



# COPYRIGHT BOARD



ANNUAL REPORT  
1998–1999

Copyright Board  
Canada



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:

I have the honour of transmitting to you for tabling in Parliament, pursuant to section 66.9 of the *Copyright Act*, the eleventh Annual Report of the Copyright Board for the fiscal year ending March 31, 1999.

Yours sincerely,

John H. Gomery  
Chairman

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**BOARD MEMBERS AND STAFF  
as of March 31, 1999**

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*Chairman:* The Honourable  
Mr. Justice John H. Gomery

*Vice-Chairman and  
Chief Executive Officer:* *Vacant*

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*Members:* Adrian Burns  
  
Andrew E. Fenus

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*Secretary:* Claude Majeau

*General Counsel:* Mario Bouchard

*Researcher-Analyst:* *Vacant*

*Assistant to the Secretary:* Lise St-Cyr

*Administrative Officer:* Ivy Lai

*Informatics Officer:* Michel Gauthier

*Members' Secretary:* Joëlle Laflamme

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## CHAIRMAN'S MESSAGE

Since my appointment was made only a short time before the end of the year which is the subject of the Report, it is not appropriate for me to comment upon the accomplishments of the Board in 1998-1999 except to say that they are remarkable considering the limited resources with which its members and personnel were working.

Fortunately, the situation in the coming period will be much improved. For the first time in a decade, the Board will be working with a full complement of members. There are reasons to hope that the budgetary problems that have plagued the Board in recent years will soon be corrected, enabling additional staff to assist and support its work; the existing personnel are insufficient in number to discharge of all of the administrative, regulatory and legal tasks which the Board is called upon to handle.

The veteran and newly appointed members of the Board view the challenges facing them with enthusiasm and determination, qualities that will be necessary if the present backlog of contested tariffs is to be reduced. The new responsibilities conferred upon the Board by Bill C-32 have added considerably to its workload. I believe that we must strive to reduce the delays that have been experienced between the initial filing of a proposed tariff and the ultimate decision of the Board.

In attempting to fulfill these objectives, I hope and expect that the decisions rendered will continue to be of the same level of excellence that has characterized the Board's work in the past.

John H. Gomery

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## MANDATE OF THE BOARD

The Copyright Board 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:

- ◆ adopt tariffs for the public performance or the communication to the public by telecommunication of musical works and sound recordings [sections 67 to 69];
- ◆ adopt 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];
- ◆ adopt 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];
- ◆ adopt tariffs 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 [formerly the Director of Investigation and Research] 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 copyright royalties payable to 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].

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## 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 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, modifies 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”) and 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”).

### *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 a hearing. 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.

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### *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 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 body 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 body or a user);
  - Issuance of licences when the rights owner cannot be located (upon request by the potential user).



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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 signal)
    - Reproduction and public performance (compulsory filing of tariffs).

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## ORGANIZATION OF THE BOARD

*Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 1999-00 (Part III of the Estimates), which was tabled in Parliament on March 25, 1999.*

**B**oard 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, has been appointed part-time Chairman of the Board for a three-year term commencing in March 1999. 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*

The position of Vice-Chairman and Chief Executive Officer was vacant at the end of March. Until that date, **Michel Héту, Q.C.**, has been the full-time incumbent of that position since the Board's inception, in 1989.

### *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).

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**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 Member of the Boards of Trustees of the Canadian Athletic Foundation, as well as Governor of Ashbury College Foundation and of the Stratford Festival Senate. She has also served on several other corporate and community boards.

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### *The Board's staff*

**T**he Board has a staff of seven 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.

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## PUBLIC PERFORMANCE OF MUSIC RIGHTS

### *Background*

Any collective society must file a statement of proposed royalties with the Board on or before the March 31 preceding the beginning of the year in which the tariff is to apply. The 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 60 days of publication. The collective societies 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.

### *Hearings*

In 1998-99, the Board held two hearings on the public performance of music. The first one was held in April and May 1998 and dealt with Tariff 22 for the years 1996, 1997 and 1998 (Transmission of Musical Works to Subscribers via a Telecommunications Service), or what is more commonly known as the “Internet” tariff, filed by the Society of Composers, Authors and Music Publishers of Canada (SOCAN). The Board undertook the examination of legal questions such as the liability of the various Internet participants, cross-border issues and the powers of the Board to vary SOCAN’s proposed tariff structure and licensees. This matter is under advisement.

