

Copyright Board of Canada



Annual
Report 2005-
2006



Copyright Board
Canada



Commission du droit d'auteur
Canada

The Honourable Maxime Bernier, 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 eighteenth Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2006.

Yours sincerely,

A handwritten signature in black ink, appearing to read "S. Callary".

Stephen J. Callary
Vice-Chairman and
Chief Executive Officer

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Board Members and Staff

as of March 31, 2006

Chairman: The Honourable Justice William J. Vancise

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

Members: Francine Bertrand-Venne
Sylvie Charron
Brigitte Doucet

Secretary General: Claude Majeau

General Counsel: Mario Bouchard

Director of Research: Gilles McDougall

Senior Clerk of the Board: Lise St-Cyr

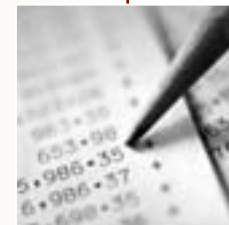
*Manager
Corporate Services:* Ivy Lai

Registry Officers: Nadia Campanella
Tina Lusignan

*Financial and
Administrative Assistant:* Joanne Touchette

Administrative Assistant: Manon Huneault

Informatics Officer: Michel Gauthier



Chairman's Message

I am pleased to present the 2005-2006 Annual Report of the Copyright Board of Canada. This report describes the Board's activities during the year in the discharge of its responsibility under the *Copyright Act* to set royalties that are fair and equitable to rights owners and to users of copyright-protected works.

The Board held four hearings in 2005-2006. All hearings concerned performing and communication rights. The first dealt with the royalties to be paid to the Neighbouring Rights Collective of Canada (NRCC) for the use and distribution of background music (Tariff 3). The second concerned the amount of royalties to be paid to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for hotel and motel in-room services (Tariff 23). The third was a major hearing in which the Board was required to determine whether ringtones are a communication to the public by telecommunication and if so, to determine the amount of royalties to be paid to SOCAN (Tariff 24). Finally, the Board held a hearing to determine the amount of royalties to be paid to SOCAN for background music (Tariff 15.A) and whether or not music stores should pay a discounted tariff. Decisions in all four matters will be rendered in the next fiscal year.

In February 2006, the Board held a pre-hearing conference to deal with procedural matters pertaining to the private copying file.

During the current fiscal year, the Board issued five decisions. Three of them established the royalties to be paid for the reproduction of musical works by commercial radio stations, by community radio stations and for works embodied in cinematographic works in view of their video-copy distribution. The fourth dealt with the amount of royalties to be paid

by commercial radio stations for the communication to the public by telecommunications of works in SOCAN's and NRCC's repertoires. The last decision set the levy to be paid, on an interim basis, for the private copying of sound recordings of musical works for the year 2006.

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

As for unlocatable copyright owners of works, the Board rendered a decision in Breakthrough Films and Television in which the principles applicable to the grant of non-exclusive licences for the use of published works for which rights holders cannot be found were considered in detail. During the fiscal year, the Board also issued 27 licences for the use of published works for which rights holders could not be found; the nature of works varied from architectural plans to literary to musical works. The Board also dismissed two licence applications, and reasons can be found in the appropriate section in this Report.

The Board also initiated procedures which will lead to four hearings in the Fall of 2006 and Spring of 2007. The first concerns the amount of royalties payable to CMRRA/SODRAC Inc. (CSI) for the reproduction of musical works by online music services for the years 2005-2007. The second pertains to the private copying of sound recordings of musical works for the years 2005, 2006 and 2007. The third deals with royalties to be collected by Access Copyright for the reproduction of literary works by educational institutions for the years 2005-2009. Finally, the fourth hearing pertains to royalties payable to SOCAN for the transmission of musical works on the Internet for the years 1996-2006 (Tariff 22).



During the year, the Board held its annual retreat at Carling Lake and reviewed the ethical and professional standards to be met by members of federal administrative tribunals. Members of the Board also participated, or made presentations, in numerous academic and professional conferences and seminars. Finally, the Board was pleased to host the visit of a delegation from the National Copyright Administration of China.

The year 2005-2006 was a challenging and productive period for the Board and I would like to thank my colleagues on the Board as well as the personnel

for their support and assistance. The Board is fortunate to have dedicated and expert support staff. Their expertise and determination to work together makes the work of the Board possible.

The Honourable William J. Vancise



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.

The *Copyright Act* (the “*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. In other fields where rights are administered collectively, the Board can be asked by a collective society to set a tariff; if not, the Board can act as an arbitrator if the collective society and a user cannot agree on the terms and conditions of a licence.

The Board’s specific responsibilities under 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 of 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.

The examination process is always the same. The collective society must file a statement of proposed royalties which the Board publishes in the *Canada Gazette*. Tariffs always come into effect on January 1. On or before the preceding 31st of March, the collective society must file a proposed statement of royalties. 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 hearing before the Board. After deliberations, the Board certifies the tariff, publishes it in the *Canada Gazette* and explains the reasons for its decision in writing.

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 and 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 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 tariffs, 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 search for non-discriminatory practices, 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.

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, the Honourable Justice William J. Vancise,
Francine Bertrand-Venne and Sylvie Charron*

Chairman

The Honourable William J. Vancise, a justice of the Court of Appeal for Saskatchewan, was appointed part-time Chairman of the Board for a five-year term commencing in May 2004. In 1996 Mr. Justice Vancise was appointed Deputy Judge of the Supreme Court of the Northwest Territories. He was appointed to the Court of Queen's Bench in 1982 and to the Court of Appeal for Saskatchewan in November 1983

where he continues to serve. Mr. Justice Vancise received his Queen's Counsel designation in 1979. He joined Balfour and Balfour as an associate in 1961 and in 1963 he was named a partner at Balfour, McLeod, McDonald, Laschuk and Kyle, where he became a managing partner in 1972. Mr. Justice William Vancise earned an LL.B. from the University of Saskatchewan in 1960 and was called to the Saskatchewan Bar in 1961.

