COPYRIGHT BOARD

ANNUAL REPORT 1996–1997

Copyright Board
Canada

Commission du droit d'auteur
Canada

The Honourable John Manley, P.C., M.P.
Minister of Industry
Ottawa, Ontario
K1A 0A6

Dear Mr. Minister:

It is my pleasure to transmit to you, pursuant to section 66.9 of the *Copyright Act*, the ninth Annual Report of the Copyright Board, covering the period from April 1, 1996 to March 31, 1997, for submission to Parliament.

Yours sincerely,

Michel Hétu
Vice-Chairman and
Chief Executive Officer

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BOARD MEMBERS AND STAFF
as of March 31, 1997

Chairman:	Vacant
Vice-Chairman and Chief Executive Officer:	Michel Hétu, Q.C.
Members:	Adrian Burns
	Andrew E. Fenus
Secretary:	Claude Majeau
General Counsel:	Mario Bouchard
Researcher-Analyst:	Pierre-E. Lalonde
Assistant to the Secretary:	Lise St-Cyr
Administrative Officer:	Jaï Bellehumeur
Assistant:	Michel Gauthier

MANDATE OF THE BOARD

Established on February 1, 1989, as the successor of the Copyright Appeal Board, the Copyright Board has six distinct areas of jurisdiction under the *Copyright Act* [the *Act*]. Its responsibilities are to:

- adopt tariffs for the public performance or the communication to the public by telecommunication of musical works for the benefit of authors and composers of music ["the SOCAN regime" (the Society of Composers, Authors and Music Publishers of Canada), by the name of the collective society which administers these rights in Canada: sections 67 to 69];
- adopt tariffs for the retransmission of distant television and radio signals ["the retransmission regime": sections 70.61 to 70.67];
- set royalties payable by a user to a licensing body operating a licensing scheme, where the parties are unable to agree on the price or the related terms and conditions ["the arbitration regime": sections 70.2 to 70.4];
- rule on applications for non-exclusive licences to use published works of unlocatable copyright owners [section 70.7];
- examine, at the request of the Director of Research appointed under the *Competition Act*, agreements between a licensing body and a user that have been filed with the Board, where the Director 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 70.8].

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 copyright royalties payable to a licensing body can file the agreement with the Board within 15 days of its conclusion, thereby avoiding certain provisions of the *Competition Act* [section 70.5].

Bill C-32

Bill C-32 (an Act to amend the *Copyright Act*), which was given Royal Assent on April 25, 1997 (S.C., 1997, c. 24), confers the following additional responsibilities to the Board:

- the adoption of tariffs for the right referred to at section 19 of the *Act*, regarding 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 right to remuneration for the owners of the neighbouring rights]; the collective

societies administering these rights will be subject to the SOCAN regime [sections 67 to 68.2];

- the adoption of tariffs, at the option of collective societies referred to in section 70.1, for any acts mentioned in sections 3, 15, 18 and 21 of the *Act*; this will allow societies presently subject to the arbitration regime to rely on the SOCAN model rather than on piecemeal agreements with users [sections 70.1 to 70.191];
- the adoption of tariffs for the reproduction and public performance of radio or television stations' news programs by educational institutions for educational purposes [section 29.6]; the collective societies administering these rights will be subject to the retransmission regime [sections 71 to 76];
- the adoption of tariffs for the reproduction and public performance of any radio or television programs by educational institutions, for educational purposes (for the benefit of the rights owners in the works, performances, sound recordings and signals) [section 29.7]; the collective societies administering these rights will be subject to the retransmission regime [sections 71 to 76];
- the issuance of non-exclusive licences for the use of fixed performances, published sound recordings and fixed communication signals, where the copyright owner cannot be located [section 77];
- the adoption of tariffs for private copying of recorded musical works, for the benefit of the rights owners in the works, the performances and the sound recording ("the home-taping regime") [sections 79 to 88].

Bill C-32 also empowers the Board to make regulations governing the issuance by the Board of licences when the copyright and the neighbouring right owner cannot be located, defining "advertising revenues" for the purposes of broadcasters qualifying for special rates with respect to neighbouring rights and prescribing the information to be kept by an educational institution in relation to the making, destruction and performance of broadcast programs and marking of the copies made, as well as the information to be sent to the collective societies involved.

ORGANIZATION OF THE BOARD

Detailed information on the Board's resources, including financial statements can be found in its Expenditure Plan for 1997-98 (Part III of the Estimates), which was tabled in Parliament on February 20, 1997.

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 position of the Chairman is vacant since October 4, 1994. Until that date, the **Honourable Donald Medhurst**, a justice of the Alberta Court of Queen's Bench, was the Chairman of the Board. His was a part-time appointment.