The second hearing was held over the months of June, July and August 1998 and dealt with

Neighbouring Rights Tariff 1.A (Commercial Radio) filed by the Neighbouring Rights Collective of Canada (NRCC) for the years 1998 to 2002 and the *Société de gestion des droits des artistes-musiciens* (SOGEDAM) for the years 1998 to 2000. This was the first time the Board was called upon to deal with the neighbouring rights regime set up in 1997 when Bill C-32 came into force. This regime aims at fixing tariffs for the public performance of sound recordings of musical works, for the benefit of the performers of these works and the makers of the sound recordings. This matter is also under advisement.

### *Regulations Defining Advertising Revenues*

Revisions to the *Copyright Act* following the adoption of Bill C-32 (an Act to amend the *Copyright Act*), which was given Royal Assent on April 25, 1997 (S.C., 1997, c. 24), provide that the Copyright Board is responsible for approving tariffs for the performance in public or the communication to the public by telecommunication of sound recordings of musical works (commonly referred to as the “neighbouring rights tariff”). Subparagraph 68.1(1)(a)(i) of the *Act* sets at \$100 the amount of royalties that “wireless transmission systems” shall pay on their first 1.25 million dollars of annual “advertising revenues”. Subsection 68.1(3) of the *Act* gives the Board the power to define, by regulations, the term “advertising revenues”, while subsection 68.1(5) gives the Governor in Council the power to define, by regulations, the term “wireless transmission

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system”, which it did in regulations taken on May 28, 1998 (SOR/98-307).

The alternative to let the Board interpret the meaning of the term “advertising revenues” in the course of approving the relevant tariffs was considered. However, given the importance of this term in the context of neighbouring rights, the Board considered it preferable to define it by regulations, which were taken on August 31, 1998 (SOR/98-447), after receiving many comments in the context of a consultation process. The Regulations allow to determine clearly and precisely that part of a wireless transmission system’s revenues which will benefit from the \$100 special royalty rate intended to reduce the financial impact on the radio broadcasting industry of the introduction of a new tariff.

The Regulations read as follows:

#### INTERPRETATION

1. In these Regulations, “system” means a wireless transmission system.

#### ADVERTISING REVENUES

2. (1) For the purposes of subsection 68.1(1) of the *Copyright Act*, “advertising revenues” means the total compensation in money, goods or services, net of taxes and of commissions paid to advertising agencies, received by a system to advertise goods, services, activities or events, for broadcasting public interest messages or for any sponsorship.

(2) For the purpose of calculating advertising revenues, goods and services shall be valued at fair market value.

(3) For purposes of subsection (1), when a system acts on behalf of a group of systems which broadcast a single event, simultaneously or on a delayed basis,

(a) any compensation paid by the system acting on behalf of the group of systems to a system that is part of the group is part of the advertising revenues of that system; and

(b) the difference between the compensation received by the system acting on behalf of the group of systems and any compensation referred to in paragraph (a), is part of the advertising revenue of the system which acts on behalf of the group.

#### COMING INTO FORCE

3. These Regulations come into force on August 31, 1998.

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## 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 collective societies representing copyright owners whose works are retransmitted.

A collective society must file a statement of proposed royalties with the Board on or before the 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 60 days of publication. The collective societies 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*

At the request of the Copyright Collective of Canada, the Canadian Broadcasters Rights Agency, the Canadian Retransmission Right Association and the Society of Composers, Authors and Music Publishers of Canada, the Board adopted, in an interim decision dated December 29, 1998, as interim tariffs to be paid for the retransmission of distant radio and television signals during 1999, tariffs similar to the ones certified by the Board for 1998, also on an interim basis.

### *Claim by a Non-Member*

On December 15, 1998, the *Société des Auteurs, Recherchistes, Documentalistes et Compositeurs* (SARDeC) requested that the Board designate, pursuant to subsection 76(1) of the *Act*, the Canadian Retransmission Right Association (CRRA) as the collective society from which owners of copyright in texts used in the production of television programs produced by the Canadian Broadcasting Corporation (CBC) or by the *Société de télédiffusion du Québec* (STQ) could claim a share of royalties that were paid for the retransmission of distant signals between January 1, 1990 and December 31, 1997.