Vice-Chairman & Chief Executive Officer

Stephen J. Callary is a full-time member appointed in May 1999 and reappointed in 2004 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

Francine Bertrand-Venne is a full-time member appointed in June 2004 for a five-year term. Prior to her appointment, Ms. Francine Bertrand-Venne was General Manager of the *Société professionnelle des auteurs et des compositeurs du Québec* (SPACQ). She was also legal counsel for labour relations, the *Copyright Act* and the *Broadcasting Act*. Ms. Bertrand-Venne is a graduate of the University of Sherbrooke (LL.B. in 1972).

Sylvie Charron is a full-time member appointed in May 1999 and reappointed in 2004 for a five-year term. Before joining the Copyright Board, 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 for 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, LL.B. in 1992, and LL.L in 2005). 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).

Note: Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2006-2007 (Part III of the Estimates) and the Performance Report for 2005-2006. 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

In 2005-2006, the Board held four hearings on the following tariff proposals:

- Tariff 3 of the Neighbouring Rights Collective of Canada (NRCC) for the use and distribution of background music for the years 2003-2009
Hearing dates: April 5 to 8, 12, 13 and April 15, 2005
- Tariff 23 of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for hotel and motel in-room services for the years 2001 to 2006
Hearing date: June 13, 2005
- SOCAN Tariff 24 for ringtones for the years 2003 to 2005
Hearing dates: June 21 to 24 and June 29, 2005
- SOCAN Tariff 15.A for background music for the year 2005
Hearing date: November 1, 2005

Decisions on the above will be rendered in the next fiscal year.

Decision

In 2005-2006, the Board issued one decision dealing with the SOCAN-NRCC tariffs applicable to commercial radio stations for the years 2003 to 2007.

Decision rendered October 14, 2005 – SOCAN-NRCC Tariffs 1.A (2003-2007)

SOCAN Tariff 1.A sets the royalties that commercial radio stations pay for the communication to the public by telecommunication of musical works in its repertoire. NRCC Tariff 1.A sets the royalties that these stations pay as equitable remuneration for the communication to the public by telecommunication of published sound recordings of musical works in its repertoire.

The proposed tariffs that are the subject of this decision were filed in 2002 and 2003. The Canadian Association of Broadcasters (CAB) objected to them, maintaining that the proposed tariffs were disproportionate to any value radio broadcasters may derive from the use of music. On June 3, 2003, the Board ruled that it would deal with SOCAN's and NRCC's proposed statements together. The hearing started in May 2004.

For the whole period, NRCC sought a tariff of 2 per cent of a station's first \$625,000 in annual advertising revenues, 4 per cent on the next \$625,000 and 6 per cent on the rest. SOCAN wanted 5 per cent of a station's gross income for 2003 and 2004 and 6 per cent for 2005 to 2007. In both cases, low-use stations would pay 43 per cent of those rates. CAB argued to the contrary that the value of the societies' repertoires had declined and that the rates needed to be reduced.



Participants explored a number of valuation models. NRCC explained why, in its view, SOCAN's rate was not a good starting point and developed a new valuation model, which tries to evaluate the amount that radio stations should pay for all of the rights related to their use of music and to allocate that amount among right holders. SOCAN relied on NRCC's approach to arrive at an overall value. CAB sought a tariff that is more aligned with the American rates.

These models and others that were mentioned were rejected by the Board who decided to use, as a starting point, the royalty rate SOCAN had received until now, that is 3.2 per cent. Because SOCAN tariff structure had remained the same for close to fifty years, because the rate had not changed since 1978 and because it had been the object of agreements for a significant share of the period since, this rate offered stability, while at the same time being amenable to adjustments based on the evolution of the market.

However, the Board was of the opinion that the rate ought to be increased on three accounts. First, it believed that music was worth more than what the broadcasters had paid for many years. The royalties represented too small a percentage of programming expenses. Furthermore, the fact that many radio stations asked the CRTC to "flip" from the AM to the FM band and that many have asked the CRTC to broadcast less spoken word so as to play more music demonstrated that music was worth more to them than what was currently paid for it. An increase in the rate of about 10 per cent, bringing the rate to 3.5 per cent, was appropriate at this stage.

Second, radio increased its use of music. A study commissioned by the two collectives concluded, based on listening to programs broadcast logger tapes, that commercial radio used 10.6 per cent more music than the figure the Board retained in 1987. Adjusting the rate accordingly brought it to 3.9 per cent.



Third, radio used music more efficiently. Indeed, the greater use of music allowed stations to better segment the market and target listeners, therefore better drawing and keeping them. In the Board's opinion, a part of the important resulting efficiencies should be paid to the right holders, which brought the tariff rate to 4.2 per cent.

The Board was of the opinion that the NRCC rate should be set as a function of the SOCAN rate. The Board has consistently set a one-to-one ratio between both rates since certifying the first NRCC tariff in 1999 that dealt with commercial radio. NRCC did not challenge that approach until 2002, when the Board certified the pay audio services tariff. NRCC then asked the Federal Court of Appeal to review the approach; the court denied the application. The Board took note of the agreement reached between parties that NRCC's repertoire represented 50 per cent of all recordings and no longer 45 per cent. NRCC's rate was thus set at 2.1 per cent, or half of SOCAN's rate as established at that stage.

