Copyright Board

ANNUAL REPORT 2003–2004

Copyright Board
Canada

CANADA

Commission du droit d'auteur
Canada

The Honourable David L. Emerson, 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 sixteenth Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2004.

Yours sincerely,

Stephen J. Callary
Vice-Chairman and
Chief Executive Officer

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as of March 31, 2004

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	Andrew E. Fenus
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General Counsel:	Mario Bouchard
Director of Research:	Gilles McDougall
Clerk of the Board:	Lise St-Cyr
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Financial Officer and Administrator:	Ivy Lai
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CHAIRMAN'S MESSAGE

I am pleased to present the 2003-2004 Annual Report of the Copyright Board of Canada. It documents the Board's activities during the year in the discharge of its responsibility to set royalties intended to be fair and equitable to both rights owners and users of copyright-protected works, for the use of the latter when the parties have not agreed upon such royalties, by contract or other means.

During 2003-2004, the Board held three hearings. The first dealt with the royalties to be paid to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the use of musical works on private television stations (Tariff 2.A and Tariff 17). The second concerned the royalties to be paid to SOCAN when recorded music is played for dancing (Tariff 18). The third dealt with a jurisdictional issue pertaining to SOCAN's Concert tariff (Tariff 4). All three matters were disposed of by the Board by decisions issued before the end of the year.

During the year, the Board issued other decisions. One decision dealt with the reproduction of musical works by community radio stations. Two pertained to private copying: the first set the levy to be paid for the private copying of sound recordings of musical works, while the second dismissed an application for orders enforcing the private copying tariffs against certain importers of blank audio recording media. Two decisions were issued pursuant to the retransmission regime: the first designated a collective society from which certain unrepresented copyright owners could claim royalties for the retransmission of their works, while the second set interim royalties for the retransmission of distant radio and television signals.

All of the foregoing decisions are described in greater detail in the present Report.

On March 19, 2004, the Board also certified various SOCAN tariffs for the years 1998 to 2007. The reasons for this decision were issued after March 31, 2004 and will be detailed in the next annual report of the Board.

In 2003-2004, the Board issued 19 non-exclusive licences for the use of works for which copyright owners could not be located. The Board also rendered a decision dismissing a licence application for the reasons that the contemplated use did not need to be authorized by the holder of the copyright.

In October 2003, with the support and participation of Industry Canada, Canadian Heritage and Foreign Affairs and International Trade, the Copyright Board hosted in Canada an International Conference on National Copyright Administration. The object of this initiative was to exchange information on desirable practices and procedures developed by sister agencies, and to deal with practical issues such as the supervision of collective societies, the internet and private copying tariffs. All of the participants agreed that the Conference was a success and served to demonstrate the benefits of providing national copyright administrative institutions with a venue for discussing common challenges and issues.

In the fall of 2003, the Board submitted a brief to the House of Commons Standing Committee on Canadian Heritage who launched its statutory review of the *Copyright Act* as mandated by section 92 of the *Act*.

From the foregoing, it can be seen that the year 2003-2004 was a busy and productive period for the Board.

As of March 31, 2004, I have resigned as Chairman of the Copyright Board due to another commitment, so this is my last Annual Report. Mr. Justice William J. Vancise of the Saskatchewan Court of Appeal has been appointed as my successor. His excellence as a jurist and years of experience assure the Board of wise leadership, and I wish him success and satisfaction in his new functions.

I would like to take this occasion to thank publicly my colleagues on the Board during my tenure, and its staff and personnel, for the sustained efforts, diligence and expertise, not only during the past year but throughout the five years I have been Chairman of the Copyright Board. This was a challenging period during which many new issues have had to be resolved. The successes achieved in dealing with these questions are due to this dedicated group, with whom I have been privileged to work.

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, issue 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 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 administratively 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 determines 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 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 opponents will have the opportunity to argue their case in a public hearing. After examination, 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.

From left to right
Stephen J. Callary, Brigitte Doucet, Mr. Justice John H. Gomery, Sylvie Charron and Andrew E. Fenus

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, MCIArb, 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 2004-2005 (Part III of the Estimates) and the Performance Report for 2003-2004. 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.

Hearings

During 2003-2004, the Board held three hearings. The first, held in April and May 2003, dealt with royalties to be paid to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) under Tariff 2.A (Commercial Television Stations) for the years 1998-2004, and Tariff 17 (Pay and Specialty Television Services) for the years 2001-2004. The second, held in June 2003, dealt with SOCAN Tariff 18 (Recorded Music for Dancing) for the years 1998-2004. Finally, the third one, also held in June 2003, dealt with a jurisdictional issue pertaining to SOCAN Tariff 4 (Concerts).

Decisions of the Board

The Board issued three decisions in 2003-2004. The first, rendered March 19, 2004, certified many of SOCAN tariffs for the years 1998 to 2007. The reasons for this decision were issued after March 31, 2004 and will be reported in the Board's next annual report. The second decision, also rendered on March 19, 2004, pertained to SOCAN Tariffs 2.A (Commercial Television Stations) for 1998-2004, and 17 (Pay and Specialty Television Services) for 2001-2004. The last one, rendered March 23, 2004, dealt with a jurisdictional issue pertaining to SOCAN Tariff 4 (Concerts).

PUBLIC PERFORMANCE OF MUSICAL WORKS 1998 TO 2007

On March 19, 2004, the Board certified the following SOCAN tariffs for the relevant years:

- Tariff 12.B (1998-2003)
- Tariffs 18, 20 (1998-2004)
- Tariff 2.C (1998-2007)
- Tariffs 3.A, 3.B, 5.A, 7, 8, 10, 13.A, 15.A (1999-2004)
- Tariff 1.A (2000-2002)
- Tariffs 1.B, 2.B, 3.C, 11, 12.A, 13.B, 13.C, 14, 15.B, 21 (2000-2004)
- Tariff 4.B.2 (2003-2007)
- Tariff 6 (2004)

The reasons for the decision were issued after March 31, 2004.

SOCAN Tariffs 2.A (Commercial Television Stations) and 17 (Pay and Specialty Television Services)

Tariff 2.A concerns commercial broadcast television. It has been set at a percentage of revenues since 1959. On January 30, 1998, the Board had reduced the applicable rate from 2.1 to 1.8 per cent and set up a modified blanket licence (MBL), allowing stations to opt out of the traditional blanket licence for certain programs. SOCAN asked that the rate be increased to 2.1 per cent until 2003 and to as much as 3.1 per cent in 2004, and that the MBL be abolished or its financial impact be considerably toned down. The Canadian Association of Broadcasters (CAB) objected to the proposal; it asked for a rate of 1.4 per cent, for the maintenance of the MBL and for some softening of its conditions.