Vice-Chairman & Chief Executive Officer

Michel Hétu, Q.C., was Head of Legal Services at the Federal Department of Communications from 1981 to 1988. In that capacity, he was extensively involved in the reform of copyright law. He was also a member of the Copyright Appeal Board from 1982 to 1989, when it was replaced by the Copyright Board. Mr. Hétu is a full-time member of the Board and was appointed in February 1989 and reappointed in 1994 for five years.

Members

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

Adrian Burns was appointed a full time member of the Copyright Board on September 1, 1995 for a five-year term. Mrs. Burns has a degree in Art History from the University of British Columbia and has done graduate studies at the British Academy in Rome. Mrs. Burns served as a Commissioner of the Canadian Radio Television Telecommunications Commission (CRTC) for seven years. Before being appointed to the CRTC, she worked in television as the Business Editor for CFCN (CTV) Calgary. During her years at CFCN and at CBC prior to that, she also worked as a news Anchor/Writer and Producer. Mrs. Burns is presently a Director of Western Limited and of The Canadian Athletic Foundation, Trustee of the National Symphony Orchestra in Washington, D.C., as well as Governor of Ashbury College and of the Stratford Festival Senate. She has served on several other corporate and community boards.

The Board's staff

The Board has a staff of six employees, three of whom report to the Chief Executive Officer: the Secretary, the General Counsel and the Researcher-Analyst.

The Secretary plans the Board's operations, serves as its Registrar, represents the Board in its relations with members of parliament, provincial governments, the media and the public and directs the preparation of the Board's reports to Parliament and to the federal government's central agencies.

The General Counsel provides legal advice on proposed tariff and licence applications before the Board. The General Counsel also represents the Board before the Courts in matters involving its jurisdiction.

The Researcher-Analyst provides economic expertise to the Board on matters raised by proposed tariffs and licence applications and conducts studies on specific aspects of rate regulation.

In order to reduce cost, the Board has entered into a support services agreement with the Department of Industry. The department provides support services and expert advice in personnel, administrative and financial matters.

PUBLIC PERFORMANCE OF MUSIC RIGHTS

Background

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) must file a statement of proposed royalties with the Board at least four months before the beginning of the year in which the tariff is to apply. This proposed tariff is then published by the Board in the *Canada Gazette*. Any music user or its representative can file an objection with the Board within 28 days of publication. SOCAN and the objectors are provided with an opportunity to present evidence and argument to the Board. Once the Board has completed its inquiry, it certifies the tariff, publishes it in the *Canada Gazette*, and provides written reasons in support of its decision.

Decisions of the Board

The Board issued three decisions regarding SOCAN's tariffs during 1996-97. The ***first*** one, dated April 19, 1996, pertained to Tariff 17 (Transmission of Pay, Specialty and Other Cable Television Services) for the years 1990 to 1995, payable by cable systems and other distribution undertakings performing similar functions: master antenna systems, DTH systems and low power television transmitters.

On September 1, 1989, the Composers, Authors and Publishers Association of Canada (CAPAC) and the Performing Rights Organization of Canada (PROCAN) filed what has come to be known as SOCAN's Tariff 17.

This was the first comprehensive statement of proposed royalties for the performance or communication by telecommunication of music "in connection with transmission of non-broadcast services" offered by a transmitter to its subscribers: pay-tv services, specialty services, parliamentary channels and other services only available through cable, including community channels.

This proposal, and other similar ones dealing with the period from 1990 to 1992, made no distinction between radio and television; the distinction was introduced in the proposal for 1993, and was carried over in the proposals for 1994 and 1995. An attempt was made in 1994 to extend the application of the tariff to the retransmission of local over-the-air signals; in a decision dated May 20, 1994, the Board found the proposed tariff to be without legal foundation.

SOCAN presented evidence and argument in support of its proposal. The Canadian Cable Television Association (CCTA), the Canadian Satellite Communications Inc. (CANCOM) and Regional Cablesystems, being "transmitters" and, as such, the intended licensees under the proposal, filed objections to it.

Even though they were not targeted as licensees, several service providers asked to participate in the proceedings either as objectors or as intervenors. The Board held that the tariff could result in a liability being

imposed on them and allowed service providers to participate fully in the proceedings.

SOCAN's proposal was articulated around two distinct notions. The first was the use targeted and the second, the person whom SOCAN intended to licence.

On the first point, SOCAN was seeking payment for the use of music on television services "other than such services carried in signals originally transmitted for free reception by the public by a terrestrial ... station". Use of music on over-the-air signals is addressed either in SOCAN Tariff 2 (Television) or in the Retransmission Tariff.

On the second point, SOCAN proposed that the licence for those uses of music be issued to only one of the participants in the communication chain, the "transmitter". This includes cable television systems and all other distribution undertakings performing similar functions: master antenna systems, DTH systems and low power television transmitters.