There was sufficient evidence on the record of these proceedings for the Board to conclude that stations earning no more than \$1.25 million of annual advertising revenues should continue to pay at the 3.2 per cent rate. Smaller stations made less profit, if any. Smaller ethnic and French language stations may even have been more ill-equipped to absorb increases in both tariffs. Because there was a cap on the rate for all stations for that first tranche of revenue, stations earning more than that amount benefited from a measure that was not intended for them. In order to remedy the situation, the Board established the final rate for SOCAN at 4.4 per cent on yearly revenues of more than \$1.25 million.

The rate for NRCC on the first \$1.25 million of revenues was also capped. However, this had no effect since, according to the *Act*, all stations pay only \$100 to NRCC on their first \$1.25 million of advertising revenues.

Low-Use Stations

Participants agreed that stations that use less protected music ought to pay less. However, to maintain the same relation to the general rate would have been unfair. That rate was raised on three accounts, two of which were not relevant to low music use stations. The amount of music they could use remained capped at the same level as in the past. The low amount of music that these stations used, and their negative profit margins, meant that they were probably unable, or only marginally, to benefit from the additional efficiencies. Their rate was increased only to account for the historical undervaluation of music. The low-use rate was therefore set at 1.5 per cent for SOCAN and 0.75 per cent for NRCC. This much smaller increase did not raise the same concerns as the increase in the general rate with respect to smaller stations. Imposing a cap was not necessary for these stations.

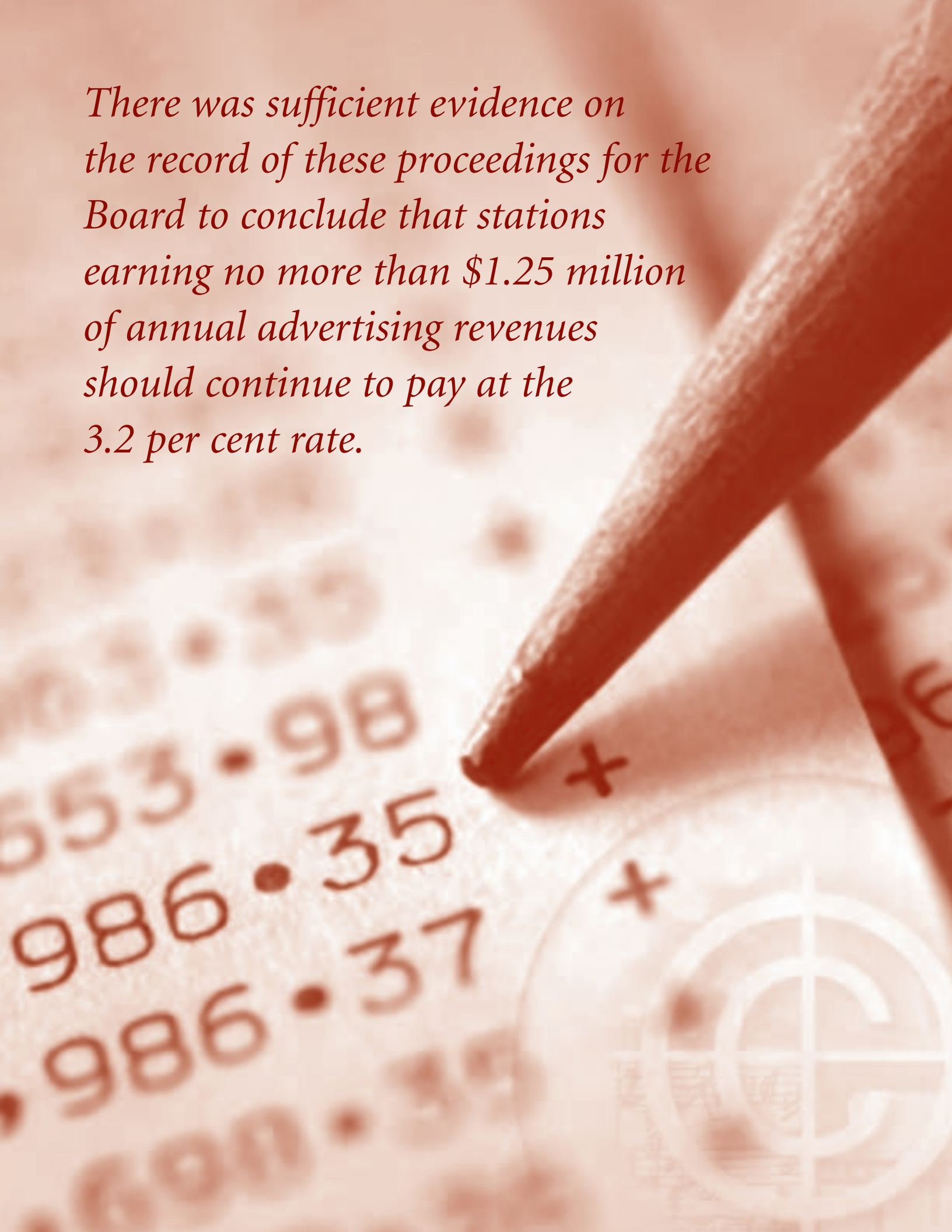
All-Talk Radio

The Board was no longer convinced of the usefulness of an all-talk category, especially in view of the comparatively lower tariff then applicable to low music use stations. There seemed to be very few, if any, stations that use absolutely no published sound recordings other than in commercials, station identification or public service announcements. The evidence also showed that the addition of that category unduly complicated the administration of the tariff for NRCC, for the sake of very few stations. The all-talk category was therefore eliminated from the NRCC tariff.

The decision contains a table that shows the final rates certified by the Board and the amount of Royalties these rates should have generated.