Tariff 17 applies to non-broadcast television signals, i.e., signals that are only offered through a transmitter (usually cable or satellite). The tariff goes back to 1990. Royalties were set at a number of cents per subscriber per month for all Canadian specialty services; royalties for other services were set at a percentage of subscription revenues. Systems serving 6,000 subscribers or less did not pay the full amount. In 2000, the full rate was 15.5¢ for the portfolio of Canadian services and 1.8 per cent for the rest. SOCAN asked that the rate be set at 1.78 per cent in 2001, growing to 2.6 per cent in 2004, and that the rate base include all transmitter (BDU) revenues. It submitted that even if maintained in Tariff 2.A, the MBL should not be extended to Tariff 17. Those who produce (the services) or distribute (the BDUs) non-broadcast signals objected to SOCAN's proposal. They asked that the rates in both tariffs be the same (and that it be reduced) and for the extension of the MBL to non-broadcast services. Some services asked that the tariff be tiered, either according to "genres" of services or in a manner similar to what is available to commercial radio.

Both matters were heard together over a period of 16 days.

Abandoning the portfolio approach: After hearing SOCAN's evidence in chief, the Board stated its intention to abandon the portfolio approach in favour of a rate per signal. The Board felt that this was a necessary change, if only because of the advent of digital tiers and of the considerable increase in the importance of satellite transmitters. The reasons that had led the Board to opt for the portfolio approach at first simply did not exist anymore.

A single rate: The Board restated the principle that broadcast and non-broadcast television are part of a single industry that should pay the same price for its music performing rights. Expressing both tariffs as a percentage of a rate base will only help to reinforce that correlation.

The starting rate: The Board used Tariff 2.A as a starting point, even though it warned that the growing revenues of non-broadcast services may make this inappropriate in the future. In support of an increase in the rate, SOCAN argued that the 1998 decision was based on false assumptions and that the current rate failed to fully account for the value of performing rights to television. For its part, CAB argued among other things that the rate had trended downwards over the years and that competitive pressures had continued to increase. The Canadian Cable Television Association (CCTA) added that Tariff 17 royalties were already growing at a very high rate and were increasingly out of proportion to royalties paid for the retransmission of distant signals. The Board concluded that it did not have enough evidence to gauge what the true value of music is in the television industry. It opted for a modest increase, while expecting that this question would be given more attention in future instances. To maintain the balance between the two sectors of the industry, the Board kept the rate for Tariff 2.A at 1.8 per cent up to 2001, and increased it to 1.9 per cent in 2002, 2003 and 2004. The rate for Tariff 17 was set at 1.78 per cent for 2001 and increased to 1.9 per cent for 2002, 2003 and 2004. The Board chose to ignore historical trends, rejected as irrelevant SOCAN's proposed derived demand analysis and noted that competitive challenges had not prevented the industry from maintaining healthy profits. It rejected the argument that Tariff 17 royalties were growing out of proportion to BDU revenues and concluded that any comparison with the retransmission tariff would be too fraught with difficulties to be of any help.

The rate base: Everyone agreed that a broadcaster's gross revenues should be the rate base for Tariff 2.A. The definition of gross revenues in Tariff 2.A was modified to ensure that royalties are paid on account of all revenues generated when a program is broadcast. SOCAN asked that Tariff 17 target not only the services' affiliation payments and advertising revenues but also BDU revenues. Essentially for the reasons set out in its first Tariff 17 decision, the Board remained of the view that the services' revenues are the appropriate rate base.

Tiering the tariff: Though non-broadcast services as a group use on average the same amount of music as conventional broadcasters, some services use considerably less than others. For this reason, some objectors wanted Tariff 17 to be tiered. For some, general entertainment should pay the same rate as conventional television, music services should pay more, sports services should pay less, and news and information should pay even less. Others suggested that only services that use music less than 20 per cent of their broadcast time pay less, as is the case with commercial radio. SOCAN opposed any tiering. The Board concluded that tiering by genre is impractical and could result in inequities, if only because it relies on past music use patterns in a rapidly evolving market. Instead, it opted for introducing a low-music use rate modelled on the commercial radio tariff. That model has withstood the test of time. The resulting administrative burden falls mostly upon those who benefit from it. It reflects not only the actual use of the SOCAN repertoire, but variations in that use over time. The Board declined for the time being to set a higher rate for services who use the SOCAN repertoire much more than others. For one thing, monitoring a premium rate raises difficulties of a different order of magnitude than monitoring a low-use rate.

Discounts: Tariff 17 included a number of discounts that were created in response to the inability of the portfolio rate to respond to differences in the nature and composition of the portfolio from system to system. With the change to a per-service rate, those discounts were no longer relevant. If the market for affiliation rights functions properly, it will take into account those factors (type of premises, market language, size of system) that may have an impact on the price to be paid for the services, thereby reducing the rate base and with it, the amount of royalties.

The MBL: The Board had to rule on whether the MBL is legal, whether it should be maintained and if so, whether it should be changed, and be extended to non-broadcast services.

According to SOCAN, the MBL fails to comply with the purposes of the *Act*, the fundamental values of Canadian society and the principles of the *Canadian Charter of Rights and Freedoms.* The Federal Court of Appeal had already ruled that the MBL is congruent with the underlying purposes of the *Act*. The argument that the MBL impinges on the principles of the *Charter* or the fundamental values of Canadian society relied on two incorrect propositions. The first is that collective administration has become a fundamental right of authors. Collective administration, while one of the preferred tools for dealing with copyright issues, is not the tool of choice in all situations. In the SOCAN regime, collective administration is neither encouraged, nor imposed, but merely made available. The second proposition is that the MBL impinges on the author's rights within the context of the SOCAN regime. Part of the argument relies on the false assumption that the purpose of the MBL is to move the setting of royalties out of the collective administration process and turn it back to the individual copyright owner. The purpose of the MBL is merely to make available an option to allow individual transactions to occur.

SOCAN argued that the MBL should be abolished because it is inconsistent with the concept of a blanket licence, promotes inefficiency, results in unwarranted reductions of royalties and allows broadcasters to use unfairly their market power. SOCAN also complained that broadcasters had repeatedly used music for which they required a SOCAN licence in programs for which they claimed the MBL. The Board concluded that it would be premature to end the MBL. The MBL is a blanket licence itself, and therefore, not inconsistent with the concept of blanket licence. Nothing on the record demonstrated that it is inefficient or unfair to composers, either inherently or as it is currently practised. Evidence of market concentration remained flawed, while evidence on the effects of the MBL on bargains struck between composers and broadcasters was anecdotal. The tariff already accounted for misuse of the MBL: all that SOCAN had to do is to ask for the full tariff. There had been only limited opportunity for composers and broadcasters to gain experience with the MBL. That said, whether the MBL is viable in the longer term remains an open question.