Three tariff formulas could be used in this case: a set amount of money per subscriber, per service (something no one suggested); a set amount of money per subscriber irrespective of the number of services received by each subscriber; a rate per service based, for example, on a percentage of revenues or of programming costs.

In the Board's view, the tariff didn't need to adopt a single approach. Hence, the Board came to the conclusion that the Canadian pay and American specialty services were more amenable to a rate per service approach, without risking a drop in their offering. The first ones are premium services and, for the most part, fully discretionary. The second ones are not offered on the basic tier. Cable operators can readily identify the amount collected for those services and can adjust their prices without regulatory authorization.

Setting a rate per service for Canadian pay and American specialty services would cover approximately 33 per cent of signal-contacts. It also made the portfolio approach for the remaining cable services much more sensible. What was left, at least until December 1994, were 13 Canadian specialty services with more or less equal distribution across the country and very high penetration figures. What was then achieved is the equalization of the rate per subscriber for the most basic part of the cable services package, the true core of the "*de facto* basic tier", thus eliminating the issue of treating services differently according to the tier in which the service is offered. Furthermore, the risk of any service drop off was virtually eliminated.

There were other reasons for using a portfolio approach for these services during the period under examination. First, it avoided the need to account for the relative use of music by each service. Second, the tariff dealt with past events. Neither cable operators, nor the service providers could change their past behaviour to reduce their liability. Therefore, so long as a fair rate was set for the portfolio, there was no particular reason to burden SOCAN or its licensees with a formula requiring extra calculations and a heavier administrative

burden where the result was going to be more or less the same.

Consequently, the tariff comprises two main components. Canadian specialty services are subject to a portfolio tariff, whose rate is set without regard to the number of such services offered by an individual transmitter. This tariff set monthly rates, for 1995, which vary from 2.2¢ to 7.6¢ for each premises, depending on the size of the distribution system. On the other hand, Canadian pay and American specialty services are subject to a separate tariff.

The next step was to determine the rate base and the rates for each component of the tariff.

The Board rejected SOCAN's view that within the market for cable television services, transmitters are trading at the same level as over-the-air commercial operators. This approach relies mainly on three assumptions. First, since transmitters deliver cable services to the consumer, they are, as over-the-air operators, the last level of trade. Second, a tariff based on data which is in the hands of the service providers is difficult to enforce in the face of the lack of information on the programming expenses of American services. Third, it is a "judgment call" as to which is the appropriate comparison.

In the Board's view, it was appropriate to compare the over-the-air commercial television industry with the cable services industry, not with the transmitters. It may be that, in law, the transmitter is the person who performs or communicates. In economic terms, however, the cable operator is more readily identified with a common carrier. An important part of the price consumers pay for subscribing to cable is for the improvement in the reception of local over-the-air signals: this does not add to the value of music in the programming offered. The goods provided by the cable operator have nothing to do with the manufacturing of programming, and everything to do with its distribution; SOCAN should derive no economic benefit from that "added value".

Again, from an economic perspective, service providers are readily comparable to over-the-air broadcasters. Those who put services and signals together compete in the same marketplace to acquire essentially the same inputs and from the same sources, with about the same amount of creative input into it. In fact, the service providers pay for all the creative inputs except the music rights: it seems logical to look at that level for comparisons to establish the quantum of the tariff.

For the same reasons, the Board used the tariff formula set out in Tariff 2.A as a starting point in articulating Tariff 17. The Board was unconvinced by the arguments put forward to the contrary. Over-the-air broadcasters and service providers operate in similar industries, competing for the same inputs, and offering viewers a similar product: programming. Their sources of income may be quite different, but the way in which they spend that income is not. The tariff for one should not create a competitive imbalance between the two players.

The Board therefore used 2.1 per cent of the service providers' revenues as its starting point. The participants suggested several adjustments to lower any rate that may be set, based on perceived differences between the over-the-air and cable television industries. The Board determined that none of the corrections suggested was appropriate for services for which the Board sets a separate rate. Since the only revenues of those services are the affiliation payments made to them by transmitters, the Board set the rate for these services at 2.1 per cent of each distribution system's affiliation payments.

All participants put forward a Quebec adjustment, invoking between them differences in viewing habits, in industry structure, in market size and in the number of cable services offered. As to the amount of the required adjustment, the Board decided that both supply and viewing statistics could provide useful information, and established a downward adjustment of 15 per cent. However it found no need for an adjustment for American specialty and Canadian pay services, which are discretionary. "The tariff formula, a percentage of affiliation payments, ensures that the royalties are automatically lower if the market commands a lower price. Therefore, the market can be relied on to generate without correction the appropriate quantum of royalties." [*NOTE*: *Les Réseaux Premier Choix inc.* have filed an application for judicial review of this aspect of the decision as it applies to Canadian pay services. The case is scheduled to be heard in the Fall of 1997].