[NOTE: This decision currently is the subject of an application for judicial review filed by the CAB in the Federal Court of Appeal – Court File No. A-542-05]

There was sufficient evidence on the record of these proceedings for the Board to conclude that stations earning no more than \$1.25 million of annual advertising revenues should continue to pay at the 3.2 per cent rate.



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.

In 2005-2006, no hearing was held.

On February 14, 2006, parties advised the Board that the objectors and the collectives had reached an agreement with respect to the retransmission of distant radio and television signals tariffs for the years 2004-2008 and filed a copy of the agreements and drafts of the tariffs reflecting the agreements. Parties requested the Board to certify the tariffs in accordance with the agreements.

As of March 31, 2006, no decision had been rendered by the Board on the above matter.

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.

Hearing

A pre-hearing conference was held on February 22, 2006 to discuss various issues and procedural matters.

Decision

Interim decision rendered December 21, 2005

CPCC filed proposed tariffs for private copying in 2005 and 2006 and objections to these proposals were filed with the Board.

On December 14, 2004, the Board issued an interim decision extending indefinitely the application of the *Private Copying Tariff, 2003-2004*. When that decision was issued, the Board only had before it a proposed tariff for 2005. For that reason, CPCC asked that the Board issue for 2006 a further interim decision that would be identical in all but one respect. CPCC asked that any reference to non-removable memory permanently embedded in a digital audio recorder be deleted, since the Federal Court of Appeal ruled in December 2004 that such a device could not be subject to a levy. No one objected to CPCC’s request. The Board granted CPCC’s application and extended for 2006, on an interim basis, the application of the *Private Copying Tariff, 2003-2004*, except for the definition of “digital audio recorder”, paragraph (a)(iv) of the definition of “blank audio recording medium” and paragraph 3(1)(d), which were deleted.

Collective Administration (General Regime)



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.

Filing of Tariff Proposals

In 2005-2006, two tariff proposals were filed in accordance with section 70.13 of the *Act*. The first one was filed by CMRRA/SODRAC Inc. (CSI) for the reproduction, in Canada, of musical works by commercial radio stations in 2007 and the other by the Canadian Broadcasting Rights Agency (CBRA) for the fixation and reproduction of works and communication signals, in Canada, by commercial and non-commercial media monitors for the years 2007 and 2008.

Decisions

In 2005-2006, the Board rendered three decisions certifying tariffs for the reproduction of musical works.

The first one, rendered June 24, 2005, certified the royalties to be collected by the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC), for the reproduction, in Canada, of musical works embodied in cinematographic works in view of their video-copy distribution for the years 2004 to 2008. The second one, rendered March 25, 2006, certified the royalties to be collected by CSI for the reproduction, in Canada, of musical works by commercial radio stations for the

years 2005 and 2006. And finally, the third one, also rendered on March 25, certified the royalties to be collected by SODRAC for the reproduction of musical works by community radio stations for the years 2006 to 2010.

Decision of June 24, 2005 – SODRAC Tariff 5 (2004-2008)

On March 27, 2003, SODRAC filed a proposed tariff for the reproduction, in Canada, of musical works embodied in cinematographic works in view of their video-copy distribution for the years 2004 to 2008. No one objected to it. The proposed tariff sought a royalty of 1.8 per cent of the distribution revenues from video-copies containing at least one work in the SODRAC repertoire. On July 23, 2003 and October 27, 2003, SODRAC reached agreements with the Canadian Association of Film Distributors and Exporters and with Imavision Distribution. Both agreements essentially replicate the wording of the proposed tariff, while lowering the royalties to 1.2 per cent. SODRAC then asked the Board to certify a tariff that would reflect the agreements.

Before certifying the tariff, the Board addressed a number of questions to the participants. The Board's reasons review some of these questions, state reservations the Board continues to entertain in regard to the tariff and explain some of the differences that exist between the proposed and certified tariffs.

The Board found it difficult to assess the percentage of the relevant market affected by the tariff. Canadian distributors acting for the major American studios represent up to 80 per cent of the market; yet, they did not object to the tariff because they believe they clear all the relevant rights at source. Distributors who had signed agreements with SODRAC represented the lion's share of the rest.

In a number of respects, the Board relied on the agreements of the parties even though the record did not show that this resulted in the best possible tariff. For example, the certified tariff provides, as do the agreements, for a set rate irrespective of the number of works used. Still, the Board noted that this was the sort of situation that may call for a tariff that varies according to the extent to which the relevant repertoire is used in a particular work. Also, the Board accepted the rate proposed by the parties to the agreements even though there was no evidence that the rate represents the true value of the relevant right. Again, the Board accepted to use an established but ambiguous definition to distinguish “musicals” from other films (the former not being subject to the tariff), based on the assurances of SODRAC that the definition has not caused any problems in practice.

In other respects, the Board opted for solutions other than those used in the agreements. The Board refused to limit the types of recording media that could be used pursuant to the tariff. It adjusted the tariff so as to deal with the licensing of copies made before the tariff came into force in a manner that is more compatible with the status of such a tariff. It refused to allow SODRAC to ask for any information relevant for the purposes of the tariff and instead, included specific reporting requirements. Finally, it refused to certify a provision requiring that a distributor whose licence has been terminated see to the immediate withdrawal of all video-copies subject to the tariff, on the ground that the provision might impose the withdrawal of copies that are no longer the property of the distributor or in regard to which royalties had already been paid.

Decision of March 25, 2006 – CSI’s Tariff for Commercial Radio Stations (2005-2006)

CSI filed proposed tariffs of royalties to be collected for the reproduction of musical works in Canada by commercial radio stations in 2005 and 2006.