The same reasons that favoured maintaining the MBL also favoured changing it as little as possible. The Board declined to alter its terms and conditions, with two exceptions. First, the MBL will be available only with respect to a broadcaster's in-house productions: this will allow composers to restore any perceived imbalance through collective bargaining. Second, illegitimate MBL claims will be further discouraged by requiring delinquent broadcasters to pay the full tariff without being allowed to claim any credit for the surcharges paid on account of the delinquent program.

The Board ruled that non-broadcast services should have access to the MBL under the same terms and conditions as conventional broadcasters; this was in keeping with the Board's finding that both sectors of the industry should be treated in a consistent manner, even though it raised implementation issues that needed to be addressed in the tariff.

Implementation issues: Changes to Tariff 17 meant that a BDU (SOCAN's target of choice for collecting the tariff) would not have all the information (e.g., a service's advertising revenues) it requires to determine how much it owes to SOCAN. The solution lied in drafting the tariff so that information flows efficiently between stakeholders. The Board acknowledged that whether the new tariff works out in practice would depend in large part on the ability of participants to share information in a timely fashion. Participants also expressed a number of concerns that are the inevitable consequence of the Federal Court of Appeal having ruled that the Board cannot apportion liability amongst joint and several debtors. Thus, the Board concluded that the tariff cannot impose payment arrangements amongst joint debtors or dictate the duration of those arrangements. These are matters for the stakeholders and the ordinary courts, not the Board.

American specialty services: The Board retained as rate base for royalties paid on account of those services their affiliation payments only, adding that the underlying assumption that American services receive no advertising revenues in their Canadian markets would need to be reexamined as soon as possible.

Small cable transmission systems: The preferential rate to which these systems are entitled remained at $10 per year, as no one had suggested any change to this. Still, the Board reiterated that once a tariff is set at a percentage of a rate base, it becomes simpler and fairer to afford the required preference by providing a discount to what would otherwise be payable. CCTA asked that the Board adjust the wording of the definition of "small cable transmission system" to take into account the December 2001 CRTC *Exemption*

Order for Small Cable Undertakings. In other tariffs, the Board had done so as a practical response to a practical problem which by its very nature, was to be temporary: everyone expected that the regulations defining what is a small system would be amended to account for the exemption order. The expected amendment has yet to be made. The Board expressed concerns about the legality of its past approach. It also noted that the Board tends to treat in the same way users entitled to a preferential treatment and those that show a very similar profile. The Board applied the same reasoning in this case.

Amount of royalties: The Board estimated Tariff 2.A royalties to about $28 million in 2002, with the MBL reducing royalties by about $2 million during that year. The Board also estimated Tariff 17 royalties to at least $22.9 million in 2002. Using 2002 as the base year, the Board estimated that increasing the Tariffs 2.A and 17 rates, as well as eliminating the discounts, should generate additional royalties of about $6.6 million for SOCAN.

Revenue neutrality: The Board concluded that SOCAN's preoccupation with revenue neutrality was misplaced. The quest for such neutrality supposes that somehow, the one-rate tariff would have generated precisely the right amount of royalties to fairly compensate SOCAN. Moreover, with the removal of all discounts, SOCAN's revenues will increase, not decrease.

SOCAN Tariff 4 (Concerts) – Jurisdictional Issue

Maple Leaf Sports & Entertainment Ltd. (MLSE) objected to SOCAN's proposed concert tariff for 2003 on the ground, among others, that the Board cannot certify pursuant to sections 67 to 68.2 of the *Act* (the SOCAN regime) a tariff that targets the right to authorize the performance in public of a musical work. That jurisdictional issue was heard as a preliminary matter on June 19, 2003. On March 26, 2004, the Board dismissed the objection.

The exclusive rights of the owner of copyright include the right to perform a musical work in public, the right to communicate the musical work to the public by telecommunication and the right to authorize such a performance or communication. The right to authorize an act protected by copyright is distinct from the right to do the act. Each right can be assigned separately. Each gives rise to a separate cause of action.

The SOCAN regime addresses the collective administration of the public performance and communication rights with respect to musical works. These provisions do not mention the authorization right. Based on this, MLSE argued that the Board is without jurisdiction to certify a tariff which purports to target that right pursuant to the SOCAN regime. SOCAN, for its part, argued that the granting of licences is essentially the granting of authorizations to perform or communicate, and that the authorization right is accordingly included, by implication, in the ambit of these provisions.

The *Act* sets out four regimes that regulate the collective administration of copyright. The SOCAN regime provides for the compulsory filing of tariffs. Retransmission of works in broadcast radio and television signals is subject to a compulsory licensing scheme which necessarily involves one or more collective societies; the regime also applies to making and using copies of broadcast programs by educational institutions. Blank audio recording media are subject to a private copying tariff, which is set pursuant to a regime that closely resembles the retransmission regime. All other collective societies administering a licensing scheme are subject to the general regime. They have the option of reaching agreements with individual users or filing proposed tariffs. In the first scenario, the Board intervenes on request, when a society and a user are unable to agree on the terms of a licence. In the second, the review and certification process for tariffs are the same as under the specific regimes.

The words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act and the intention of Parliament. The purpose of the SOCAN regime is to create a means whereby a collective society is allowed to collect fees fixed in a tariff certified by the Board. Since the authorization right is included in the rights which SOCAN administers, it may logically be targeted in a proposed tariff filed pursuant to the SOCAN regime.

There is a tendency to confuse the authorization right with something else, probably because "to authorize" has at least two meanings in the *Act*. The first refers to the granting of a permission. The second is a protected form of use. Both involve the granting of a permission, but only the second involves the authorization right as defined in the *Act*. The authorization right, though separate, is of a different nature since it is directly linked to the act being authorized. For example, the public performance right can exist without the communication right being protected, but the right to authorize a communication cannot exist if the communication right is not protected.

The Board rejected MLSE's argument that any tariff targeting the authorization right would have to be filed pursuant to the general regime, not the SOCAN regime. The regimes that regulate collective administration, other than the general regime, do not mention the authorization right. Specific regimes are more targeted and more demanding than the general regime as regards tariff filing and protection of users. If MLSE were correct, societies would be able to change the level of regulatory protection by licensing the authorization right instead of the specific act.

