



COPYRIGHT BOARD



ANNUAL REPORT
2001-2002

Copyright Board
Canada



CANADA

Commission du droit d'auteur
Canada

The Honourable Allan Rock, P.C., M.P.
Minister of Industry
Ottawa, Ontario
K1A 0A6

Dear Mr. Minister:

I have the honour of transmitting to you for tabling in Parliament, pursuant to section 66.9 of the *Copyright Act*, the fourteenth Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2002.

Yours sincerely,

Stephen J. Callary
Vice-Chairman and
Chief Executive Officer

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BOARD MEMBERS AND STAFF
as of March 31, 2002

Chairman: The Honourable Justice John H. Gomery

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

Members: Sylvie Charron
Brigitte Doucet
Andrew E. Fenus

Secretary General: Claude Majeau

General Counsel: Mario Bouchard

Director of Research: Gilles McDougall

Clerk of the Board: Lise St-Cyr

*Financial Officer
and Administrator:* Ivy Lai

Informatics Officer: Michel Gauthier

Registry Clerk: Tina Lusignan

Members' Secretary: Nadia Campanella

CHAIRMAN'S MESSAGE

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

During this reporting year, the Board held three hearings and issued four decisions.

Two hearings pertained to the public performance of music. The first, dealing with a tariff relating to Pay Audio Services as proposed by the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the years 1997 to 2002 and the Neighbouring Rights Collective of Canada (NRCC) for the years 1998 to 2002, was held in April/May 2001. It was the first time that the Board held a joint hearing on two distinct rights. A decision was issued on March 15, 2002. The second, dealing with SOCAN's multiple licensing of premises and related issues for the years 1998 to 2002, was held in February 2002. A decision will be rendered after the Board deals with SOCAN's proposed Tariff 18 (Recorded Music for Dancing), which is part of the issue of multiple licensing of premises by SOCAN. Tariff 18 will be heard early next year.

In November/December 2001, a hearing was held on a tariff proposed by the Educational Rights Collective of Canada for the reproduction, by educational institutions, of television programs and other subject-matters. This new matter, described as "educational rights", will cover the years 1998-2002. The decision is under advisement.

On June 15, 2001, the Board rendered its decision certifying SOCAN's "Concerts" tariffs for the years 1998 to 2002. A three-day hearing had been held in early March 2001.

On November 23, 2001, the Board disposed of an application to vary the statement of royalties to be collected from the Canadian Broadcasting Corporation (Radio) by the NRCC.

With respect to the retransmission of distant radio and television signals, on December 21, 2001, the Board extended indefinitely the application of the interim tariffs that were set on December 8, 2000 for the year 2001, subject to some changes.

In 2001-2002, the Board also issued three non-exclusive licences for the use of works whose copyright owner could not be located.

At the Board's initiative, Copyright Administrative Institutions held their first international gathering in Montreal on October 10, 2001. Representatives from Australia, the Netherlands, Slovenia, Switzerland, the United States and Canada exchanged on issues of common interest to agencies charged with supervising or regulating various aspects of copyright and especially its collective administration. A working group was asked to assess the opportunity of creating an international association for those institutions. Many that were not able to attend the meeting showed a strong interest for the creation of such an association. The World Intellectual Property Organization and the European Union also showed interest in the initiative.

Following the meeting, a colloquium dealing with these same institutions was held on October 11 and 12. The event was organized by the *Centre de recherche en droit public* of the *Université de Montréal*, with

assistance from the Board. It provided experts from Canada and from around the world with an opportunity to discuss the role of these institutions and the challenges they will have to meet in the near future.

In the year 2002-2003, the Board will deal with at least two very important matters. It will examine for the third time the controversial tariff of levies for the private copying of sound recordings. The many individuals and corporations (over 1,200) who have filed objections and comments to the proposed statement of the Canadian Private Copying Collective have raised a vast array of highly complex factual and legal issues. The Board will also examine all tariffs dealing with the communication of musical works in Canada by commercial television broadcasters in a single hearing. It is already clear that the tremendous evolution that has occurred in this market will lead some participants to argue in favour of significant amendments to the existing SOCAN tariffs. Both of the decisions resulting from these hearings could have a profound impact upon the relevant markets.