CSI’s proposal for 2005 was essentially identical to the certified tariff for the years 2001 to 2004. The tariff proposal for 2006 maintained the same rates as the 2001-2004 tariff but expanded the ambit of the tariff to Internet simulcast and website operations.

The Canadian Association of Broadcasters (CAB) objected to both tariff proposals. It withdrew its objections after reaching an agreement with CSI. A consortium composed of the Canadian Broadcasting Corporation, Standard Radio Inc. and Sirius Satellite Radio Inc. (collectively, “Sirius Canada”) also filed an objection for 2005, but withdrew that objection after receiving some explanations concerning the ambit of the proposed tariff. Before certifying the 2005-2006 tariff, the Board for its part raised concerns about a number of issues, including authorized uses, the modification of the rate base and the rates and amount of royalties.

Authorized Uses

The tariff certified for 2006 clearly establishes that, as far as Internet is concerned, the tariff allows reproductions only for the purpose of simulcasting, and only of the station’s own signal. The tariff does not target other Internet uses such as streaming or downloading of previously aired programs, archiving, podcasting, or other such future commercial Internet products. The 2006 tariff does not apply either to multi-channel subscription radio services.



Change to the Rate Base

The Board was of the view that the definition of “gross income” was broad enough to capture revenues derived from simulcast operations, including revenue from banners displayed while a listener accesses a simulcast. The Board agreed that it would be helpful to remove any possible doubt on this issue. Consequently, the definition of “gross income” in the tariff for 2006 includes a declaratory provision to that effect.

Rates and Amount of Royalties

The rates set in the tariffs remained the same as before. Stations where works from the repertoire account for less than 20 per cent of air time and stations that neither make nor keep hard drive copies 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 other stations are 0.27 per cent, 0.53 per cent and 0.8 per cent respectively. This is expected to generate royalties of approximately \$7 million per annum.

Decision of March 25, 2006 – SODRAC Tariff 3.B (2006-2010)

SODRAC and SODRAC 2003 inc. (together, “SODRAC”) filed a proposed tariff of royalties to be collected for the reproduction of musical works, in Canada, by community radio stations licensed to operate in a language other than English in 2006 to 2010. No objections were filed.

The proposed tariff was essentially identical to the one the Board certified for 2001 to 2005, which reflected the terms of an agreement reached between SODRAC and two associations of users, the *Association des radiodiffuseurs communautaires du Québec* and the *Alliance des radios communautaires du Canada*.

The Board certified the tariff as filed. In due course, the Board will consult with SODRAC and users to develop a text that is harmonized with CSI’s commercial radio tariff.

Arbitration Proceedings

Pursuant to section 70.2 of the *Act*, on application of the society or the user, the Board can set the royalties and other terms of a licence for the use of the repertoire of a collective society subject to section 70.1, when the society and a user are unable to agree on the terms of the licence.

MusiSélect inc. filed such an application on July 4, 2005. The application asked the Board to fix the terms and conditions of a licence for the reproduction of sound recordings in the repertoire of the Audio-Video Licensing Agency (AVLA). At the end of this reporting period, the application was pending.



*Pursuant to section 77 of the Act,
the Board may grant licences
authorizing the use of published works...*

Unlocatable Copyright Owners

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

In 2005-2006, 52 applications were filed with the Board and 27 licences issued as follows:

- *David Oppenheim*, Toronto, Ontario, for the reproduction and incorporation, in a documentary, of a short clip of the film “A New World in the Yukon” produced in 1970 by Jerry Fairbanks Productions, Hollywood, CA in association with Canawest Film Productions Ltd. of Vancouver, B.C., A Production of Anvil Mining Corporation Ltd.
- *Mount Royal College Bookstore*, Calgary, Alberta, for the reproduction of two articles written by Robert Severns.
- *Standard Life Assurance Company of Canada and Standard Life Realty Advisors*, Ottawa, Ontario, for the reproduction of the electrical and mechanical plans created by B. Siebrand, P.Eng. in 1987 for the property located at 5335 Canotek Road in Ottawa.
- *Pearson Education Canada*, Don Mills, Ontario, for the reproduction of the article entitled “Getting Off Welfare” published in the magazine SOUND, Kamloops, B.C. (author and year of publication unknown).
- *Lyse St-Cyr Morin*, Ottawa, Ontario, for the reproduction of architectural plans created by Christine Gieyftor for the property located at 26 Concourse Gate in Ottawa.
- *Richard Lindseth Architecture*, Calgary, Alberta, for the reproduction of architectural plans created by J. Sertic Homes (J. Mossman, engineer and J. Pasalic, draftsman) for the property located at 41 Woodhaven View S.O. in Calgary.
- *McGraw-Hill Ryerson*, Whitby, Ontario, for the reproduction of a letter written by Rita Schindler published in the *Toronto Star* on December 30, 1990.
- *Lucie Gagné*, Ottawa, Ontario, for the reproduction of the joint authorship work entitled “Diary of the 13th Battery Canadian Field Artillery 1914-1919”.
- *Enerflow Industries Inc.*, Calgary, Alberta, for the reproduction of architectural plans created by APX Engineering Service Ltd. for the property located at 8625, 68th Street S.E. in Calgary.
- *Professor Daniel Coleman*, McMaster University, Hamilton, Ontario, for the reproduction of the poster titled “National Progress” created by Francis Robert Halliday for the 1921 Canadian National Exhibition in Toronto.
- *Southern Alberta Institute of Technology (SAIT) Polytechnic*, Calgary, Alberta, for the reproduction of five sets of images and diagrams for which the source is unknown.
- *Board of Governors Archives at Exhibition Place*, Toronto, Ontario, for the reproduction and public performance of the films *Railyard* © Robert Sax 1977 and *Gimme a Break!* © James Sennema 1977.
- *Saxby & Pokorny Architects*, Calgary, Alberta, for the reproduction of mechanical and engineering plans created in 1981 by Larry W.T. Tang, Continental Design Inc. for the property located at 800 Macleod Trail S.E. in Calgary.