The same would happen with other provisions of the *Act*. Every provision that creates protection for an act also protects the right to authorize the act. By contrast, few provisions that qualify, restrict or regulate the protection of an act, mention the right to authorize the act. If MLSE is correct, every time the right to act is qualified, restricted or regulated, the right to authorize the act is not. That interpretation would defeat the purpose of the regulatory regimes the Board administers. The only way to deal with this is to "read into" every mention of the right to do the right to authorize the doing.

MLSE feared that SOCAN may be able to commence infringement proceedings for the authorization right even though no tariff had been filed in respect of that right, or that such proceedings could be brought against a person even though someone has already paid royalties for the public performance right. The Board found these fears to be unfounded. If the SOCAN regime implicitly applies to the authorization right, then so do all the relevant terms set out in that regime. Furthermore, it would make no sense to impose liability on a person who sanctions that which is already duly authorized. The person who has obtained the authorization right for a performance shields from liability the person who performs; the person who would otherwise need a licence for the authorization right does not if the performer has a licence to perform.

The Board also addressed other issues raised in the participants' pleadings. It concluded among other things that rights holders can deal separately with the right to perform and the right to authorize a performance, even though, given the relationship that exists between the two rights, actions on account of one right could trump the ability to act on account of the other. It also stated that a society acting pursuant to the SOCAN regime can obtain a tariff only with respect to the repertoire that it actually administers.

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 December 22, 2003, pursuant to a request made by all the relevant collective societies, the Board issued a decision extending indefinitely, on an interim basis, the application of the *Television Retransmission Tariff, 2001-2003* and of the *Radio Retransmission Tariff, 2001-2003*. These tariffs will remain in force, unless modified in the meantime, until the final tariffs are certified for the period commencing January 1, 2004.

Minor changes were made to the tariffs, including some intended to account for amendments to the *Local and Distant Signal Regulations* which came into force January 1, 2004.

CLAIMS BY NON-MEMBERS: APPLICATION BY THE *SOCIÉTÉ DES AUTEURS DE RADIO,TÉLÉVISION ET CINÉMA* (SARTEC)

On December 19, 2003, pursuant to subsection 76(1) of the *Act,* the Board designated the Canadian Broadcasters Rights Agency (CBRA) as the collective society from which unrepresented owners of copyright in texts written pursuant to agreements managed by SARTEC and used in the production of television programs by *Groupe TVA inc.* or its subsidiaries can claim royalties for retransmission occurring in 1998 or thereafter.

SARTEC had filed a number of applications for designation. The Trial Division of the Federal Court dismissed for delay an application for a declaration challenging the right of members of SARTEC to receive a share of the royalties. SARTEC withdrew most of its applications. The Board remained seized of applications in respect of programs produced by *Groupe TVA inc.* or its subsidiaries. On December 1, 2003, availing itself of its power to proceed of its own motion in such matters, the Board advised the parties that it intended to consider the possibility of issuing a designation for an indeterminate period of time.

The Board proceeded with the indeterminate designation for reasons similar to those stated in an earlier application dealing with identical issues (see Copyright Board's 1998-1999 Annual Report). Since the relevance of CBRA being designated with respect to programs produced by *Groupe TVA inc.* was solely dependent on whether or not the group remains a member of that collective, the Board ruled that the designation would remain in force until CBRA notifies SARTEC that *Groupe TVA inc.* no longer is a member of CBRA. In that way, the designation would remain effective as long as it was relevant, while taking into account the impact of the possible departure of the relevant group of producers.

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.

Decisions of the Board

On December 12, 2003, the Board certified the private copying tariff for 2003 and 2004. The certified tariff replaced an interim decision that extended the application of the 2002 tariff and set the applicable rates at 29¢ for audiocassettes, 21¢ for CD-R and CD-RWs and 77¢ for CD-Rs Audio, CD-RWs Audio and MiniDiscs.

The Canadian Private Copying Collective (CPCC) proposed rates for the years 2003-2004 of 51¢ for each audiocassette, 59¢ for each CD-R of 100 megabytes (Mbs) or more, 49¢ for each CD-RW of 100 Mbs or more, $1.15 for each CD-R Audio and CD-RW Audio or MiniDisc, and 65¢ for each blank DVD. For removable and non-removable electronic memory cards and hard drives, CPCC sought rates varying between 0.193¢ to 1.08¢ per Mb.

The Board received some 1,500 letters of comments in addition to a number of formal objections. By the time the hearing started, the objections could be stated as follows. First, the private copying regime is constitutionally invalid. Second, the requested amounts are too high. Third, some targeted media are not leviable. Fourth, CPCC's zero-rating program (explained below) is flawed and illegal; it ought not to be taken into account in setting the levy or in the alternative, ought to be incorporated into the tariff and extended.

The hearing into the matter lasted twelve days.

Before proceeding with the analysis of the various issues, the Board noted four areas that deserved particular attention.

With respect to *technological developments,* private copying has shifted significantly from audiocassettes to blank CDs. New copying media such as recordable and rewritable DVDs continue to emerge. As expected, the popularity of MP3 music files has grown, as has the use of MP3 players. Technological protection measures (TPMs) and digital rights management (DRM) systems are increasingly being used to control the distribution and use of, and access to, music and other content, though they are far from having been fully exploited.

When it comes to *private copying habits*, Internet is now a dominant source. Prerecorded CDs are a second significant source while some copies continue to be made from radio and other sources. Almost half of all tracks copied originate from the Internet, and more than that are copied through a personal computer. A growing, but still small, proportion of tracks downloaded from the Internet come with the right to make private copies; still, peer-to-peer networks (e.g., Kazaa) remain the main source of music downloads.

There were significant discrepancies in the evidence describing the size of the Canadian *market for blank audio recording media*. Neither the size of the market for individual blank media nor the proportion of consumption by individual consumers could be established with reasonable certainty. Figures for sales of CD-Rs varied between some 90 million units to close to a quarter of a billion. There was however little debate over pricing trends; the price for audiocassettes had remained stable while that of all other types of blank media was going down.

Zero-rating is a mechanism, developed and administered voluntarily by CPCC, whereby various groups are allowed to purchase media directly from certain manufacturers, importers or special distributors levy-free. *CPCC's extended zero-rating program* raised important issues in these proceedings, even after CPCC announced its intention to considerably increase the ambit of the program.

