



# COPYRIGHT BOARD



ANNUAL REPORT  
2000-2001

Copyright Board  
Canada



CANADA

Commission du droit d'auteur  
Canada

The Honourable Brian Tobin, 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 thirteenth Annual Report of the Copyright Board for the financial year ending March 31, 2001.

Yours sincerely,

Stephen J. Callary  
Vice-Chairman and  
Chief Executive Officer

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**BOARD MEMBERS AND STAFF  
as of March 31, 2001**

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

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

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*Members:* Adrian Burns  
  
Sylvie Charron  
  
Andrew E. Fenus

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*Secretary General:* Claude Majeau

*General Counsel:* Mario Bouchard

*Clerk of the Board:* Lise St-Cyr

*Financial Officer  
and Administrator:* Ivy Lai

*Informatics Officer:* Michel Gauthier

*Registry Clerk:* Tina Lusignan

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## CHAIRMAN'S MESSAGE

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

During this reporting year, the Board held five hearings and issued six decisions.

Three hearings pertained to the public performance of music. The first, dealing with Tariff 9 (Sports Events) of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the years 1998 to 2001, was held in May 2000; a decision was issued on September 15, 2000. The second, dealing with SOCAN's pay and specialty television tariff (17.A) for the years 1996 to 2000, was held in September 2000; the decision was released on February 16, 2001. The third, dealing with SOCAN's "concerts" tariffs (4.A, 4.B.1, 4.B.3 and 5.B) for the years 1998 to 2002, took place in March 2001; a decision was issued in the following reporting year.

One hearing was held in May 2000 on an application filed in 1999, pursuant to section 70.2, by the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC), for the use of its repertoire by MusiquePlus inc. This was the first time that the Board held an arbitration hearing and also the first time it dealt with reproduction rights for musical works. The Board issued its decision on November 16, 2000.

In October and November 2000, the Board held hearings dealing with the private copying tariff for the years 2001-2002. The Board issued its decision on December 15, 2000; reasons followed on January 22, 2001.

On September 29, 2000, the Board issued a decision certifying the tariff for the use of the repertoire of the Neighbouring Rights Collective of Canada (NRCC) by CBC Radio, for the years 1998 to 2002. The matter had been heard over nine days in November 1999 and February 2000.

On December 8, 2000, the Board set interim royalties to be paid for the retransmission of distant radio and television signals for the year 2000.

The Board issued 17 non-exclusive licences for the use of works whose copyright owner could not be located.

The Board also issued a number of preliminary orders and rulings of varying complexity, as required for the orderly processing of claims currently under examination. These matters include a proposed Internet retransmission tariff, a question that has been commented upon extensively in the media, and which will require the Board to deal with issues without precedent in the near future. Other pending matters include a tariff dealing with the reproduction of musical works by commercial radio stations and a tariff for the transmission of musical works and sound recordings by digital pay audio services.

During the course of the year, members and staff also participated in numerous professional, government and industry meetings dealing with copyright policy and law. They provided advice and guidance in intellectual property to many Canadians who contacted the Board, either in writing or by phone.

The Board also continued the development of its Web site in an effort to make it a comprehensive and timely source of information for Canadians about Canadian copyright and the activities of the Board.

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];
- ◆ set levies for the private copying of recorded musical works [sections 79 to 88];
- ◆ rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals, when the copyright owner cannot be located [section 77];
- ◆ examine, at the request of the Commissioner of Competition appointed under the *Competition Act*, agreements made between a collective society and a user which have been filed with the Board, where the Commissioner considers that the agreement is contrary to the public interest [sections 70.5 and 70.6];
- ◆ set compensation, under certain circumstances, for formerly unprotected acts in countries that later join the Berne Convention, the Universal Convention or the Agreement establishing the World Trade Organization [section 78].

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

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

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

### *Guidelines and Principles Influencing the Board's Decisions*

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

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

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

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

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

#### *Outline of the Board's Areas of Jurisdiction*

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

##### 1. Copyright in works

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

- Other rights administered collectively (arbitration of conditions of licences, upon request from a collective society or a user);
- Issuance of licences when the rights owner cannot be located (upon request by the potential user).