SARDeC claimed that it represented authors of all texts targeted in the motion and held a mandate from such authors of those texts that are its members. It also maintained that those authors were not represented with respect to those works for the purposes of the retransmission regime by any of the collective societies authorized to collect royalties pursuant to the tariffs certified by the Board and had not filed any claims with them. Finally, it stated that it reached agreements with CBC and STQ agreements which clearly state that authors of those texts are the first copyright owners in them.

On December 23, 1998, CRRA relied on five reasons to object to the motion. First, the record as constituted did not make it possible to determine whether SARDeC did indeed hold the relevant rights on the relevant works. Second, if it did, then it is a collective society subject to the provisions of sections 71 and

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following of the *Act*, and the motion is an attempt to circumvent those provisions, including the requirement to file proposed statements of royalties. Third, the motion did not specify which works are targeted in it, and as such constituted a hypothetical claim with respect to an undetermined body of works. Fourth, CRRA's constitution requires that it only represent interests held by its broadcaster members; it has never claimed to represent, or sought royalties on account of anything else, or anyone else. Fifth, all royalties received by CRRA for the relevant period have already been distributed in application of CRRA's distribution policy. Any remedies SARDeC may have lie with the broadcasters themselves, be they as a result of collective agreements between them and SARDeC or otherwise.

On December 24, 1998, the Board issued a decision designating CRRA as the collective society from which the copyright owners, and any person claiming under them, are entitled to be paid retransmission royalties, subject to the same conditions as those to which a person who has so authorized that collective society is subject. The targeted owners are: owners of copyright in texts, written pursuant to the agreement managed by SARDeC, used in the production of television programs produced by CBC or by STQ and retransmitted on distant signals between January 1, 1990 and December 31, 1997, if those owners did not authorize a collective society named in Appendix A of the Retransmission of Distant Radio and Television Signals Tariff certified by the Board for the years 1990 to 1997 to collect royalties on account of those texts.

The reasons were delivered on January 27, 1999. In its analysis, the Board stated that the retransmission regime is a universal, statutory licence scheme. Any retransmitter who meets the conditions set out in subsection 31(2) of the *Act* acquires the retransmission right for all works embedded in the signals he or she retransmits. The licence is free with respect to local signals; distant signals command the payment of royalties set by the Board. The amount of royalties is set at a level sufficient to compensate all works carried on distant signals.

The Board also stated that conversely, all copyright owners in all works carried on a distant signal are entitled to a share of the remuneration as long as they comply with the *Act*. They can get paid in one of two ways. The vast majority have formed collective societies that filed proposed statements of royalties, thereby becoming entitled to collect from retransmitters a share of the royalties, which the societies then distribute to their members. Rights owners who have not joined a collective (sometimes referred to as "orphans") can avail themselves of subsection 76(1) of the *Act* and claim their share from one of the societies targeted in the tariffs.

The Board mentioned that it is within that framework that it fulfills its role pursuant to section 76 of the *Act*, by designating the society which rights owners will be entitled to approach to claim their share of the royalties. It is important therefore to clearly understand the nature of the relationship created by the *Act* between orphan rights owners and the societies designated by the Board. On the one hand, an orphan simply cannot file a claim unless a



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designation is in place: without a designation, the orphan claimant has no remedies. On the other hand, orphans allowed to claim under a designation do not need anyone's permission to file such a claim.

The Board concluded that a claim can be filed only with a designated society, and that this can only occur *after* the Board has exercised its power of designation. Furthermore, a designation can be made absent any claim, upon request or on the Board's own motion. Therefore, it is not for the Board to decide whether or not the claim is valid. All that the designation does is to allow a person purporting to own some rights to file a claim. It is for that person and the designated society and, ultimately, for the courts to determine whether the claimant truly owns the relevant rights. The Board added that in this instance, since the designation is made for a category of works, there is no need to know who owns the rights in them or even whether those owners truly are orphans. In addition, the fact that a society's constitution prevents it from acting for certain rights owners cannot, of itself, immunize it from being designated under the *Act*: neither the Board's powers, nor the orphans' remedies, should depend on such considerations. The fact that the Board can proceed to a designation of its own can only further support the view that it can do so without knowing the extent of the targeted body of works and even without knowing what are those works or who owns rights in them. It is sufficient that the designation outlines criteria allowing orphans to know with whom eventual claims ought to be filed.