The Legality of Private Copying

Until March 19, 1998, copying a sound recording for one's own private purposes infringed copyright, but copyright owners were unable to prevent or license private copying. On that date, the *Act* legalized private copying of music onto audio recording media. The Board commented on several nuances of the private copying regime, and in particular upon its relevance to peer-to-peer networks, the application of fair dealing exemptions and other matters. Here are a few of the conclusions the Board reached.

First, private copying must be for the private use of the person making the copy. The copy made to give to a friend is not a private copy, nor is the copy made available online. Second, the source that is used to make the copy is not important: an unauthorized source copy can be used to make a legal private copy. Third, the medium onto which the copy is made is important: only an audio recording medium, as defined in section 79, can be used to make a private copy. That said, a medium can be an audio recording medium even though no levy is payable on it: so, computer hard drives may be audio recording media even though CPCC did not ask for a levy on them. Fourth, any fair dealing exception that may have existed in the past is now subsumed within the private copying regime; those copies should be taken into account in setting the tariff.

Zero-Rating Program: Jurisdictional Issues

A levy is payable on every blank audio recording medium manufactured or imported in Canada for the purpose of trade. Some believe that the regime cannot survive, in its current form, without some reprieve for those who do not private copy. The Board disagreed. Part VIII includes only one exception to accommodate perceptually disabled persons. The Governor in Council has regulatory powers it has not yet exercised. The *Act* does not provide the Board with any tools to accommodate those who do not use blank media to copy music. It is not for the Board, nor CPCC, to assume the role of the legislator by implying additional exemptions.

CPCC has voluntarily "zero-rated" certain transactions. Principled or pragmatic objections were raised against the program: administrative burden, lack of universal accessibility, "entrance" fees, market distortions, lack of supervision, etc. Instead, the Board focussed on the legality of the program. There are valid arguments in favour of zero-rating businesses and organizations since they cannot engage in private copying (but not individual consumers, all of whom benefit from the option of making private copies). In the end, however, the Board does not have the power to exempt those who are, under the *Act*, liable for the payment of levies. As structured, the zero-rating program creates exemptions. For all these reasons, the program has no legal basis, no legislative foundation, and is therefore illegal. The Board also expressed serious reservations about the fairness and impact of the proposed implementation of CPCC's extended program.

Constitutional Matters

As in 1999, it was alleged that the private copying regime is not copyright law or is an improperly enacted tax. Though the Board was not persuaded that any of the arguments added to what the Board had to say in 1999, it chose to make some additional comments.

The dominant feature of the regime is within the scope of copyright law. Its existence depends on the reproduction right, and the inability of rights-holders to enforce it in the context of mass infringement. Its effects are also clear; rights-holders are remunerated, and individual Canadians who indulge in private copying now do so legally. That the price for doing so is borne, in part, by those who do not private copy is not relevant in deciding whether the regime is copyright law.

The levy is not a tax. Debates about the precise meaning of words were not helpful. The analysis was better served by asking whether the regime is, by design or in practice, a tax or a type of regulatory charge. On this issue, the Board essentially repeated what has been said in 1999.

Definition of an Audio Recording Medium

The definition of "audio recording medium" sets out what is subject to a levy. The Board focussed on two aspects of this provision: the proper interpretation of the phrase "ordinarily used by individual consumers for that purpose" and the relevance of a medium's physical attributes ("a recording medium, regardless of its material form"), particularly the significance of its incorporation into a device.

On the first point, the Board repeated certain principles. First, what is relevant is use by individual consumers, not use of the product generally. Second, using a set percentage to determine what is ordinary would be arbitrary and inconsistent with the object of the regime. A qualitative and quantitative approach is better suited; it allows the levy to more easily adapt to market realities and the private copying habits of Canadians. One relevant factor is the apparent purpose of the medium, as evident from its invention, design and promotion, and its actual use.

The second point turned on whether the incorporation of a product into a device can affect its status as an audio recording medium. The definition is extremely broad. The English version contains the clause, "regardless of its material form". This rules out the possibility that the levy was intended to apply only to removable media. A medium that is incorporated into a device remains a medium. To limit the application of the levy to removable media would be inconsistent with the need to interpret the *Act* in a technologically neutral fashion.

Based on these principles, the Board maintained the levy on all media that were already subject to it. It concluded that recordable or rewritable DVDs are currently used only marginally, if at all, to record music and as such, do not yet qualify for a levy. With respect to removable memory or hard drives capable of use with MP3 players or similar devices, the Board concluded that because they were removable, it was impossible to make generalizations as to their use and that there was insufficient evidence to demonstrate that any particular type of removable memory qualifies under the *Act*.

With respect to memory or hard drives incorporated into devices that are intended for use primarily to record and play music, the Board concluded that it was possible to categorize them based on the intrinsic characteristics of the device into which the medium has been incorporated. Thus, a medium of a kind embedded into certain devices may be ordinarily used by individuals for copying music, whereas the same medium embedded in other devices may not. This can be true, notwithstanding that the essential attributes of the medium itself, for instance, solid state memory or hard disk, remain relatively constant. So, non-removable memory incorporated into digital audio recorders (a device that is designed, manufactured and advertised for the purpose of copying sound recordings of musical works) falls within the definition of an “audio recording medium” under the *Act*.

Setting the Levy Rates

In its two previous decisions, the Board used a valuation model that attempts to capture the value of each private copy, to estimate the average number of private copies made onto each audio recording medium, and thus calculate rights-holders’ remuneration as a fixed rate per unit. In this instance, because of uncertainties raised by the evidence and other market and policy considerations, the Board refused to set the rates by solely updating the valuation model.

A new levy for non-removable memory permanently embedded in digital audio recorders had to be set. The Board rejected a rate per unit of memory as too complex. As capacity increases, consumers are less likely to use all available memory for copying music. Also, since consumers’ demand for private copies is finite, there comes a point when more capacity is not useful for the purpose of private copying. The Board did not wish to impede the development of the emerging market for these new technologies or to encourage levy avoidance or evasion. It wanted the levy to be as simple as possible. For these reasons, the rate was set at $2 for each recorder that can record no more than 1 Gigabyte (Gb) of data, $15 for each recorder that can record more than 1 GB and no more than 10 Gbs of data, and $25 for each recorder that can record more than 10 Gbs of data.

With respect to all other media the Board opted for a freeze in the levy. The evidence on the data needed to use the existing model was uncertain. Changes in remuneration from prerecorded CD sales were overall insignificant. There was no valid reason to change the manner in which the relative importance of the eligible repertoire was assessed. To further complicate the adjustment made to account for the fact that consumers are not willing to pay the same price for a private copy of music as for an original published sound recording made no sense. Evidence relating to paid downloads and free samples was non-existent, even though levies may be phased out as these became more prevalent.