On the other hand, the Board ruled that transmitters offering no more than three Canadian specialty services should pay half the rate for the services in the Board's portfolio.

The Board agreed with SOCAN that for the period under examination, the licence for the use of music on cable services should be issued to the transmitters, even though the Board set the rate as a function of the service providers' revenues. The transmitters are those who actually communicate the music to the public. Moreover, collecting the tariff from them minimizes the administrative burden of the tariff in two ways: the tariff structure, which mirrors that of the retransmission tariff, is familiar, and the transmitters, who need a licence for cable-originated services in any case, deal with all uses covered in the tariff through a single payment. Finally, any liability of the service providers for the transmitters' performances before September 1, 1993 would rest not on subsection 3(1.4) of the *Act*, but on some other, less certain, principles of copyright law.

Targeting one person for a debt where the right exists to collect it from more than one is reasonable. SOCAN had chosen, not unreasonably, to target the transmitter as the licensee. In a pick and pay environment, the focus may shift from purchasing services to purchasing programming. For the period under examination, however, transmitters were selling cable services to the subscribers, as a package or a series of packages. Identifying the transmitter as the licensee was therefore appropriate, especially for the services included in the Board's portfolio. The need to minimize the administrative burden imposed by the tariff also justified identifying the transmitter as the licensee for the services outside that portfolio.

The *Act* requires a preferential rate for small systems. In the Board's view, a rate of $10 per year would give small systems the preferential rate they are entitled to under the *Act* while recognizing the authors' entitlement to compensation for the use of their property.

The Board also agreed that the rate should be scaled in for smaller systems, especially since smaller systems' portfolios of services tend to be smaller.

As for the wording of the tariff, all efforts were made to follow in Tariff 17 the structure and language already set out in the Retransmission Tariffs for the relevant periods. Its application was structured around the notion of "signal", directly imported from the retransmission regime.

The ***second*** decision, issued September 20, 1996, certified undisputed tariffs which, in some cases, reflected agreements reached between SOCAN and users:

Tariff 1.A (Commercial Radio) for 1995, 1996 and 1997;
Tariff 2.B (TVOntario) for 1996;
Tariff 2.C (*Radio-Québec*) for 1996;
Tariff 3.A (Cabarets, Cafes, Clubs, etc. – Live Music) for 1995 and 1996;
Tariff 5.A (Exhibitions and Fairs) for 1996;
Tariff 7 (Skating Rinks) for 1996;
Tariff 8 (Receptions, Conventions, Assemblies and Fashion Shows) for 1996;
Tariff 9 (Sports Events) for 1996;
Tariff 10 (Parks, Streets and Other Public Areas) for 1996;
Tariff 11.B (Comedy Shows and Magic Shows) for 1996;
Tariff 12 (Theme Parks, Ontario Place Corporation and Similar Operations; Canada's Wonderland and Similar Operations) for 1996;
Tariff 13 (Public Conveyances) for 1996;
Tariff 15 (Background Music in Establishments not covered by Tariff 16) for 1996;
Tariff 18 (Recorded Music for Dancing) for 1996;
Tariff 20 (Karaoke Bars and Similar Premises) for 1996; and
Tariff 21 (Recreational Facilities Operated by a Municipality, School, College or University) for 1996.

In the same decision, the Board certified tariffs dealing with Concerts (Tariffs 4, 5.B and 14) for the years 1995 and 1996; Music Suppliers (Tariff 16) for the years 1994 to 1996; Recorded Music Accompanying Live Entertainment in Cabarets, Clubs or Similar Establishments (Tariff 3.B) for 1995; and the new Tariff 3.C for 1995 for Adult Entertainment Clubs. Hearings were held before the Board on all of these tariffs.

Adult Entertainment Clubs (New Tariff)

The Ontario Adult Entertainment Bar Association (the Association) objected to proposed Tariff 3.B for 1995.

The relevant evidence provided during these proceedings can be stated in a few words. Tariff 3.B applies mostly to establishments whose form of live entertainment is erotic dancing. Performers, both on stage and at tables, dance to music that has been selected either by the person who is performing on the stage or by a third party, usually a disc jockey.

There are three categories of dancers. Freelancers receive no money from the club operator; they are only paid by patrons for their performances at tables. Scheduled dancers receive a payment per shift as well as payments from patrons for their performances at tables. Feature attractions are paid by the club; some, but not all, do table dancing.

SOCAN argued that music is as important to table dancing as it is to dancing on the stage. It asked that payments from patrons for table dancing be taken into account in the tariff base because the club derives an economic benefit from that activity. It maintained that not doing so will encourage clubs to use only freelance dancers, in order to reduce the royalties they pay to the minimum of $60 a year.