The Board has continued to develop and enhance its Web site in an effort to make it a comprehensive and timely source of information about copyright law and the activities of the Board.

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

John H. Gomery

MANDATE OF THE BOARD

The Copyright Board of Canada was established on February 1, 1989, as the successor of the Copyright Appeal Board. The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society. Moreover, the Board has the right to supervise agreements between users and licensing bodies, issues licences when the copyright owner cannot be located, and may determine the compensation to be paid by a copyright owner to a user when there is a risk that the coming into force of a new copyright might adversely affect the latter. Its responsibilities under the *Copyright Act* (the *Act*) are to:

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

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

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

OPERATING ENVIRONMENT

Historical Overview

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

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

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

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

rights”), for the adoption of tariffs for private copying of recorded musical works, for the benefit of the rights owners in the works, the recorded performances and the sound recordings (“the home-taping regime”), and for the adoption of tariffs for off-air taping and use of radio and television programs for educational or training purposes (“the educational rights”).

General Powers of the Board

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

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

Guidelines and Principles Influencing the Board's Decisions

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

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

follow or that determine the ambit of the Board's mandate or discretion.

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

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

Outline of the Board's Areas of Jurisdiction

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

1. Copyright in works

- Public performance of music (compulsory filing of tariffs);
- Retransmission of distant signals (compulsory filing of tariffs);
- Other rights administered collectively (optional filing of tariffs);

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

Royalty Proposal and Review Mechanism

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

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

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

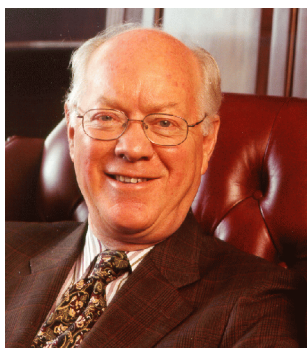
ORGANIZATION OF THE BOARD

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

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

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

Chairman



The Honourable John H. Gomery, a justice of the Quebec Superior Court since 1982, was appointed part-time Chairman of the Board in March 1999 and reappointed in 2002 for 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 as a member of the special committee on “Uniformity on Personal Property Security Law”.

Vice-Chairman & Chief Executive Officer



Stephen J. Callary is a full-time member appointed in May 1999 for a five-year term. Mr. Callary has served as Managing Director of consulting firms, RES International and IPR International; as Executive Director of TIMEC - the Technology Institute for Medical Devices for Canada; and as President of Hemo-Stat Limited and Sotech Projects Limited. He has extensive international experience dealing with technology transfer, software copyrights and patents and the licensing of intellectual property rights. From 1976 to 1980, Mr. Callary worked with the Canadian Radio-Television and Telecommunications Commission (CRTC), the Privy Council Office (PCO) and the Federal-Provincial Relations Office (FPRO). He has a B.A. degree from the University of Montreal (Loyola College) and a B.C.L. degree from McGill University. He was admitted to the Quebec Bar in 1973 and pursued studies towards a Dr.jur. degree in Private International Law at the University of Cologne in Germany.

Members



Sylvie Charron is a full-time member appointed in May 1999 for a five-year term. She was an Assistant Professor with the University of Ottawa's Faculty of Law (French Common Law Section) and worked as a private consultant in broadcasting, telecommunications and copyright law. Prior to her law studies, she worked with the Canadian Radio-Television and Telecommunications Commission for 15 years. Ms. Charron is a graduate of the University of Ottawa (B.Sc. Biology in 1974, M.B.A. in 1981 and LL.B. - Magna cum laude in 1992). Ms. Charron is a member of the Canadian Association of Law Teachers, of the *Association des juristes d'expression française de l'Ontario* (AJEFO), of the Council of Canadian Administrative Tribunals, and is former Vice-Chair of the Ottawa Chapter of Canadian Women in Communications and past Executive Director of the Council of Canadian Law Deans.



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



Andrew E. Fenus, MCI Arb, C. Arb., is a full-time member appointed in July 1994 and reappointed in 1999 for five years. He was a Board member and Provincial Adjudicator with the Rent Review Hearings Board of Ontario from 1988 to 1994 where he served as Senior Member of the Eastern Region. Mr. Fenus is a Member of The Chartered Institute of Arbitrators and a Chartered Arbitrator in The ADR Institute of Canada. He is a graduate of Queen's University (Honours BA in 1972 and Master of Public Administration in 1977) and McGill University (Master of Library Science in 1974).