Finally, the Board dismissed two further arguments of CRRA: first, CRRA argued that any remedies SARDeC may have lie elsewhere. The Board believed that CRRA seemed to ignore the wording of subsection 76(3), which states that filing a claim with a designated society is the only remedy open to orphan retransmission rights owners. Second, CRRA also stated that this motion constituted an abuse of process. According to it, if SARDeC truly owned the rights it claims, it should have filed a proposed statement of royalties in a timely fashion and claim a share of the royalties, as the societies identified in the Board's tariffs did; having refrained from doing so, it cannot avail itself of the remedies available to orphan rights owners. The Board did not share this view; the right to file a claim pursuant to section 76 is necessarily linked to the tariffs certified by the Board. A person's status as an orphan claimant is to be determined by looking at those societies which receive a share of the royalties, not by looking at societies which could have filed a proposed statement but did not. A collective society that fails to file a proposed statement loses the right to collect royalties from retransmitters. There is no reason to believe that rights owners who are members of such a society are thereby deprived from claiming what is owed to them from those societies which received royalties on account of the retransmission of these very owners' works. The universal character of the regime only serves to bolster this conclusion. The Board's refusal to grant the motion would have necessarily resulted in a denial of justice.

*[NOTE: On January 26, 1999, CRRA filed an application in the Federal Court of Appeal for judicial review of that decision.]*

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### *Hearings*

In October 1998, the Board held a hearing on the tariffs filed for retransmission of distant radio and television signals for the years 1998, 1999 and 2000. The main issues addressed were the rate and allocation pertaining to the broadcasters' compilations, the rate structure and discounts for DTH distribution undertakings, the changes to the administrative provisions and certain allocation issues between collective societies. The matter is currently under advisement.

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## UNLOCATABLE COPYRIGHT OWNERS

Pursuant to section 77 of the *Copyright 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 1998-99, the Board issued 11 licences. Since its inception in 1989 up to the year 1997-98, the Board has issued 57 licences.

- *Charles Daudelin et l'Atelier de recherche en design interactif de Montréal*, Montreal, Quebec, authorizing the reproduction of 15 texts and 14 photographs, on an interactive CD-ROM entitled *Chaos redevenu virtuel* aiming at ensuring the timelessness of the work "Chaos" of the painter/sculptor Charles Daudelin which was created and set up at the "G" Complex in Quebec City in 1973.
- *Canadian Institute for Historical Microreproductions*, Ottawa, Ontario: the Institute is an organization which locates, preserves, catalogues and distributes early Canadiana in print form, microfiches or CD-ROMs. 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 preservation of Canadiana in Canada and elsewhere. Three licences were issued: the first one authorizing the reproduction of 621 works, the second one for 551 works and the third one for 1,152 works.
- *Loisirs de Granby*, Granby, Quebec, authorizing the reproduction on CD-ROMs and audiotapes of 18 songs well known in summer camps.
- *Société Radio-Canada*, authorizing the adaptation and production of the play *K-2* by Patrick Meyers for broadcast on CBC's French television network and *Le Réseau des Arts*.
- *Athabasca University*, Athabasca, Alberta, authorizing the reprint of two short stories as reading material in an English course: *The Tree*, by Maria Luisa Bombal, reprinted from *Short Stories of Latin America*, 1963, Las Americas Publishing Company; *In the Beginning*, by Humberto Costantini from *De por agui nomas*, 1958, reprinted from *The Eye of the Heart*, edited by Barbara Howes, 1973.
- *Éditions du Renouveau Pédagogique inc.*, Saint-Laurent, Quebec: two licences were issued authorizing the reproduction of the following works in French textbooks: the painting entitled *Rive nord du Lac Supérieur* by Lawren S. Harris and a linocut entitled *Rose Latulipe* by Henri Beaulac.