The Association's arguments could be outlined as follows. Firstly, discotheques and bars are the adult entertainment clubs' true competitors. Music has neither more, nor less importance for the former than for the latter. Therefore, Tariff 3.B should be abolished and adult entertainment clubs should pay under Tariff 15 or 18. Secondly, patrons' payments for table dancing should not be included in the rate base: these are private dealings from which the club derives no direct benefit. Thirdly, the resistance facing SOCAN in the collection of the tariff is evidence of the excessive nature of the tariff. Alternatively, if the tariff formula were retained, the Association asked that the rate be reduced to its 1991 level of 1.42 per cent.

The Board first concluded that music is an integral part of the entertainment that the club's client is purchasing and that neither the rate nor the rate base for Tariff 3.B were out of line with the general scheme of the SOCAN tariffs. It agreed however that Tariff 3.B could be improved, since the application of the definition of compensation for entertainment to adult entertainment clubs clearly created serious problems for SOCAN as well as for users.

The Board ruled that adult entertainment clubs should pay royalties according to a different tariff formula, with a rate base that would not be open to confusion, misinterpretation or avoidance; the current Tariff 3.B would continue to apply to other establishments that play recorded music as an integral part of live entertainment.

The Board determined that the tariff formula should be based on data that is readily available, readily understood and verified, easy to administer, and hard to circumvent. It should not give an advantage to clubs who structure their purchase of entertainment differently than others. The amount of royalties generated should vary with the importance of the operation and with the number of days of operation. These objectives could be reached by setting a price per seat, per day. The Board created a new Tariff 3.C (Adult Entertainment Clubs) and established a licence fee of 4.2¢ per day, per seat authorized under the establishment's liquor licence or any other document issued by a competent authority for this type of establishment. This rate is the ratio of the average amount of entertainment expenses over the average number of authorized seats in a sample of eleven clubs which, in the Board's opinion, properly reflected this market.

Concerts

The Concerts tariffs proposed by SOCAN for 1995 and 1996 were almost identical. The proposed rate was 5 per cent for popular music concerts, 3.1 per cent for classical music concerts, and 1.9 per cent for classical music concerts included in a series. The rate base would remain gross receipts in the case of concerts for which admission is charged, and gross costs of production in the case of free concerts. Presenters of series would face more stringent reporting requirements and payment schedules. All uses would be subject to a $20 minimum.

For their part, classical music orchestras would pay according to the same formula as in 1994, which is a flat fee per concert that increases with the size of the orchestra's annual budget. Increases of between 4.5 and 11 per cent would apply in each year.

Insofar as the popular music concerts are concerned, the Board denied SOCAN's demand to fix the rate at 5 per cent.

The Board took notice of the agreement reached between SOCAN and the Canadian Alliance of Music Presenters (CAMP), representing a substantial number of concert presenters and promoters, wherein the rate was set at 2.3 per cent for 1995 and 2.4 per cent in 1996. The Board concluded:

> "To ignore the SOCAN/CAMP agreement under those circumstances is to ignore that SOCAN intends to practice two prices in the same market. This is not merely an 'unusual situation', but constitutes an unfair commercial practice. The Board will not allow SOCAN to practice price discrimination. The Board cannot force SOCAN to collect more than it wants to from CAMP members; it can, however, prevent SOCAN from collecting anything more than that amount from others."
>
> "...Given SOCAN's attitude, this is the only way the Board can ensure that all purchasers of concert performing rights will be treated equally and will be allowed to compete on the same footing in the marketplace."

However, the Board outlined in its decision a number of perceived problems with the current tariff (underestimation of some composers' contribution, inadequate tariff structure for singer-songwriters) and asked participants to find long-lasting solutions to these problems.

As for free concerts, in its decision of August 12, 1994, the Board had opted for production costs as the rate base. SOCAN argued in favour of keeping the current rate base; according to it, the reported difficulties with the tariff were being exaggerated, and were mainly due to the novelty of the formula.

The Board preferred the arguments put forward by the objectors. It agreed with them that using costs of production as a rate base might have been unfair. In the absence of gate receipts, the best measure of the value of music at free concerts appeared to be the artists' fees. That amount is readily verifiable, fluctuates with the market and can, in most cases, be determined in advance, resulting in a lighter paper burden.

The Board therefore prescribed, as a rate base for the tariff, all fees paid to those performing on stage (singers, musicians, dancers, conductors).

For classical music concerts, SOCAN asked that the rates for the per event and the presenters' tariff be kept in line, as in the past, with the rate for popular music concerts. This request was based on the assumption that popular and serious music should be valued on the same footing. The Board decided that this assumption should be challenged, and that the link between the classical and popular music concert tariffs should be loosened. The markets appear different. The financial challenges encountered are different in each sector of the concert industry. The revenue structures also are very different. "SOCAN should therefore make a separate case for these tariffs and not expect that they will automatically be linked to the popular music concert tariffs." The terms and rates in Tariffs 4.B.1 (Per concert licence) and 4.B.3 (Annual licence for presenting organizations) were therefore maintained at their current levels.