Note: Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2002-2003 (Part III of the Estimates) and the Performance Report for 2001-2002. These documents are or will soon be available on the Board's Web site.

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 2001-02, the Board held two hearings on the public performance of music. The first, dealing with Pay Audio Services proposed by the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the years 1997 to 2002 and the Neighbouring Rights Collective of Canada (NRCC) for the years 1998 to 2002, was held in April/May 2001. It was the first time that the Board held a joint hearing on two distinct rights. The second, dealing with SOCAN's multiple licensing of premises and related issues for the years 1998 to 2002, was held in February 2002.

Decisions of the Board

The Board issued three decisions in 2001-2002. The first addressed the public performance of musical works within the repertoire of SOCAN during concerts. The second disposed of an application to vary the statement of royalties to be collected from the Canadian Broadcasting Corporation (radio) by the NRCC. The third addressed the public performance of musical works within the repertoire of both SOCAN and NRCC by pay audio services.

SOCAN'S TARIFFS 4.A, 4.B.1, 4.B.3 AND 5.B (CONCERTS)

Tariffs 4.A (popular music concerts), 4.B.1 (classical music concerts), 4.B.3 (annual licence) and 5.B (concerts at exhibitions and fairs) establish royalties to be paid for the use of musical works during concerts. The Canadian Arts Presenting Association (CAPACOA), representing in particular concerts producers, filed an objection to this tariff proposal. On June 15, 2001, the Board certified the tariff for the years 1998 to 2002.

SOCAN asked that all tariffs under review be gradually increased by approximately 20 per cent over five years, from 2.5 to 3 per cent for popular music concerts, from 1.3 to 1.56 per cent for classical music concerts and from 0.8 to 0.96 per cent for presenters whose licences apply to an entire season. SOCAN argued that the proposed increases were justified, would have a minimal impact on attendance and promoters, and would be beneficial for its members.

CAPACOA maintained that nothing justifies an increase in the rate, and that certain factors tended, in its view, to make the task of concert producers increasingly difficult. Performers now have unprecedented bargaining power in the concert market. Touring has evolved to become a major source of revenues which need to be taken into account in the establishment of the tariffs. Finally, producers play a major role in promoting new talent, and tours by international stars help to provide visibility for local talent.

The Board concluded that the proposed increase for popular music concerts was fully justified. The evidence adduced by CAPACOA tends to overestimate the problems facing presenters and operators of venues, and especially the extent to which an increase in the concert tariff may exacerbate them. Before taking the decision, the Board examined certain factors that tend to justify a price increase and others that tend to

promote a certain degree of stability. The fact that performers are earning larger fees would tend to favour a rate increase, to the extent that one seeks to maintain an equitable division of revenues flowing to the creative inputs in a concert. However, the fact that the majority of Canadian performers use their own material in concerts is an argument for greater stability.

In addition, SOCAN filed the agreement reached with Viacom covering the public performance of music, including concerts, at Canada's Wonderland theme park. Pursuant to the agreement, the concert tariff increased from 2.5 per cent in 2000 to 3 per cent in 2005. Even though this contract is only of modest relevance, it is a further indication that the market is able to absorb the increase sought by SOCAN.

The record as it relates to classical music concerts is, to say the least, superficial. Nevertheless, the analysis offered with respect to popular concerts also applies to classical concerts and accordingly, the adjustment requested is justified.

The Board underlined some of the questions raised in its 1996 decision and during the hearing in the present case, and that could be useful in outlining the evidence for the next decisions. Hence, on the tariff structure, the Board was still concerned that a per event tariff may be inefficient. The Board's objective is a tariff formula that would allow SOCAN to continue to distribute concert royalties as at present (i.e., in a personalized way) while eliminating some of the administrative expenses which end up being borne by members of SOCAN as well as by users.

The Board expressed two concerns with respect to a tiered tariff. First, as the rate increases, so does the need to consider allowing a discount for the use of works that are not in SOCAN's repertoire. Second, the larger the event, the more it becomes important to consider the competitive disadvantage faced by Canadian presenters as compared with American presenters. Thus, it may

be that a tiered tariff for large-scale concerts is something that should be re-examined.