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- *University of Toronto Press Custom Publishing*, Toronto, Ontario, authorizing the reprint of the book entitled *Development and the Military in the Philippines: Military Perceptions in a Time of Continuing Crisis* co-written by Filipe B. Miranda and Ruben F. Ciron and published by Social Weather Stations, Quezin City, Philippines, in 1988.
  - *Sister Thérèse Potvin, s.a.s.v.*, Edmonton, Alberta, authorizing the graphical reproduction of 24 rounds in a compilation which she prepared and entitled *Vive les canons!*

*Memorandum of Understanding with the Canadian Copyright Licensing Agency (CANCOPY)*

The Copyright Board and CANCOPY have agreed to combine their resources to ensure the efficient and expeditious administration of applications made pursuant to section 77 of the *Act* and have entered into a Memorandum of Understanding. Hence, applications made to the Board for the use of published works, of a sort that is usually found in CANCOPY's repertoire, and where the copyright owner is unlocatable, will be referred to CANCOPY for examination. The Board however will still decide whether a licence should be issued and what the appropriate terms and royalty payment should be.

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

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## ARBITRATION PROCEEDINGS

**P**ursuant to section 70.2 of the *Copyright 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.

In 1998-99, one application was filed, pursuant to that section, on July 27, 1998, by the Canadian Copyright Licensing Agency (CANCOPY) asking the Board to set royalties and the relevant terms and conditions in a licence with the Ministry of Education, Skills and Training of the Province of British Columbia authorizing its educational institutions the right to copy works in CANCOPY's repertoire.

On July 31, 1998, the parties advised the Board that they had reached an agreement. In compliance with subsection 70.3(1) of the *Act*, the Board did not proceed with the application and the interested parties were so advised on August 5, 1998.

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## COURT DECISIONS

An application for judicial review was filed on March 4, 1998, by the Society of Composers, Authors and Music Publishers of Canada (SOCAN) against the Board's majority decision (Vice-Chairman Héту dissenting) of January 30, 1998, pertaining to Tariff 2.A (Commercial Television Stations) for the years 1994 to 1997.

SOCAN argued that the Copyright Board lacked jurisdiction to reduce the royalty rate from 2.1% to 1.8% of gross advertising revenues for the years 1994 to 1997 and to introduce an optional tariff structure with a "modified blanket licence" (MBL) for 1997. Alternatively, SOCAN submitted that the Board's decision was patently unreasonable.

The Federal Court of Appeal dismissed SOCAN's application. In a decision dated March 19, 1999, the Court ruled that it is squarely within the Board's statutory mandate and expertise to consider which factors are relevant to tariff-setting and that it has not been adequately demonstrated that the Board's decision to lower the tariff rate was "patently unreasonable" (or "clearly irrational" as that term is defined in Supreme Court jurisprudence).

With respect to the Board's introduction of the MBL (which essentially enables stations to reduce their royalty obligations to SOCAN by allowing them to deduct from their gross advertising revenues those revenues attributable to programs which do not contain music from SOCAN's repertoire, that is, music that is "cleared at source"), the Court ruled

that it must utilize the "pragmatic and functional approach" in order to ascertain the applicable standards of review once it has been determined that the tribunal had statutory authority to decide the matter before it. In the Court's opinion, the discretion accorded to the Board under the *Copyright Act* to set tariff rates and append "related terms and conditions" is sufficiently broad to encompass the MBL. To the Court, accepting SOCAN's arguments would limit the Board's jurisdiction to setting the numerical basis of the tariff and that limitation would be untenable in light of the Board's prerogative to impose terms and conditions.

The Court also viewed that the Board has the jurisdiction and obligation to fix not only the tariff rate, but also to determine the manner of calculating the revenue base to which the rate will apply. To the Court, it seemed both reasonable and necessary that the Board retain the flexibility to determine whether revenues derived from certain sources are to be excluded from the revenue base, including music commissioned by a broadcaster directly from a composer. Applying the standard of correctness, the Court was not prepared to say that the Board lacked jurisdiction to adopt the MBL or that the Board's decision was irrational. The Court concluded in saying that "the introduction of the MBL may well prove to be an unwise policy decision, but even the Board majority recognized that this issue can be revisited if the doomsday scenario outlined by SOCAN materializes."