- *National Film Board of Canada*, Saint-Laurent, Quebec, for the reproduction and incorporation in a documentary of eleven transparencies of works by Emily Carr produced by photographer Michael Neill in 1980.
- *Lise Bazinet*, Ottawa, Ontario, for the reproduction of architectural plans created by Trend Setter Development Limited for the property located at 24 Mary Drive in Ottawa.
- *University of Toronto Press*, Toronto, Ontario, for the reproduction of the poster titled “National Progress” created by Francis Robert Halliday.
- *Production & Studio MiDo inc.*, Métabetchouan-Lac-à-la-Croix, Quebec, for the mechanical reproduction of the song “Le père Noël c’t’un québécois”, written by Pierre Laurendeau and Roger Magnan, published by Pop Success and Reliable Music.
- *Near-Miss Productions Inc.*, Montréal, Quebec, for the reproduction and incorporation of nine photographs in a documentary.
- *Darrell Knight*, Calgary, Alberta, for the reproduction of the book entitled *History of the Thirty-First Battalion C.E.F.* produced by H.C. Singer and A.A. Peebles.
- *Harinder Lidder*, Ottawa, Ontario, for the reproduction of architectural plans (drafted in 1956 and 1991) for the property located at 19 Bassano Street in Ottawa.
- *Les services de garde La petite école*, Daveluyville, Quebec, for the mechanical reproduction of six musical works.
- *Anthony Mckenzie*, Ottawa, Ontario, for the reproduction of architectural plans created by RCS for the property located at 25 Palsen Street in Ottawa.
- *The University of Alberta Press*, Edmonton, Alberta, for the reproduction of the article “Portrait of a Giant” written by Georgia Engelhard.
- *Urban Keios Design Inc.*, Ottawa, Ontario, for the reproduction of architectural plans created in 1963 by Julius Domos for the property located at 1244 Lampman Crescent in Ottawa.
- *Nick Davidson*, Kanata, Ontario, for the reproduction of architectural plans created by B.H. of Marcel C. Brunet & Assoc., for the property located at 39 Naismith Crescent in Kanata.
- *Mouchak Incorporated*, Ottawa, Ontario, for the reproduction of architectural plans (architect and builder unknown) for the property located at 1042 Merivale Road in Ottawa.
- *Breakthrough Films and Television*, Toronto, Ontario, for the off-camera narration in a documentary of eight excerpts from Charles Monroe Johnson’s book *Action with Seaforths*, published in 1954 by Vantage Press Inc., New York. Reasons for this licence were issued on March 6, 2006 and are summarized as follows.



On May 10, 2005, the Board issued a licence to the production company Breakthrough Films and Television (Breakthrough). The licence, retroactive as of November 2004, allowed Breakthrough to reproduce, through off-camera narration, eight excerpts of the book by Sergeant Charles Monroe Johnson, to represent in public and communicate to the public through telecommunication the excerpts of the book incorporated in the documentary, and to make copies of the documentary. Breakthrough, who was not able to locate the author or his successors, applied for a licence pursuant to subsection 77(1) of the *Act* which gives the Board the power to issue licences when the owner of the copyright cannot be located.

When a licence application pertains to a work, five conditions must be met before the Board can issue a licence: 1) the work is published; 2) copyright subsists in the work; 3) the contemplated act is an act mentioned in section 3; 4) the copyright owner cannot be located; and 5) the applicant has made reasonable efforts to locate the copyright owner.

The Board concluded that all conditions were met. The third condition however required more in-depth examination. For the licence to be issued, the Board had to determine if Breakthrough used an important part of the work according to section 3. The Board concluded affirmatively, relying on earlier decisions of the Federal Court of Appeal. The Board concluded that although the excerpts were quantitatively small in relation to the book as a whole, the use of those excerpts constituted, from a qualitative standpoint, an appropriation by Breakthrough of Sergeant Johnson's knowledge, time and talent and therefore, of a substantial part of his work, since all excerpts were taken from the same chapter describing a specific battle, and used in the documentary to describe the same battle. The five conditions



set out in subsection 77(1) of the *Act* were therefore met, justifying the issuance of a licence to Breakthrough.

Amongst the conditions which the Board can set in a licence are time stipulations. The Board can therefore exercise its discretion to issue a retroactive licence. In this instance, although Breakthrough asked the Board to issue a licence once the narration was completed, the application was made before the exploitation of the documentary. Moreover, Breakthrough made sufficiently substantial efforts to locate all copyright owners, including Sergeant Johnson. In addition, all the owners located granted a licence to Breakthrough. The Board had no reason



to believe that Sergeant Johnson would have acted otherwise. Accordingly, the Board found that the issuance of a retroactive licence was justified.

Two members of the panel dissented, on two grounds. For them, Breakthrough did not need a licence because what it did was not protected by copyright. The notion of “substantial part of a work” found in section 3 of the *Act* is to be evaluated on criteria of quality and quantity. From a quantitative perspective, the minority believed that what Breakthrough took from Mr. Johnson’s book was “trivial”. They also concluded that in this instance, the taking involved was not qualitatively substantial. The eight excerpts did not constitute a coherent whole and the proposed use was different from that contemplated by the author.