On the issue of minimum licence fees, given the lack of any evidence, and CAPACOA's apparent acquiescence on the subject, the Board agreed to maintain a minimum rate of \$20 per concert for the time being. Nevertheless, it remains concerned that one half of all licensed events pay the minimum fee for their SOCAN licence. One may therefore expect the Board to move to eliminate minimum licence fees if SOCAN is not able to establish that the tariff structures it proposes are efficient.

With regard to classical music concerts, the Board would have preferred to have more detailed analyses that would allow verifications in respect of each concert and that would include, for comparison purposes, events where only public domain music is used.

Finally, the Board underlined that it will need firm evidence concerning the financial situation of the industry and the impact of the increases granted in this decision before allowing further increases. Users can therefore expect that any new increase will occur gradually, and any cycle of increases will be followed by a period of stability.

APPLICATION TO VARY NRCC TARIFF 1.C (CANADIAN BROADCASTING CORPORATION - RADIO)

On September 29, 2000, the Board set at \$960,000 per year the royalties to be paid by the CBC to the NRCC for the years 1998 to 2002. On May 15, 2001, NRCC applied for a variation of the decision so as to increase the royalties for 2001. The sole reason for the application was that CBC had agreed to pay to SOCAN royalties that are 11.65 per cent higher in 2001 than in 2000. CBC asked that the application be denied for the reason, among others, that any such change is not material, as the NRCC tariff is not premised on SOCAN payments or derived from them.

The Board denied the application to vary. The September 29 decision did assume that royalties paid to SOCAN by CBC would remain fairly constant up to the end of 2002. However, the significance of a change has to be viewed in context. The amount of SOCAN royalties is only one of three factors used in the equation developed by the Board, which the Board opted not to use; available data dealing with the other two factors were simply too unreliable. In addition, the finality of decisions has intrinsic value. In the Board's view, participants would be better served by concentrating their resources on developing the necessary data to test the Board's assumptions in the next proceedings.

SOCAN AND NRCC TARIFFS FOR PAY AUDIO SERVICES

SOCAN's Tariff 17.B and NRCC's Tariff 17 proposals both targeted primarily digital pay audio ("DPA") services. The two Canadian DPA service providers, DMX Canada (DMX) and Galaxie, participated in the hearing, as did two groups of distribution undertakings: the direct-to-home satellite companies, Bell ExpressVu and Star Choice (hereafter "DTH"), as well as the Canadian Cable Television Association (CCTA) and Shaw Communications, representing the interests of cable system operators. On March 15, 2002, the Board certified SOCAN's tariff for the years 1997 to 2002 and NRCC's tariff for 1998 to 2002.

The collectives proposed that, as a starting point, the tariff be based on the prices paid or rates of return achieved in a number of real or theoretical free markets. NRCC then asked that performers, makers and authors/composers each get a third of the royalties before any eligible repertoire adjustment. SOCAN argued that authors and composers should get the same as performers and makers. The approaches put forward by the collectives resulted in a rate of between 30 and 40 per cent of a distribution undertaking's affiliation payments.

The objectors maintained that the commercial radio tariff should serve as starting point. They argued that DPA services are of accessory value in the world of digital offerings and that this would result in a rate in the order of between 3 and 5 per cent.

In the Board's view, none of the comparisons offered is clearly preferable to the others. Proposed free-market comparators (such as what television pay and pay-per-view services spend on movie rights) are dramatically different from telecommunication rights for music and sound recordings. The tariffs put forward as starting points target industries that do not compete with DPA and whose business models are so far removed from that of DPA as to make comparisons difficult, if not irrelevant. The Board concluded that there were no useful proxies available, but, at most, a variety of marginally relevant indicators that could serve to establish a "comfort zone" within which the Board was able to exercise its discretion in setting the tariff.

Under the circumstances, the Board set the tariff in four steps. First, it decided on the relative value of the repertoires. Second, it established the range within which a reasonable rate might be found, using the tools made available in the proceedings. Third, the Board identified the factors which, in its view, tended to push the rate higher or lower within that range. Fourth, it selected a figure, to be adjusted to account for the eligible repertoires.