##### 2. Copyright in performers' performances and sound recordings

- Public performance of recorded music (compulsory filing of tariffs);
- Other rights administered collectively (optional filing of tariffs);
- Other rights administered collectively (arbitration of conditions of licences, upon request from a collective society or a user);
- Issuance of licences when the rights owner cannot be located (upon request by the potential user).

##### 3. Home taping of recorded musical works, recorded performers' performances and sound recordings

- Reproduction for private use (compulsory filing of tariffs).

##### 4. Off-air taping and use of radio and television programs for educational or training purposes (works, performances, sound recordings and communication signals)

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

#### *Royalty Proposal and Review Mechanism*

The *Copyright Act* requires that the Board certify tariffs in the following fields: the public performance or communication of music, the public performance or communication of sound recordings of musical works, the retransmission of distant television and radio signals, the



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reproduction of television and radio programs by educational institutions and private copying.

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

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

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## ORGANIZATION OF THE BOARD

**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.



Andrew E. Fenus, Adrian Burns, The Hon. John H. Gomery, Stephen J. Callary, Sylvie Charron

### *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*

**Stephen J. Callary** is a full-time member appointed in May 1999 for a five-year term. Mr. Callary has served as Managing Director of consulting firms, RES International and IPR International; as Executive Director of TIMEC - the Technology Institute for Medical Devices for Canada; and as President of Hemo-Stat Limited and Sotech Projects Limited. He has extensive international experience dealing with technology transfer, software copyrights and patents and the licensing of intellectual property rights. From 1976 to 1980, Mr. Callary worked with the Canadian Radio-Television and

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Telecommunications Commission (CRTC), the Privy Council Office (PCO) and the Federal-Provincial Relations Office (FPRO). He has a B.A. degree from the University of Montreal (Loyola College) and a B.C.L. degree from McGill University. He was admitted to the Quebec Bar in 1973 and pursued studies towards a Dr.jur. degree in Private International Law at the University of Cologne.

### *Members*

**Adrian Burns** is a full-time member appointed in September 1995 and reappointed in 2000 for one year. 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.

**Sylvie Charron** is a full-time member appointed in May 1999 for a five-year term. She was an Assistant Professor with the University of Ottawa's Faculty of Law (French Common Law Section) and worked as a private consultant in broadcasting, telecommunications and copyright law. Prior to her law studies, she worked with the Canadian Radio-Television and Telecommunications Commission for 15 years. Ms. Charron is a graduate of the University of Ottawa (B.Sc. Biology in 1974, M.B.A. in 1981 and LL.B. - Magna cum laude in 1992). Ms. Charron is a member of the Canadian Association of Law Teachers, of the *Association*

*des juristes d'expression française de l'Ontario* (AJEFO), of the Council of Canadian Administrative Tribunals, and is former Vice-Chair of the Ottawa Chapter of Canadian Women in Communications and past Executive Director of the Council of Canadian Law Deans.

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

*Note: Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2001-02 (Part III of the Estimates) and the Performance Report for 2000-01.*

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## PUBLIC PERFORMANCE OF MUSIC

### *Background*

The provisions under sections 67 onwards of the *Act* apply to the public performance of music or the communication of music to the public by telecommunication. Public performance of music means any musical work that is sung or performed in public, whether it be in a concert hall, a restaurant, a hockey stadium, a public plaza or other venue. Communication of music to the public by telecommunication means any transmission by radio, television or the Internet. Collective societies collect royalties from users based on the tariffs approved by the Board.

### *Hearings*

In 2000-2001, the Board held three hearings on the public performance of music. The first one was held in May 2000 on Tariff 9 (Sports Events) of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the years 1998 to 2001.

The second one took place in September 2000 on SOCAN's Tariff 17.A (Transmission of Pay, Specialty and Other Services by Broadcasting Distribution Undertakings – Television) for the years 1996 to 2000.