Music Suppliers

The Board concluded that SOCAN's attempt at convincing the Board of the need for a change in the tariff rates or its structure had failed utterly.

A ***third*** decision was issued on December 20, 1996. It certified Tariff 2.E aimed at the CTV Television Network. In its essence, the tariff reflects the terms of an agreement reached in November 1995 between SOCAN and CTV.

Public performance rights societies had attempted since 1963 to collect royalties from CTV. For the years 1963 to 1971, a tariff was certified; in the end, however, the Supreme Court of Canada ruled that CTV did not need a music performance licence. Following the adoption of amendments to the *Act*, further tariffs were filed dealing with the years 1990 to 1993. In 1993, the Federal Court of Appeal ruled that, notwithstanding the 1988 amendments, the principles set out by the Supreme Court of Canada two decades earlier still applied to CTV's situation.

On September 1, 1993, further amendments to the *Act* came into force. On that same day, SOCAN filed for the year 1994 a proposed statement directed at CTV. Similar proposals were filed for the years 1995 and 1996.

On December 6, 1995, an agreement dated November 27, between SOCAN and CTV, was filed with the Board. The agreement dealt with the period from September 1, 1993 to December 31, 1998. On September 1, 1996, SOCAN included in its proposed statement of royalties for the year 1997, Tariff 2.E which reflected the agreement. The Board was then able to certify a tariff that recaptured the terms of the agreement.

RETRANSMISSION RIGHTS

Background

The *Copyright 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 collecting bodies representing copyright owners whose works are retransmitted.

A collecting body must file a statement of proposed royalties with the Board before March 31 preceding the year in which the tariff is to apply. This proposed tariff is then published by the Board in the *Canada Gazette*. Any retransmitter or its representative can file an objection with the Board within 28 days of publication. The collecting bodies and the objectors are provided with an opportunity to present evidence and argument to the Board. Once the Board has completed its inquiry, it certifies the tariff, publishes it in the *Canada Gazette*, and provides written reasons in support of its decision.

Decisions of the Board

On March 31, 1994, eight collecting bodies (or collectives) filed statements of proposed royalties for the retransmission of distant radio and television signals for the years 1995, 1996 and 1997. All submitted statements for works carried on distant television signals, and three, the Canadian Broadcasters Rights Agency (CBRA), the Canadian Retransmission Right Association (CRRA) and the Society of Composers, Authors and Music Publishers of Canada (SOCAN), also submitted statements for works carried on distant radio signals. Overall, the proposed statements of royalties for 1995-97 were identical to the ones certified for the years 1992-94, with the exception that the broadcasters requested an increase to take into account the rights on compilation of which they claimed to be the copyright owners.

Objections to these statements were received from the Canadian Cable Television Association (CCTA), Canadian Satellite Communications Inc. (CANCOM) and Regional Cablesystems Inc.

The collectives filed with their proposals a letter informing the Board that they had reached an agreement with CCTA on all issues relating to the royalties to be paid for the retransmission of television signals in 1995, 1996 and 1997, except the compilation claim. A memorandum of agreement between the collectives and the objectors was executed on July 14, 1995; it was filed with the Board on September 28, 1995, along with an agreed statement of facts. Under the agreement, the rates would remain the same as in 1994 in all but two respects. First, broadcasters could argue in favour of an increase of between 1¢ and 3¢ to account for their compilation claim. Second, the rate for small systems could be changed to account for the amendment to the definition of small retransmission system, but could not be increased to account for the broadcasters' compilation claim.

On October 13, 1995, the interested collectives informed the Board that they had agreed on the sharing of any royalties attributable to the compilation claim.

In its decision dated June 28, 1996 rendered after a hearing, the Board generally accepted the arguments put forward by the broadcasters and concluded that the broadcast day constitutes a compilation of dramatic works, protected as such under the *Act*.

Compilations being protected works were entitled, in principle, to compensation under the retransmission regime. The Board determined that the recognition of the compilation claim should not affect the rate, and that the royalty share for compilation, if compilation receives any compensation, should be addressed through allocation rather than through a rate increase.

Those who supported the compilation claim asked for compensation for providing direct and indirect value to retransmitters. For their part, those who objected offered reasons which, according to them, established that compilations have no value in the retransmission market.

The Board determined that compilations should be compensated and used viewing as the best means available to allocate royalties among collectives. It set at 0.67 per cent the share attributable to compilations and consequently adjusted the shares for each collecting body.