The minority added that even if they had concluded that the contemplated use was protected by copyright, they still would have declined to issue the licence. Nothing in the *Act* prevents the Board from issuing a licence after a use has occurred; here, however, other public policy reasons militated against issuing a retroactive licence.

In this instance, the conditions to issue a licence were not met because the rights being asked for were not trivial and attracted a higher level of scrutiny. Furthermore, Breakthrough was a sophisticated applicant who should have initiated the process earlier. Lastly, the applicant’s actions were not beyond reproach. The search for the copyright owner probably had not start until after protected uses had occurred. Believing that it needed the rights, Breakthrough nevertheless allowed History TV to broadcast the programs without having obtained the required permission; this in turn put History TV in an arguably delicate situation.

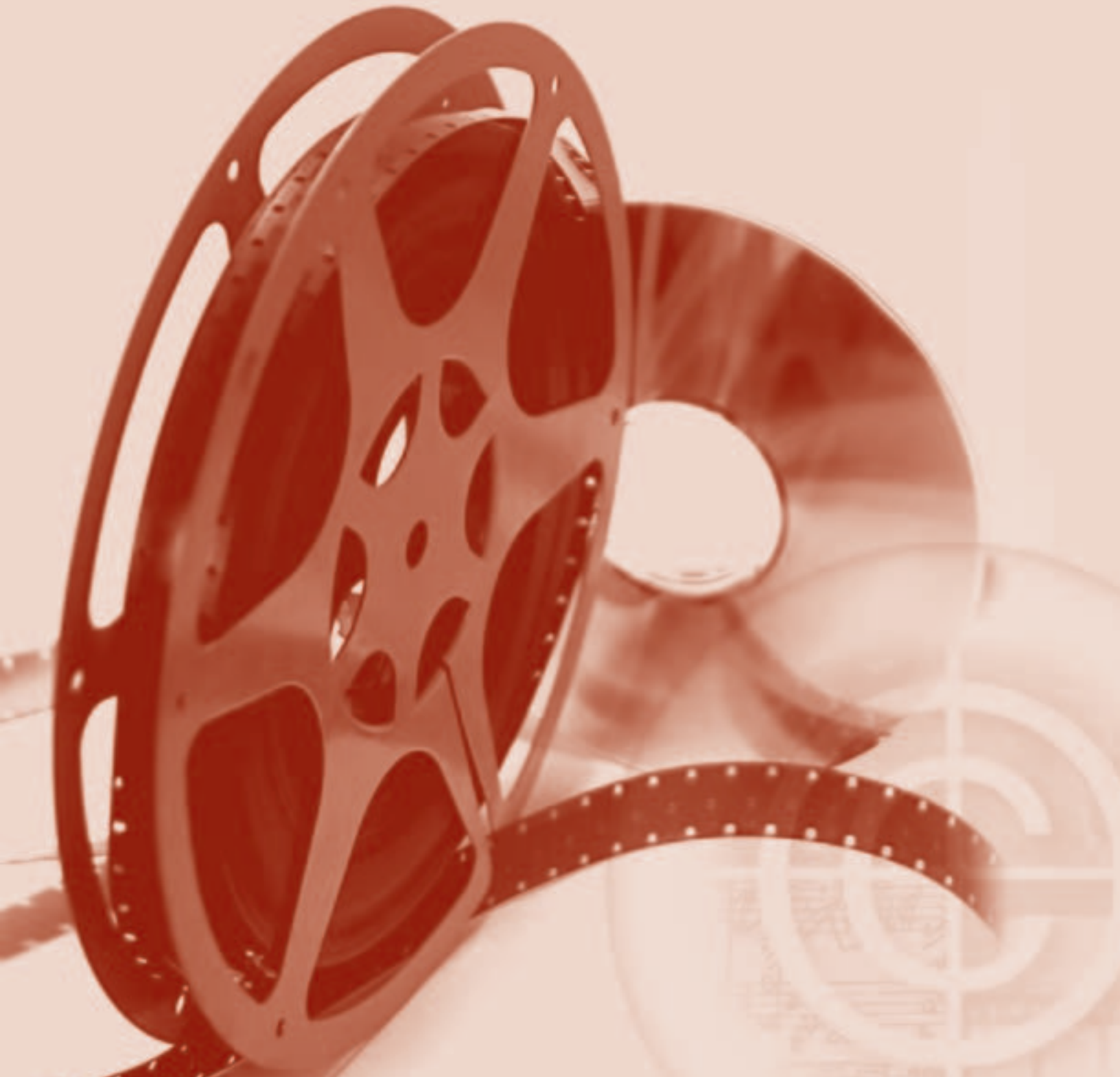
Dismissals of Applications

The Board also dismissed two applications.

The first was filed by the National Film Board of Canada; it sought to use a musical work of the Russian composer Georgy Sviridov. Mr. Sviridov passed away in 1998; according to the record, so did the person who inherited his copyright. A Russian barrister specialized in copyright informed the applicant that title to the works of Sviridov is the object of a dispute before the Russian civil courts that will not be resolved for some time yet; as a result, it was not possible to determine precisely who owns the relevant rights. On the other hand, all those who *claim* to own some rights in the works of Sviridov are known. The Board ruled that the owner of the rights in the relevant work, while undetermined, was not unlocatable. For that reason, it dismissed the application.