The Board found that, as was the case in earlier decisions, authors and composers should get the same as performers and makers.

Second, the bottom of the range was established by doubling SOCAN's commercial radio tariff (so as to account for NRCC's repertoire to the level of SOCAN's repertoire), or 6.4 per cent of gross revenues before adjustments to account for the ineligible repertoire. That rate was then increased to account for greater music use and differences in business models. The application

of these factors would increase the rate at the bottom of the range to somewhere between 15 and 20 per cent.

The top of the range was set by starting with some of the higher figures (in the order of 60 per cent) put forward by the collectives and discounting them for factors such as the non-exclusive and non-competitive character of music telecommunication rights. This would set the rate at slightly higher than 30 per cent.

The Board then explained some of the factors that would tend to increase or decrease the rate. Among the former were the fact that:

- distribution undertakings find DPA valuable;
- rights holders are entitled to receive additional benefits from new uses of the repertoire;
- the availability of the repertoires helps DPA to achieve efficiencies.

Among the latter were the fact that:

- while it may not face economic difficulties, DPA remains in a state of flux and uncertainty;
- collectives are not entitled to appropriate all of the efficiencies achieved by using their repertoires;
- some room must be left for other elements of copyright.

In the Board's view, the factors that tended to increase the rate were more important than those that tended to decrease it. Under the circumstances, the Board chose a starting point of 26 per cent, to be shared equally between authors and composers, and performers and makers. After taking into account the ineligible musical works and sound recordings, a rate of 18.2 per cent was obtained as the sum of:

$$(26 \div 2) \times 0.95 = 12.35, \text{ for musical works;} \\ (26 \div 2) \times 0.45 = 5.85, \text{ for sound recordings.}$$

Because this is a new tariff, applied to an industry that is still in its early days, the Board applied an

additional discount of 10 per cent, bringing the final rate to 16.38 per cent, or 11.115 per cent for SOCAN and 5.265 per cent for NRCC. This discounted rate will apply only for the life of the tariff in this initial phase. Small systems, which are entitled to a preferential rate, shall pay at half the rate of other systems.

For the Board, no doubt subsisted on the ability to pay of those who are liable for the tariff. DPA service providers make substantial profits, as do most distribution undertakings. The tariff represents a significant but not unreasonable share of DPA's profits. Moreover, the tariff represents less than one-half of one per cent of what typical subscribers to DPA pay for the audio and video package they receive.

The objectors asked for a single tariff, or at least for a mechanism that allows them to settle all relevant royalties through a single payment. The collectives argued that the Board is legally required to certify separate tariffs. The Board, concerned with the burden which could result from the multiplication of tariffs, established only one tariff. The Board chose not to designate a single collecting agent for both collectives, but hoped that the collectives would voluntarily set up an integrated payment system.

[NOTE: On April 15, 2002, NRCC filed an application in the Federal Court of Appeal for judicial review of that decision.]

RETRANSMISSION OF DISTANT SIGNALS

Background

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

Decision of the Board

With respect to retransmission, the Board issued only one decision in 2001-2002. It extended indefinitely the application of the interim tariffs that were set on December 8, 2000 for the year 2001, subject to some changes. First, account was taken of the Exemption Order for Small Cable Undertakings adopted by the Canadian Radio-television and Telecommunications Commission (CRTC). Second, the definition of low or very low power television station (LPTV) was amended so as to take into account a change in the relevant rules. Third, at the request of the collectives, the allocation of the retransmission royalty was changed.

EDUCATIONAL RIGHTS

Background

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

Hearing

The Board held a three-day hearing in November/ December of 2001 on the tariff proposed by the Educational Rights Collective of Canada for the years 1998 to 2002. The decision is under advisement.

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 application pursuant to that section in 2001-2002.