Regulations Establishing the Period for Royalty Entitlements of Non-Members of Collecting Bodies

Under the *Copyright Act*, the right to retransmit a work on a radio or television signal is subject to a compulsory licensing scheme according to which the Copyright Board sets the royalties to be paid to collecting bodies representing the owners of rights in the retransmitted works.

Section 70.66 of the *Act* provides that a rights owner who does not authorize a collecting body to act on the owner's behalf (a so-called "orphan" owner) can seek payment for the use of the work from the collecting body that is designated by the Board for that purpose. Paragraph 70.66(3)(*b*) also provides that the Board can establish, by regulation, the periods within which this entitlement must be exercised. No regulation to that effect had ever been made before.

Pursuant to the above-mentioned paragraph of the *Copyright Act*, the Board made on March 19, 1997, the *Regulations Establishing the Period for Royalty Entitlements of Non-Members of Collecting Bodies*. These regulations entitle copyright owners to claim rights within two years after the end of the calendar year in which the retransmission occurred. Where the retransmission occurred before January 1, 1997, claims can be made until December 31, 1998.

UNLOCATABLE COPYRIGHT OWNERS

Pursuant to section 70.7 of the *Act*, the Board may grant licences authorizing the use of a published work if the copyright owner is unlocatable. However, the *Act* requires licence applicants to make reasonable efforts to find the copyright owner. Licences granted by the Board are non-exclusive and valid only in Canada.

Since its inception, in 1989, up to the year 1995-96, the Board issued 22 licences. In 1996-97, the Board issued 17 licences to the following applicants:

- *Éditions du Phare*, Saint-Jérôme, Quebec, authorizing the reproduction of a poem written by A. Atzenwiler, in a textbook to be used to teach French at the Grade 3 elementary school level.
- *Les Éditions CEC inc.*, Anjou, Quebec, authorizing the reproduction, in a textbook to be used to teach French at the Grade 1 elementary school level, of a text co-written by Alain Serres and Yan Thomas published in 1992, a photograph taken by Jordi Serra-Cobo and a photograph taken by Yann Jondeau, both published in 1994.
- *Les Films Rozon inc.*, Montreal, Quebec, authorizing the use, in the setting of television programs entitled "*Les immortels de l'humour 1 et 2*", excerpts of texts of variety television shows which were produced and broadcast by the Canadian Broadcasting Corporation in 1956 and 1963 and co-written by Raymond Guérin and Émilien Labelle.
- *The Canadian Institute for Historical Microreproductions*, Ottawa, Ontario: The Institute is an organization which locates, preserves, catalogues and distributes early Canadiana on microfiche. Its objectives are to improve access to printed Canadiana, to make rare and scarce Canadiana more widely available to bring together fragmented collections of Canadiana and to ensure the preservation of Canadiana in Canada and elsewhere. Two licences were issued: the first one authorizing the reproduction, in any material form, of 1,048 works, the second one authorizing the reproduction, in print form, microfiches or CD-ROMs, of 912 works.
- *Les Distributions Rozon inc.*, Montreal, Quebec, authorizing the use of two excerpts of the television program entitled "*Les zéros de conduite*", written by Raymond Guérin and produced and broadcasted by the Société Radio-Canada in 1963, in a television program of the series *Juste pour rire*.
- *Manitoba Education and Training, Independent Study Program*, Winkler, Manitoba, authorizing the reproduction of approximately 90 pages of the book entitled *The Technology Connection: The Impact of Technology on Canada* published in 1980, co-written by Dwight Botting, Dennis Gerrard and Ken Osborne, to be used as support material for a Grade 9 Social Studies course for distance education students.

- *LoneWolf Advertising Agency*, Halifax, N.S., authorizing the reproduction, in a brochure depicting the history and achievements to date of the Canadian Coast Guard Ship Louis St-Laurent, of a colour photograph of the Honorable Louis St-Laurent, taken in 1948 and which appeared in a Canadian Heritage/Parks Canada publication in 1995.

- *Guérin, éditeur ltée*, Montreal, Quebec: Two licences have been issued, the first one authorizing the reproduction, in textbooks to be used to teach French at the Grade 4 elementary school level, of two texts: one written by Martine Blanc published in 1974 and another written by Geoffrey Williamson published in 1960. The second licence authorized the reproduction, in a textbook to be used to teach French at the Grade 5 elementary school level, of a text written by Mathilde Alanic published in 1967.

- *Musée de la Civilisation*, Quebec, Quebec authorizing the reproduction and spotting of a photograph (unknown photographer), taken in 1965, depicting a demonstration against the war in Vietnam, December 31, 1965 in Montreal and published by Éditions du Remue-ménage in 1988. This photograph will be shown in an exhibition entitled *Des immigrants racontent* which will be held at the Museum from November 1996 to October 1997.

- *Lower Mainland WITT Association*, Vancouver, B.C., authorizing the reproduction of a drawing of a woman working on a telephone pole (artist unknown) on the first page of a resource book for Women in Trades, Technologies and Blue-Collar Work in the Lower Mainland (Vancouver).

