from the comprehensive tariff to the transactional tariff

Under ERCC's tariff proposal, copies of programs made under the transactional tariff could be used indefinitely, but the comprehensive tariff allowed schools to use copies only as long as they continued to pay the comprehensive rate. A school that switched from the comprehensive to the transactional tariff would have to either erase the tapes it made under the comprehensive tariff or pay a conversion charge set as a percentage of the transactional rate on each tape it choose to keep going forward. ERCC proposed that the conversion charge be set at half the price of a copy made under the transactional tariff. The school would then acquire the right to use the copy indefinitely, just as if it had be made under the transactional tariff.

The Education Coalition objected to the imposition of any conversion charge. The Board concluded that it was within its power to set a tariff based on a rental model (as is the case with the comprehensive tariff), to set a tariff based on an outright purchase model (as is the case with the transactional tariff), or to allow for both models to coexist. It also agreed that a conversion charge would serve to deter schools from switching back and forth between the comprehensive and transactional tariffs so as to unduly reduce their royalty payments. The Board agreed with the rate proposed by ERCC, adding that when the tariff is next reviewed, the charge would need to be revisited in light of actual experience under the transactional and comprehensive tariff rates.

The Board also allowed educational institutions to benefit from a discount if they voluntarily provide, with respect to copies made before September 1, 2001, information similar to that which they are required to provide under the *Educational Program, Work and Other Subject-matter Record-keeping Regulations* (SOR/2001-296).

The second decision pertained to an Interim Tariff for the years 2003 to 2006.

At the request of ERCC, with the concurrence of the Education Coalition, and subject to the outlined changes, the Board adopted an interim tariff to be collected by ERCC from educational institutions in Canada, for the reproduction and performance of works or other subject-matters communicated to the public by telecommunication for the period 2003 to 2006.

The interim tariff is identical to the tariff the Board certified on October 26, 2002 for the years 1999 to 2002 in all but two respects. First, some dates pertaining to reporting requirements have been changed. Second, the transitional provisions have been omitted, as they no longer serve any purpose. The interim tariff will remain in force until the final tariff is certified, unless it is modified at some point in time.

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.

There were no applications pursuant to that section in 2002-2003.

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, the Board has issued 115 licences. In 2002-2003, 33 applications were filed with the Board and 16 licences were issued as follows:

- *Melanie and Gordon Copp*, Calgary, Alberta, authorizing the reproduction of architectural plans for the property located at 312 Coach Grove Place S.W. in Calgary built in 1981 by Maioi Development.
- *Kirby Sewell*, Calgary, Alberta, authorizing the reproduction of 1981 architectural plans created by Ismail Ahmed for the Doral Manor property located at 1311, 15 Avenue S.W. in Calgary.
- *John Duffy*, Los Angeles, California, authorizing the creation of a derivative work of the motion picture “Shoot” produced by Getty Picture Corporation and Essex Enterprises Ltd. in 1976.
- *Marble Arch Properties Ltd., c/o Army & Navy Dept. Store Ltd.*, Calgary, Alberta, authorizing the reproduction of the construction and engineering drawings created by Angelo S. Martin of Angelo Martin Architecture for the property located at 1111, 33rd Street N.E. in Calgary.
- *Groupe Beauchemin, éditeur ltée*, Laval, Quebec, authorizing the reproduction of two photographs taken by Henri Paul in 1956 for the advertising of Molière’s play *Le malade imaginaire* featured at the *Théâtre du Nouveau Monde de Montréal*.