Other considerations also came into play. There is an illegal black market in which media are sold for the purpose of trade but levy-free. There is also a grey market in so far as media are imported and “burned” by the person who purchases them. The grey market is not illegal, although it may have undesirable effects. Many factors led the Board to conclude that the grey and black markets were significant. First, retailers claimed to have purchased nearly twice as many blank CDs as were reportedly sold by Canadian manufacturers and importers. Second, the way in which available data is gathered is simply not geared to account for those markets. Third, both CPCC and the Canadian Storage Media Alliance (CSMA) have been highly preoccupied with enforcement issues, which seems to imply that those directly concerned with the issues believe that there are serious problems. The Board also was concerned that higher levies would represent a financial burden too important for consumers. Keeping the rates at their current levels dealt with all of those issues.

Other considerations, including international comparisons and the current impact of TPMs and DRM, were not taken into account.

In the end, the Board was simply not comfortable enough with the evidence presented to justify any increase in the rates. It believed that the rates established previously were, and are still, as fair and equitable as possible for all parties. As a result, rates were set at 29¢ for audiocassettes of greater than 40 minutes, 21¢ for CD-Rs and CD-RWs, and 77¢ for CD-Rs Audio, CD-RWs Audio and MiniDiscs.

The decision also addressed a number of terms and conditions of the tariff.

Vice-Chairman Callary dissented on three points.

First, he had no problems using the existing valuation model. On that basis, he would have set the rates at 28¢ for audiocassettes, 29¢ and 21¢ for CD-Rs and CD-RWs, respectively, and 72¢ for CD-Rs Audio, CD-RWs Audio and MiniDiscs. For non-removable memory permanently embedded in digital audio recorders, he would have set the same rates as the majority.

Second, he did not feel that the data on record was unreliable or that grey and black market transactions were a problem serious enough to justify a freeze.

Third, he would have taken the zero-rating program into account in setting the rates. The Board should proceed from the proposition that Parliament enacted a regime that is meant to be workable and fair and that achieves its underlying goals. The zero-rating program has become an intrinsic part of the regime; a levy that does not account for it will be unfair to rights-holders. Setting a rate that is based on the expectation that all purchasers of blank media will pay it, and then having CPCC collect only from a percentage of those purchasers results in a devaluation of the owners' rights. The zero-rating program is not illegal. By setting it or accounting for it in the levy rate, neither CPCC nor the Board assume the role of the legislator by implying additional exemptions. By implementing the program, CPCC did not undermine the regime; it heeded a direct message sent by the Board, and responded to a hard reality in the marketplace. Taking the program into account in setting the rates simply is taking into account the reality of the levy's application.

[NOTE: This decision currently is the subject of three applications for judicial review before the Federal Court of Appeal]

Private Copying Tariff Enforcement

On May 7, 2003, CPCC asked that the Board issue orders requiring certain importers of blank audio recording media to pay outstanding levies and to generally comply with the terms of the private copying tariff. At the outset, the Board raised the issue of whether it has the power to issue such orders. CPCC argued that the Board has the power to order someone to comply with the terms of a certified tariff and to hold that person in contempt in the event he/she refuses to do so. On January 19, 2004, the Board dismissed the application.

The application raised two questions. Does the Board have the power to order someone to comply with the terms of a certified tariff and if so, can it sanction non compliance with the order through contempt proceedings?

CPCC's argument that the Board has the power to issue an order requiring someone to comply with the terms of a certified tariff rested on three main propositions.

First, CPCC argued that subsection 66.7(1) of the *Act* grants to the Board the powers of a superior court of record in respect of the enforcement of its decisions, and that certified tariffs are decisions. This argument runs against administrative law values and principles, such as restricting a tribunal's powers to those that are necessary to the proper exercise of its core competence. If only for that reason, a reference to the enforcement of decisions is not of itself sufficient to conclude that Parliament intended the Board to deal with the day-to-day enforcement of tariffs. The provision provides the tools the Board requires to carry out its core mandate; it allows it to issue decisions of a procedural or interlocutory nature made in support of, and as a corollary to, the exercise of its core function. One does not require the power to enforce tariffs in order to certify tariffs. Moreover, subsection 66.7(2) of the *Act* allows a person to seek the assistance of a superior court in enforcing decisions of the Board; this implies that there are things a superior court can do that the Board cannot.

Second, CPCC argued that the Board has the same powers as the Competition Tribunal; that tribunal enforces its own orders. Similarities between the *Copyright Act* and the *Competition Tribunal Act* must be analysed by looking at the whole statutory scheme. When so approached, the differences, not the similarities, become striking. The Tribunal's functions and powers are set out in a single, extremely broad provision. The Board's mandate is set out throughout Parts VII and VIII of the *Copyright Act*, and is mostly limited to setting levies and their related terms and conditions. The two bodies also fulfill quite different roles. The Tribunal supervises all non-criminal, anti-competitive behaviour in Canada. The Board sets rates and packages them in tariffs. The Tribunal is the only forum capable of properly ensuring the enforcement of the orders it makes. By contrast, the Board's tariffs are not that complex to understand or enforce, and courts have proven to be an effective forum to enforce them. Furthermore, the *Copyright Act* clearly leaves it to others to enforce tariffs. The Competition Tribunal issues highly complex and fine-tuned orders; it cannot fulfill its role without being able to deal with those who defy its orders. The Board can certify tariffs and their related terms and conditions without getting involved in their enforcement.

Third, CPCC argued that a certified tariff cannot be effectively enforced by the Federal Court without an order of the Board directed against a specific person or an order to pay a quantified amount. This, even if true, is irrelevant. Certified tariffs set out rights and obligations. The *Act* sets out how they can be enforced. Nothing more is needed. As for having to decide whether filing legal actions makes practical sense, that is nothing more that what confronts all rights-holders who suspect that a user's obligations towards them are not being satisfied.

The Board also concluded that even if it had the power to issue the requested orders, it would not have the power to find those who would fail to comply with them in contempt of the Board. Failure to comply with such an order would constitute contempt *ex facie* and subsection 66.7(3) of the *Copyright Act* indicates that the power to sanction *ex facie* contempt rests elsewhere. Again, the Board dismissed the apparent similarities between it and the Competition Tribunal based on an analysis of the whole statutory schemes.

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.