The British Columbia Institute of Technology filed the second application: it wished to reproduce excerpts from a cinematographic work entitled *Learning to Build Wings Over Canada: Brisbane Aviation Co. Ltd.* Apparently, the film had been made around 1941. It contained no credits, and its author was unknown. It was also impossible to determine whether the work had been published. Before issuing a licence for the use of a work pursuant subsection 77(1) of the *Act*, the Board must ascertain, among other things, that the work was published and that copyright subsist. The Board ruled that the application had to fail on at least one of those counts. The film is an anonymous work. Section 6.1 of the *Act* provides that copyright in such a work subsists until the earlier of (a) fifty years following the year during which the work was first published or (b) seventy-five years following the year during which the work was made. If the film was not published, the Board could not issue a licence even if copyright in the film subsists. If the film was published, that had to have occurred more than fifty years ago and the work was no longer protected by copyright.

The Board ruled that the owner of the rights in the relevant work, while undetermined, was not unlocatable.



Court Decisions



RE: CSI – Online Music Services Tariff (2005-2007)

In March 2004, CMRRA/SODRAC Inc. (CSI) filed a proposed tariff for the reproduction of musical works by online music services for 2005 to 2007. Groupe Archambault inc. (Archambault) objected to the tariff. Pursuant to the Board's procedure, participants exchanged interrogatories. Interrogatories that participants could not agree upon were submitted to the Board for interlocutory rulings. Archambault opposed many of CSI's interrogatories.

Archambault argued that much of the information that CSI sought from Archambault was overly detailed and covered many aspects of the company's business that were not relevant to the question before the Board. It further argued that the interrogatories sought information that, if divulged, would be extremely prejudicial to Archambault.

On June 9, 2005, the Board rejected the majority of Archambault's objections. The Board stated that confidentiality was not in itself a valid reason for objecting to the interrogatories because the Board has the power to issue confidentiality orders under appropriate circumstances.

Archambault applied to the Federal Court of Appeal for judicial review of the Board's decision and for a stay of application. Archambault argued that the Board's direction to answer CSI's interrogatories violated section 8 of the *Charter of Rights and Freedoms* (the right to be secure against unreasonable search and seizure). Archambault submitted that an order for production by a government agency is tantamount to a seizure, even in a regulatory environment. The lack of relevance of the requested documents, their confidential character and the prohibitive cost in providing them, rendered the Board's order abusive.

On October 14, 2005, Justice Pelletier dismissed Archambault's stay application, holding that the interlocutory nature of the matter meant the Court would only intervene if there were exceptional circumstances, which was not the case here. Archambault's attempt to frame the issue as a violation of a *Charter* right was not sufficient to render the present circumstances exceptional.

Further, Justice Pelletier held that even if there were exceptional circumstances present that would allow him to intervene, the application would still have failed. Archambault could not demonstrate that irreparable damage would occur if confidential documents were circulated to the participants and their release was subsequently found to have been unnecessary. According to Justice Pelletier, this argument was speculative, particularly considering that Archambault had not asked the Board for a confidentiality order, as the Board had invited it to do.

Archambault then had until November 4, 2005 to provide answers to the interrogatories that were the subject of the Board's Order. On November 3, 2005, Archambault withdrew from the proceedings. On February 8, 2006, the Court ruled that, as Archambault had withdrawn from the proceedings before the Board, the application for judicial review was moot and for that reason, dismissed the application.

RE: Access Copyright's Tariff for Educational Institutions (2005-2009)

In March 2004, Access Copyright filed a proposed tariff for the reprographic reproduction of works in its repertoire by elementary and secondary schools in the years 2005 to 2009. Many potential users objected to the tariff. In accordance with a directive on procedure issued by the Board, the participants exchanged written interrogatories.

On July 15, 2005, in the course of dealing with the status of certain interrogatories Access Copyright had addressed to objectors, the Board ruled that, in light of subsection 29.4(2) of the *Copyright Act*, the objectors did not have to produce all of their set examinations for the purpose of discovering what copyrighted works might have been reproduced in those exams. Subsection 29.4(2) allows, under certain circumstances, copying on the premises of an educational institution for the purposes of examinations.

Access Copyright applied for judicial review of the decision to the Federal Court of Appeal. The Court dismissed the application from the bench, on March 14, 2006.

The Court held that arguments as to whether subsection 29.4(2) applied so as to deprive Access Copyright of its right to have a tariff set for the copying of material on educational premises would properly be heard by the Board at the main hearing of the matter. The Court did not accept that the matter had been finally determined, particularly because the Board had heard no argument with respect to subsection 29.4(2). The Court also stated that, in any event, the interlocutory ruling of the Board could be the subject of a judicial review after the Board had reached its final decision on the tariff issue. In the Court's opinion, the application did not raise the "special circumstances" necessary to intervene in an interlocutory matter.



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 2005-2006, 114 agreements were filed with the Board.

Access Copyright, The Canadian Copyright Licensing Agency, which licenses reproduction rights, such as digital licensing and photocopy rights, on behalf of writers, publishers and other creators, filed 81 agreements granting various educational institutions, libraries, non-profit associations and copy shops a licence to photocopy works in its repertoire.

The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) filed 13 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. The agreements filed in 2005-2006 have been concluded with various organizations and educational institutions as well as with the *Musée de la civilisation du Québec* and two government departments, namely *Immigration et Communautés culturelles Québec* and *Éducation, Loisir et Sport Québec*.

Access Copyright and COPIBEC also filed two agreements they jointly entered into with Lundbeck Canada Ltd.

The Audio-Video Licensing Agency (AVLA), which is a copyright collective that administers the copyright for owners of master and music video recordings, filed, for its part, 14 agreements.

Finally, the Canadian Broadcasters Rights Agency (CBRA) filed four agreements it entered into with regard to media monitoring by non commercial services, namely Treasury Board Canada, the Government of Alberta, the Government of Ontario and the Government of British-Columbia. CBRA represents various Canadian private broadcasters who create and own radio and television news and current affairs programs and communication signals.