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- *Les éditions de la Pastèque*, Montreal, Quebec, authorizing the reproduction of 58 pages of drawings created by Jacques Gagnier for the column entitled *La vie en image* published in the Sunday supplement of the newspaper *La Patrie* from 1944 to 1947.
 - *Aurora College*, Fort West, Northwest Territories, authorizing the reproduction of *The Business of Your Life* (consisting of 25 modules) published in 1994 or 1995 by Muriel Stewart of MultiMedia Designs.
 - *Sites Productions Inc.*, Toronto, Ontario, authorizing the reproduction of three pen and ink sketches by Sidney Clarke Ells, in a television documentary profiling the Methye Portage.
 - *Dave Fryett*, Calgary, Alberta, authorizing the reproduction of architectural plans dated 1991 (name of architect or creator unknown) for the property located at 292 Sunmills Drive S.E. in Calgary.
 - *Lothar Klein*, Toronto, Ontario, authorizing the reproduction and musical adaptation of *The Philosopher in the Kitchen*, translated into English by Anne-Marie Drayton and published by Penguin Books in 1970, then republished by Penguin Books USA in 1994 under the title *The Physiology of Taste*.
 - *Ron Boghean*, Calgary, Alberta, authorizing the reproduction of the architectural plans designed by Adobe Designs (TAJ designer) for Sussex Homes Inc. for the property located at 113 Del Rio Place N.E. in Calgary.
 - *John Wills*, Calgary, Alberta, authorizing the reproduction of the architectural plans designed by A.O.K. Home Designs (K. Stewart, draftsman) for S & S Homes for the property located at 144 Shawnessy Drive S.W. in Calgary.
 - *Canada's National History Society*, Winnipeg, Manitoba, authorizing the reproduction of an image of the 1924 painting *Girl Ironing* by Kenneth Keith Forbes.
 - *Louise Fleury-Maltais*, Alma, Quebec, authorizing the reproduction of the work *Pour fêter nos amours*, extracted from "La muse populaire" published in 1921 by C.O. Beauchemin et fils (andantino, L. Collin), and *Le Noël d'un prisonnier* written by François Depret, published in the "Cahier des prisonniers" by Les Éditions La Baçonnrière, Neuchâtel, c. 1940.
 - *Maternaide du Québec*, Trois-Rivières, Quebec, authorizing the mechanical reproduction of 10 songs (authors, composers and publishers unknown) on CDs.
 - *Conseil supérieur de la langue française*, Quebec, Quebec, authorizing the reproduction of a book cover published by Granger Frères in 1956 and a cartoon by Henri Letondal.

Memorandum of Understanding with the Société québécoise de gestion collective des droits de reproduction (COPIBEC)

As was done in 1998 with the Canadian Copyright Licensing Agency (CANCOPY) – now known as "Access Copyright" – the Copyright Board and COPIBEC have agreed to combine their resources to ensure efficient and expeditious administration of applications made pursuant to section 77 of the *Act* and have entered into a Memorandum of Understanding. Hence, applications filed with the Board for the use of published works of a sort that is usually found in COPIBEC's repertoire and for which the copyright

owner is unlocatable, will be referred to COPIBEC for examination and recommendation to the Board of licence fees and other terms and conditions if COPIBEC is of the opinion that a licence could be issued under the circumstances. The Board however still decides whether a licence should be issued and what the appropriate terms and royalty payment should be.

COPIBEC has always worked closely with the Board in the past, recommending fees for licences and acting as a repository for royalties in the event copyright owners came forward to claim compensation for use of their works.

COURT DECISIONS

SOCAN's Tariff 22 (Music via the Internet)

On October 27, 1999, the Board issued a decision regarding SOCAN's proposed Tariff 22, which relates to the communication of musical works to the public via the Internet. Because of the novelty and complexity of the issues, the Board divided the hearing into two phases. The first phase dealt with preliminary legal matters.

In this first phase the Board made a number of findings concerning the nature of music communications via the Internet and the liabilities that attach to such communications [see 1999-2000 Annual Report, pages 16-19]. On November 26, 1999, SOCAN filed in the Federal Court of Appeal an application for judicial review of the Board's decision. SOCAN did not challenge the Board's conclusion that a person who posts a musical work on the Internet communicates that work to the public, and also authorizes the communication. However, it did challenge the Board's finding that intermediaries, including Internet Access Providers (IAPs), if providing only the means on telecommunication necessary to enable another person to communicate, benefit from the "common carrier" exemption in paragraph 2.4(1)(b) of the *Act*. SOCAN also challenged the Board's conclusion that a communication occurs in Canada if it originates from an Internet server physically located in Canada.

Respondents to SOCAN's application included the Canadian Association of Internet Providers (CAIP), the Canadian Cable Television Association, the Canadian Association of Broadcasters, the Canadian Broadcasting Corporation, the Canadian Motion Picture Distributors Association, and several IAPs. The Canadian Recording Industry Association and the Neighbouring Rights Collective of Canada were interveners in the proceedings.

On May 1, 2002, Messrs. Justices Evans and Linden dismissed the application in part, with Madam Justice Sharlow dissenting in part.

Mr. Justice Evans dealt extensively with the standard of review of the Board's decision. Upon a pragmatic and functional analysis, he decided that the Board was required to correctly interpret certain provisions of the *Act*, including paragraph 2.4(1)(b), and to correctly determine the territorial applicability of Canadian copyright law. He held that deference was due in respect of the Board's application of the law to particular facts; such conclusions were required to be reasonable.