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## AGREEMENTS FILED WITH THE BOARD

Pursuant to section 70.5 of the *Copyright 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*. The same provision also grants the Commissioner of Competition [the "Commissioner"] appointed under the *Competition Act* access to those agreements. In turn, where the Commissioner considers that such an agreement is contrary to the public interest, he may request the Board to examine it. The Board then sets the royalties payable under the agreement, as well as the related terms and conditions.

During 1998-99, 772 agreements were filed with the Board compared to a total of 1,265 filed since the Board's inception in 1989 up to 1997-98.

The Canadian Copyright Licensing Agency (CANCOPY), which licenses reproduction rights, such as photocopy rights, on behalf of writers, publishers and other creators, filed 728 agreements granting various institutions and firms a licence to photocopy works in its repertoire. Amongst these agreements, there were those concluded with Ministries of Education, Provincial governments, public libraries, corporations, non-profit associations and copy shops.

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, 27 agreements. In addition, the Board also

acknowledged receipt of 12 agreements which were filed in 1997-98 and for which the Board was not in a position to confirm their status before adopting its policy on Access to Agreements referred to below.

Finally, the *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) filed five 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).

### *Access to Agreements Policy*

Members of the public sometimes ask to consult filed agreements. At first, the Board granted free access to them, until some of the collectives started questioning this approach. Since then, access requests have been dealt with in accordance with the *Access to Information Act* (ATIA), with the attendant exceptions to disclosure, including those concerning confidential information of a financial and commercial nature. Later on, the Board concluded that section 68 of the ATIA allows it to "opt out" of the restrictions to disclosure set out in the ATIA by adopting a policy of open access to all agreements, as long as the *Copyright Act* allows the Board to adopt such an open access policy. This in turn raises practical, legal and public policy issues.

The Board has examined the question of access to agreements from two angles in order to

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clearly establish its policy on the matter. On the one hand, it can be argued that the filing mechanism exists for the benefit of the Commissioner who, alone, is granted access to agreements. In exchange for immunity from criminal prosecutions, parties file with the Board documents which would be otherwise much less readily accessible to the Commissioner, and attorn to the Board's jurisdiction to change the terms of the agreement if the Commissioner challenges them. A policy of public access could result in fewer filings, thus undermining the objective of the law.

On the other hand, it can be argued that the main objective of the filing mechanism is transparency: the filing of agreements without the public having access to them is pointless. The Commissioner is unlikely to exercise his rights under the *Act* unless pressed to do so by persons who have reason to believe that they are the subject of some discrimination by a collective society. Those persons cannot reasonably be expected to establish that they are being discriminated against if they cannot access the agreements that are the source of that potential discrimination. Thus, to be workable, the scheme requires that such person be given access to the agreements. Transparency is the price paid by those who file agreements for immunity from prosecution. According to this analysis, the Board not only could, but should adopt a more liberal access policy than what is provided for in the *ATIA* because anything else defeats the very purpose of the mechanism. The access right granted to the Commissioner can be seen as merely allowing him to consult agreements not otherwise accessible under the *ATIA* or the *Privacy Act*.

The Board consulted with interested players. It also sought the point of view of the Commissioner, who favoured an approach that would promote transparency.

In the end, the Board opted for the second scenario. In the Board's view, transparency, through public scrutiny, is essential and must be the overriding consideration if this regime is to function properly. Parties to an agreement filed with the Board are immune from quasi-criminal sanctions flowing from section 45 of the *Competition Act*. Such immunity is highly unusual. Reliance on complaints by informed industry participants with access to the agreements is clearly the preferable means of identifying cases requiring closer examination by the Board, where the Commissioner finds that the agreement may be contrary to the public interest. Furthermore, the fact that parties can claim the immunity described earlier should be a sufficient incentive to overcome the concern of any chilling effect.

Consequently, the Board issued a notice on October 1, 1998 establishing the following access policy with respect to all agreements filed with the Board pursuant to section 70.5 of the *Act*:

- 1) Access requests to agreements filed before January 1, 1999 will continue to be dealt with in accordance with the *ATIA*.
- 2) All agreements filed as of January 1, 1999 will be made available to the public.
- 3) Agreements will continue to be screened before access for the purposes of the *Privacy Act*.