Decision of the Board

On March 26, 1999, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) filed a proposed statement of royalties for the reproduction of musical works in Canada by radio stations other than *Radio-Canada* and the Canadian Broadcasting Corporation for the years 2000 to 2002.

For reasons of commodity, SODRAC subsequently divided its proposed tariff into two parts. The first targeted commercial radio stations; its examination was combined with the proposed statement of the Canadian Musical Reproduction Rights Agency (CMRRA) for commercial radio stations and was the subject of a Board decision issued on March 28, 2003 (see Copyright Board's 2002-2003 Annual Report).

The second part targeted all not-for-profit stations, including community stations, campus stations affiliated with a post-secondary educational institution, native stations and religious stations. SODRAC sought royalties of $50 per month from French-language and ethnic-language stations and $10 per month from all other stations. Three associations objected to this part of the tariff: the *Association des radiodiffuseurs communautaires du Québec* (ARCQ), the *Alliance des radios communautaires du Canada* (ARCC), and the National Campus and Community Radio Association (NCRA).

SODRAC eventually agreed with ARCQ and ARCC that their member stations would pay $250 per year for a licence to reproduce works in the SODRAC repertoire and to use the resulting copies for broadcasting purposes. On March 27, 2002, SODRAC filed with the Board an amended proposal that reflected this agreement. The proposal targeted only stations licensed by the Canadian Radio-television and Telecommunications Commission (CRTC) as community radio stations, except those licensed to operate in English. As a result, members of the NCRA were no longer targeted by the proposed tariff.

On the same date, SODRAC filed with the Board a proposed Tariff 3.B for the years 2003 to 2005. This tariff, published in the *Canada Gazette* on May 11, 2002, is identical to the amended proposal for 2000 to 2002. Only NCRA objected to this proposed tariff; it subsequently withdrew its objection after receiving assurances from SODRAC that the proposed tariff for 2003 to 2005 did not target community stations licensed to operate in the English language.

On May 10, 2003, the Board, after taking note of the fact that SODRAC did not intend to collect royalties for the year 2000, certified the tariff for the years 2001 to 2005.

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 2003-2004.

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 134 licences. In 2003-2004, 31 applications were filed with the Board and 19 licences were issued as follows:

- *SummitREIT Property Management Ltd.*, Calgary, Alberta, authorizing the reproduction of architectural plans created by Peter & Symonds Partnership Architects and Planners for the property located at 3805, 29th Street N.E. in Calgary.

- *Nargis Gamble*, Calgary, Alberta, authorizing the reproduction of architectural plans for the property located at 74 Applestone Park S.E. in Calgary built by North Star (later d.b.a.West Star) for MaCalgary Developments.

- *Éditions du remue-ménage*, Montreal, Quebec, authorizing the reproduction of the cover of the book entitled *Pour contrôler les naissances - D'après la méthode Ojino-Knaus* written by Jacques Poys and published in 1943 by Les Éditions Nossiop.

- *The Estate Condominium Board*, Calgary, Alberta, authorizing the reproduction of architectural plans created by K. Michie in 1982 for the property located at 720, 13th Avenue S.W. in Calgary.

- *John Hillman*, Montreal, Quebec, authorizing the mechanical reproduction of the musical work *Intentions* written by George Adams (1940-1992).

- *Office national du film du Canada*, authorizing the reproduction and incorporation in a documentary, of a cartoon by Stewart Cameron published in 1943 in his book entitled *Basic training daze: candid cartoons of you and me in the army* (publisher unknown).

- *Monique Saintonge*, Laval, Quebec: two licences were issued to the applicant authorizing the mechanical reproduction of the musical work *Donne-moi ton coeur* written by Lucien Brosseau and published by BMI Canada Limited of Toronto in 1958.

- *Martin Racine*, Val-Bélair, Quebec, authorizing the mechanical reproduction of 23 musical works written and/or recorded by Isidore Soucy.

- *Northern Sky Entertainment Ltd.*, Toronto, Ontario, authorizing the use, as off-camera narration in a television documentary, of three excerpts of letters written by Lieutenant Robert C. Lewin, Lieutenant John B. Doyle, Jr. and Lieutenant Russell Lloyd during the Second World War.

- *Robert Wong*, Ottawa, Ontario, authorizing the reproduction of architectural plans created in 1957 (architect unknown) for the property located at 2012 Killarney Drive in Ottawa.

- *University of Prince Edward Island's Robertson Library*, authorizing the digital reproduction and the communication to the public of *The Prince Edward Magazine* published in Charlottetown, P.E.I. from 1899 to 1905.

- *334154 Alberta Limited*, Calgary, Alberta, authorizing the reproduction of architectural plans created by Strong, Lamb & Nelson (Edmonton) Ltd. (formerly Burwash-De Jong Ltd.) for the property located at 3515, 17th Avenue S.W. in Calgary.

- *Christopher Simmonds Architect*, Ottawa, Ontario, authorizing the reproduction of architectural plans created in 1983 by Polyhedra Design and Drafting for the property located at 154 Billings Avenue in Ottawa.

- *University of British Columbia Music Library*, authorizing the digital reproduction, the public performance and the communication to the public of 14 musical works (sheet music) on the University's Web site.

- *Carleton Condominium Corporation No. 281*, Ottawa, Ontario, authorizing the reproduction of electrical site distribution plans created in 1983 by J.G. Knowlton Ltd. for the Eagle Ridge Condominium Complex located at 100 Stratas Court in Ottawa.

- *Adjeleian Allen Rubeli Limited*, Ottawa, Ontario, authorizing the reproduction of architectural plans created in the 1970s by Fisher, Tedman, Glaister Architects of Toronto and Gratton (or Grattan) D. Thompson of Montreal for the property located at 205 Richmond Road in Ottawa.

- *Ontario Office of the Worker Adviser*, authorizing the digital reproduction and the communication to the public of a detail of Paul Rand's painting "Coal Diggers" (1935) on their Web site.

- *Soloway Jewish Community Centre - Ganon Preschool*, Ottawa, Ontario, authorizing the mechanical reproduction of 21 songs.

In addition, the Board rendered a decision dismissing a licence application filed by *Pointe-à-Callière, Musée d'archéologie et d'histoire de Montréal* for the reasons that the contemplated use did not need to be authorized by the holder of the copyright. The Museum wished to reproduce and display, in the context of an exhibition entitled *Dreams and Realities Along the Lachine Canal*, twelve quotations, ten of which would also be translated. The texts came from two books entitled *St-Henri* and *Petite Bourgogne*. The books are compendia of short commentaries on the social, political, labour and community history of these Montreal neighbourhoods. The Board came to the conclusion that the passages to be used did not constitute a substantial part of the works from which they were taken.