- *Edwinna von Baeyer* and *Pleasance K. Crawford*, co-editors, Toronto, Ontario, authorizing the reproduction of all or major portions of seven articles, in the paperback version of an anthology on Canadian gardening. The Board had issued a licence in 1995-96 to these applicants authorizing the same reproduction for the hardcover version of the anthology.

- *Thérèse Potvin, s.a.s.v.,* Edmonton, Alberta, authorizing the graphical reproduction of the words and music sheets of 15 songs to be inserted in Volumes C and D of the series entitled "*Mes chansons, ma musique*" prepared by Sister Potvin. The volumes will serve as support material for educational methods recently developed by the Alberta Education Department for the music teachers at the elementary school level.

- *Dr. Gerri Sinclair, Exemplary Center for Interactive Technologies in Education (ExCITE)*, Faculty of Education, Simon Fraser University, Burnaby, B.C., authorizing the reproduction of seven photographs and a cartoon on a CD-ROM entitled "*The Prime Ministers of Canada on CD-ROM*".

- *The Glebe Centre*, Ottawa, Ontario, authorizing the reproduction of excerpts of a poem (untitled and author unknown) in the fundraising literature of the Centre.

- *Monique Dufresne*, Educational Counsellor, Val-Mauricie School Board, authorizing the reproduction of the French translation of the exercise book originally entitled "The Learning Works" (*Je suis merveilleux*, as translated by Josée Buisson).

ARBITRATION PROCEEDINGS

Pursuant to section 70.2 of the *Act*, the Board can arbitrate disputes between a licensing body, that represents copyright owners, and the users of the works of those owners. Its intervention is triggered by application by either the licensing body or the user.

In 1996-97, applications were filed, pursuant to that section, on August 13, 1996, by the Association of Universities and Colleges of Canada (AUCC) and Wilfrid Laurier University (WLU), asking the Board to set the terms and conditions for licences authorizing some 55 institutions to continue the protected uses set out in the Canadian Copyright Licensing Agency (CANCOPY) licences that were to expire at the end of that month. CANCOPY filed its own application, asking in essence that all the terms of the licences be reexamined.

On August 21, 1996, the Board issued an interim decision granting AUCC's and WLU's request to extend, on an interim basis, licences expiring on August 31, 1996. Interim licences would expire on the earlier of the date of the Board's final decision in this matter or August 31, 1997. Reasons for the interim decision were delivered on September 13, 1996. Since the Board's inception in 1989, it was the first time it issued a decision related to this regime.

On March 13, 1997, CANCOPY filed a notice with the Board to the effect that the parties had reached an agreement. Therefore, in compliance with subsection 70.3(1) of the *Act*, the Board did not proceed with the application.

COURT DECISIONS

An application for judicial review was filed against the Board's decision of April 19, 1996 dealing with SOCAN's Tariff 17. CCTA argued, among other issues, that the Board should have apportioned the royalties set out in the tariff between cable operators and service providers. It relied on subsection 3(1.4) of the *Act*, which makes operators and providers jointly and severally liable for the payment of royalties on account of the single communication that is effected when the signal generated by the latter is transmitted to its subscribers by the former. For its part, the Board had stated that this provision was entirely separate from the regulatory regime that it is required to administer. The provision merely integrated into the *Act* the private law rules governing joint and several liability, which were better left for the courts to sort out.

The Federal Court of Appeal agreed with the Board. It ruled that the sums that the various participants in the telecommunication of musical works to the public may owe to each other are not royalties even if they are payable as a consequence of the payment of the royalties by one of them. The Board, therefore, was right in deciding that it lacked the jurisdiction to make the apportionment of royalties.

The application for judicial review was dismissed.

AGREEMENTS FILED WITH THE BOARD

Pursuant to section 70.5 of the *Act*, agreements concluded between licensing bodies, acting on behalf of copyright owners, and users of the works of these owners, may be filed by any of the parties to the agreement within 15 days of the agreement. Section 45 of the *Competition Act* does not apply in respect of any royalties or related terms and conditions arising under an agreement that is filed in this manner. However, these agreements can be investigated by the Board if it is asked to do so by the Director of Investigation and Research appointed under the *Competition Act*.

Two-hundred and fifty-four (254) agreements were filed with the Board during 1996-97, compared to a total of 199 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 238 agreements granting various institutions and firms a licence to photocopy works in its repertoire. Amongst these agreements, there were those concluded with the Departments of Education of British Columbia, Yukon, Saskatchewan, Ontario and Alberta.

The Audio-Video Licensing Agency (AVLA), which is a copyright collective that administers the copyright for the owners of master audio and music video recordings has filed, for its part, 16 agreements.