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 2001-02, 31 applications were filed with the Board. Out of that number, three licences were delivered in this reporting year for the reproduction of architectural plans, as follows:

- *James Ballantyne*, Calgary, Alberta, authorizing the reproduction of architectural plans created by Guzmits Engineering Limited for the property located at 534 17 Avenue S.W. in Calgary
- *Jean-Pierre Gilbert*, Calgary, Alberta, authorizing the reproduction of architectural plans created in 1987 (author unknown) for the property located at 43 Scenic Park Crescent N.W. in Calgary
- *Ritu N. Birchard*, Calgary, Alberta, authorizing the reproduction of architectural plans created by M. Richardson for the Davand Construction Company, Airdrie, Alberta, for the property located at 67 Hawksbrow Drive N.W. in Calgary totalling 99 licences issued since the Board's inception in 1989.

COURT DECISIONS

Retransmission

On February 25, 2000, the Board certified the retransmission tariff for 1998, 1999 and 2000. FWS Joint Sports Claimants had asked that the Board change its royalty allocation methodology; with these changes, sports programming would have obtained a considerably larger share of the royalties. The Board refused to do so. [See 1999-2000 Annual Report, page 20]

FWS challenged the decision, arguing that the Board had committed three reviewable errors. On November 6, 2001, the Federal Court of Appeal dismissed the application for judicial review.

FWS first argued that the Board erred in law when stating that "... it is the subscribers who 'use' the cable services and who are in the best position to indicate the extent of actual use of its various components." To FWS, this could only mean that subscribers, not cable services, used works protected by copyright. The Court disagreed: the passage was better understood as meaning that, since subscribers view programs, viewing preferences were the indicator of the value of those programs to cable companies. The Court also disagreed that this represented a "stunning reversal", with allocation now reflecting the value of programs to subscribers. According to the Court, the Board had not departed from its earlier position that ultimately, royalties should be allocated on the basis of the value of programs to cable companies; it was simply making it clear that, in the absence of a free market in retransmission rights, viewing was the most reliable indicator of a program's usefulness in attracting and retaining subscribers.

FWS then argued that, by valuing programming based on viewing to the exception of any other method, the Board had unlawfully fettered its discretion. FWS especially disagreed with the Board having rejected its proposed valuation

approach "for reasons of principle, rather than methodology." For the Court, the key to what the Board meant was found later when it set out three principles on which it had proceeded; taken together, they explained why the Board concluded that the value of sports programs to broadcasters is not a good proxy for the value of the cable companies' retransmission rights in those programs. Decisions about the allocation of royalties among collectives fell squarely within the Board "home territory", just as decisions that set royalties. Both involve the exercise of a broad statutory discretion, policy elements, the use of economic and statistical data, and an understanding of the cable industry and the related technology. Both should attract the same high level of deference.

FWS also argued that the Board had committed a further error in examining the evidence adduced by FWS only in a cursory fashion. The opinion of the Court was that while not necessarily addressing every item of evidence in great depth or, in some instances, at all, the Board's reasons adequately explained why it did not accept FWS' approach or its evidence. According to the Court, the Board outlined the weaknesses of the evidence, including the "absurd results" that would, in its opinion, follow from the adoption of the proposed approach and the difficulties of applying to Canada assumptions made in the U.S. context. This was the third time that FWS made similar arguments. Under the circumstances, the relatively brief treatment of the evidence could be explained by the fact that FWS was taking what one of its witnesses aptly called "an improved kick at the can."

On January 18, 2002, FWS applied for leave to appeal to the Supreme Court of Canada from the decision of the Federal Court of Appeal. The application was still pending at the end of this reporting year.

AGREEMENTS FILED WITH THE BOARD

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

In 2001-02, 160 agreements were filed with the Board, totalling 3,070 agreements filed since the Board's inception in 1989.

The Canadian Copyright Licensing Agency (CANCOPY), which licenses reproduction rights, such as photocopy rights, on behalf of writers, publishers and other creators, filed 100 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 25 agreements. COPIBEC is the collective society which authorizes in Quebec the reproduction of works from Quebec, Canadian (through a bilateral agreement with CANCOPY) and foreign rights holders. COPIBEC was founded in 1997 by *l'Union des écrivaines et écrivains québécois* (UNEQ) and the *Association nationale des éditeurs de livres* (ANEL). The agreements filed in 2001-02 have been concluded with municipalities and various organizations in the Province of Quebec.

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, 34 agreements.

Finally, the Canadian Broadcasters Rights Agency (CBRA) filed one agreement with Transcriptions Verbatim Inc. 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.