COURT DECISIONS

On March 27, 2003, the Supreme Court of Canada had granted leave to appeal the May 1, 2002 decision of the Federal Court of Appeal which granted in part an application for judicial review of the October 27, 1999 decision of the Board dealing with SOCAN's Tariff 22 (Music on Internet). The matter was heard and reserved on December 3, 2003.

Public Performance of Music

On March 15, 2002, the Board certified the first tariff respecting the royalties payable by providers of digital pay audio services for the communication to the public by telecommunication of musical works and sound recordings of such works. The Neighbouring Rights Collective of Canada (NRCC) challenged the Board's decision before the Federal Court of Appeal mainly on two accounts. First, it alleged that the Board erred in law in allocating (before making further adjustments that account for the relative importance of eligible repertoires) half the royalties to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and the other half to NRCC, thereby overlooking that performers and makers have separate rights to remuneration. Second, the Board erred in certifying a joint tariff for NRCC and SOCAN, each having submitted separate tariffs. The application concerned the interpretation of the Board's statutory power to alter the terms and conditions attached to royalties when it approves a tariff.

On July 10, 2003, the Federal Court of Appeal dismissed NRCC's application.

The Court started by concluding, based solely on "common ground" among the parties (other than the Board), that performers and makers have separate rights to equitable remuneration. The disputed issue was whether the Board's reasons indicated that it had allocated royalties on the erroneous view that performers and makers have but one right to remuneration. The Court concluded that it would be very surprising if such a highly specialized Board would have committed such an elementary error, especially since in an earlier decision dealing with private copying, the Board had allocated the royalties more or less equally among authors, performers and makers. Neither was the Court convinced that the Board had erred in relying upon a previous decision which dealt with the remuneration rights of performers and makers for commercial radio (Tariff 1.A). The Board, as a specialized administrative tribunal, was entitled to significant deference in the interpretation of its own case law.

The next issue was whether the Board had ignored NRCC's evidence on the relative values of the contributions made by authors, performers and makers to the value of the communication to the public by digital pay audio services of recorded music. The Court concluded that the Board had not ignored NRCC's evidence; it was well aware of it but did not accept it.

The third issue was whether the Board had misused its discretion in certifying a single tariff when parties had proposed separate tariffs and did not consent to certification of a single one. NRCC submitted that converting two into a single tariff could not be looked upon as an alteration to the royalties and the terms and conditions related thereto.

A pragmatic and functional analysis had to be applied to determine the applicable standard of review. At issue was whether the Board's discretion to certify the tariffs submitted "with such alterations to the royalties and to the terms and conditions related thereto" authorizes the Board to issue one tariff when the parties submitted separate tariffs and did not consent to the certification of a single tariff. That this was a question of law and that the Board's decision will be of precedential significance, militated in favour of review on the correctness standard. On the other hand, at issue was the Board's power to grant a remedy of a kind unfamiliar in court litigation. The issue could be characterized as "jurisdictional", concerning as it did the interpretation of a statutory grant of remedial discretion. But the Board has been given an usually broad discretion to certify tariffs subject to such alterations to royalties and terms and conditions as it considers necessary. This suggested an intention on the part of Parliament that the Board's view of its duties are to be accorded deference.

The Board was in the better position to determine whether its powers extend to certification of a single tariff where the parties do not consent thereto. This was not a question of law that is relevant to copyright infringement proceedings, but was of a specialized nature that arose in the course of proceedings that Parliament has entrusted to the exclusive jurisdiction of the Board. The issue was intimately linked to the performance of the Board's statutory functions, including concern for regulatory efficiency and fairness. The Board's understanding of tariff administration and the balancing of competing economic interests was more relevant than was a general knowledge of law in determining whether the subsection authorizes the Board to unilaterally certify a single tariff.

Also of importance was a consideration of the purposes of the statutory scheme as a whole, as well as those of the disputed provision. The purpose of the statute is to ensure that creators are compensated for the use of their works. It establishes a scheme for collective administration. It balances, in the public interest, the competing claims of producers, users and consumers. The Board, established to administer this scheme, discharges its regulatory responsibilities in the context of rapid and profound technological advances which are reshaping the market and call for sophisticated regulatory responses. It was presumably intended to equip the Board with the powers needed to implement its decisions in an effective and efficient manner and to that end the legislator conferred upon it a very wide royalty certification discretion. Review according to the correctness standard would not be compatible with these purposes.

Courts seem reluctant to hold that patent unreasonableness is the appropriate review standard for the determination of questions of law by an adjudicative tribunal not protected by a strong preclusive clause; nevertheless, the instant case should be treated as an exception. Particular latitude should be allowed where an exercise of power is integral to a complex regulatory scheme and can have only an indirect and limited effect on individuals' economic interests.

The remaining question was whether it was patently unreasonable for the Board to have interpreted subsection 68(3) as authorizing it to merge tariffs. It was not, from the wording of the provision, immediately apparent that altering the proposed tariffs by certification of a single tariff could not rationally fall within the Board's discretion to make "such alterations to the royalties and to the terms and conditions related thereto as the Board considers necessary". The reasons given by the Board – to reduce the administrative burden on digital pay audio services providers while not significantly prejudicing collective societies – were rationally related to the discharge of its regulatory function.

While NRCC may find a single tariff inconvenient and may be potentially prejudiced by it, it did not make some startling inroad into highly prized private legal rights. In any event, if NRCC is adversely affected by the certification of a single tariff, any prejudice is likely to be small. Each tariff is of limited duration; next time around, it will be open to NRCC to argue that the single tariff had caused it difficulties and that separate tariffs ought to be certified.

[Reference: Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada (F.C.A.), [2004] 1 F.C.R. 303]

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 2003-2004, 291 agreements were filed with the Board, totalling 3,677 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 230 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 23 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 2003-2004 have been concluded with municipalities and various organizations in the Province of Quebec.

Access Copyright and COPIBEC have also filed two agreements they have jointly entered into with the Toronto-Dominion Bank and with Apple Canada Inc.

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 Canadian Musical Reproduction Rights Agency (CMRRA), a Canadian centralized licensing and collecting agency for the reproduction rights of musical works in Canada, has filed an Online Licensing Template Agreement concluded with the Canadian Recording Industry Association (CRIA), Napster and MusicNet for the issuance of online licenses for downloads and streams of musical works embodied in a sound recording.

Finally, the Canadian Broadcasters Rights Agency (CBRA) filed three agreements pertaining to non-commercial media monitoring and two 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.