Mr. Justice Evans rejected SOCAN's argument that paragraph 2.4(1)(b) is an exemption that should be interpreted narrowly. He preferred to interpret the *Act* "with an eye to striking an appropriate balance between ... competing interests." He held that three criteria must be satisfied in order for an intermediary

to avail itself of the common carrier provision. First, the activities must constitute “means of telecommunication”. Second, they must be “necessary” to enable another person to communicate. Third, they must be the intermediary’s “only act”.

Mr. Justice Evans agreed with the Board that the words “means of telecommunication” connote more than traditional physical facilities. Like the Board, he held that paragraph 2.4(1)(b) encompasses a wider range of services and equipment. He explored various shades of meaning of “necessary”, and concluded that the word was used by Parliament in its most familiar, “relatively strict” sense. The Board had held that the common carrier exemption applies to ancillary activities (such as caching) that improve performance and enhance efficiency. Mr. Justice Evans determined, therefore, that the Board erred in law by giving the word “necessary” a broader interpretation than it normally bears. He also found that the Board unreasonably applied the law to the evidence before it. Mr. Justice Evans determined that the evidence did not show that the communication of music would, in all probability, not occur without caching. Mr. Justice Evans agreed with the Board that an intermediary that acts in concert with a content provider, or otherwise does not limit its role to that of a passive transmitter, cannot claim that its “only act” with respect to a particular communication is within the common carrier exemption. He added that this reasoning applies to caching. Aside from the issue of caching, he held that “it was far from unreasonable (let alone patently unreasonable) for the Board to conclude that the normal activities of host server operators and Internet access providers fall within paragraph 2.4(1)(b).”

Mr. Justice Evans also addressed the issue of liability for authorizing communications to the public. He affirmed that the Board did not misdirect itself in law by adopting an erroneous test. Further, it was not unreasonable for the Board to conclude that the normal activities of host server operators do not implicitly authorize content providers to communicate the material that they have posted on the server.

Finally, Mr. Justice Evans held that the Board was incorrect to say that the location of a communication is determined solely by the location of the host server. Instead, he found that a communication, or an authorization, occurs in Canada if there is a “real and substantial connection” to Canada. He held that the Board should be given latitude to decide how to apply such a test, but suggested that the location of the content provider, the end user and the intermediaries, in particular the host server, are normally relevant. A communication surely occurs in Canada where each of the end nodes, the content provider and the end user, are located in Canada.

Madam Justice Sharlow, in dissent, disagreed with the majority’s interpretation of the word “necessary”. She would have adopted the Board’s implicit interpretation of “necessary” as something that makes a communication practicable or more practicable.

On March 27, 2003, the Supreme Court of Canada granted both CAIP’s application for leave to appeal and SOCAN’s application for leave to cross-appeal.

Retransmission

On February 25, 2000, the Board certified the retransmission tariff for 1998, 1999 and 2000. FWS Joint Sports Claimants had asked the Board to change its royalty allocation methodology so that sports programming would have received a larger share of royalties. The Board declined to do so [see 1999-2000 Annual Report, page 20]. On November 6, 2001, the Federal Court of Appeal dismissed an application by FWS for judicial review of the Board’s decision. On June 13, 2002, the Supreme Court of Canada dismissed an application by FWS for leave to appeal the decision of the Federal Court of Appeal.

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 pursuant to section 70.5 of the *Act* within 15 days of its conclusion, shields the parties from prosecutions pursuant to section 45 of the *Competition Act*. The same provision also grants the Commissioner of Competition appointed under the *Competition Act* access to those agreements. In turn, where the Commissioner 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.

In 2002-2003, 316 agreements were filed with the Board, totalling 3,386 agreements filed since the Board's inception in 1989.

Access Copyright, The Canadian Copyright Licensing Agency (formerly known as CANCOPY), which licenses reproduction rights, such as photocopy rights, on behalf of writers, publishers and other creators, filed 217 agreements granting various institutions and firms a licence to photocopy works in its repertoire. These agreements were concluded with various educational institutions, municipalities, corporations, non-profit associations and copy shops.

The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) filed 67 agreements. COPIBEC is the collective society which authorizes in Quebec the reproduction of works from Quebec, Canadian (through a bilateral agreement with *Access Copyright*) 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). The agreements filed in 2002-2003 have been concluded with municipalities and various organizations in the Province of Quebec.

Access Copyright and COPIBEC have also filed three agreements they have jointly entered into with the Royal Bank of Canada, the Bank of Nova Scotia and Schering Canada.

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, 24 agreements.

Finally, the Canadian Broadcasters Rights Agency (CBRA) filed five agreements pertaining to commercial media monitoring. CBRA represents various Canadian private broadcasters that create and own radio and television news and current affairs programs and communication signals.