The third one, pertaining to SOCAN's "concerts" tariffs (4.A, 4.B.1, 4.B.3 and 5.B) for the years 1998 to 2002, took place in March 2001.

### *Decisions of the Board*

The Board issued three decisions in 2000-2001. The first addressed the public performance of musical works within the repertoire of SOCAN during sports events. The second set the royalties to be paid by the Canadian Broadcasting Corporation radio services (CBC Radio) for the communication of sound recordings within the repertoire of the Neighbouring Rights Collective

of Canada (NRCC). The third certified a tariff for the communication to the public by telecommunication of works within SOCAN's repertoire by pay and specialty television services.

### **SOCAN'S TARIFF 9 (SPORTS EVENTS)**

SOCAN's Tariff 9 sets the royalties to be paid for the use of musical works during sports events. The Canadian Arts Presenting Association (CAPACOA), acting for a number of constituencies including some National Hockey League venues, objected to the proposed tariff. On September 15, 2000, the Board certified the tariff for the years 1998 to 2001.

Since 1992, both the structure and the rates of the tariff reflected agreements reached between SOCAN and some user groups. The royalties were based on the number of tickets sold; a grid provides for different rates for major league, professional and amateur sporting events in five ticket price tiers, with the same per event minimum applicable to all three categories.

SOCAN asked that the Board double each of the rates as well as the minimum. It relied on a number of arguments, including a change in the use of music and the increase in ticket prices. CAPACOA's position was that SOCAN had not provided any justification for such increases, or any evidence of increase in the market value of music. Instead, it proposed using a comparison with five other tariffs which had increased little, if at all. Finally, it reproached SOCAN for not having a coherent big picture view of its tariffs overall.

The Board found the evidence on the record to be unsatisfactory. Thus, SOCAN had offered no evidence of change in the amount or manner of

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use of music since 1992, the base line year against which the increase was being sought. While being sympathetic to SOCAN's misgivings about conducting costly studies on the value of music for a tariff generating barely \$100,000 a year, the Board stated that it required more substantial evidence in order to set fair and equitable tariffs. Comparisons between this and other tariffs would have helped to understand how it fit within the larger picture of other tariffs. The Board also regretted CAPACOA's passive approach, which consisted only of criticizing the evidence and arguments of SOCAN.

This being said, a detailed comparison highlighted the extreme disparity between Tariff 9 and other percentage-based tariffs whose rates varied from 1.6 (circus, etc.) to 3 per cent (cabarets, cafes, clubs, etc.); by contrast, the share of revenues represented by Tariff 9 was two orders of magnitude lower.

Based on the evidence and arguments submitted, the Board reached several conclusions.

First, the royalty rate should be expressed as a percentage of ticket price. The tiered structure was regressive. Amateur sport and smaller venues almost always paid the minimum prices, while royalties paid by large professional events were capped. Every time a user pays the minimum fee, that user pays more per ticket than the posted rate. These difficulties rarely arise within a tariff based on a set percentage of a rate base. Such a tariff also ensures that the value of music relative to the licensee's activity remains constant, automatically adjusting for market-specific inflation.

Second, the royalty rate had to be increased. The little evidence that was available clearly demonstrated that music at sporting events was undervalued when compared to tariffs involving similar uses (e.g. circuses). These tariffs revealed rates between 32 and 64 times higher or even more, with no apparent rationale for the disparity.

As a result, a doubling of the tariff was entirely supportable.

Third, the minimum fee had to be removed. Such a fee must reflect a balance between SOCAN's actual costs and what is otherwise payable in the absence of that fee. Furthermore, such fees ought to be tailored to the business model of the industry concerned. Absent either of these conditions, the minimum becomes the price and the rate structure only serves to give a distorted view of what truly occurs.

To be in proportion with the minimum of Tariff 11 (Circuses, Ice Shows, etc.), the minimum under Tariff 9 would have to be less than \$2. The Board saw no point in imposing such a nominal minimum. However, the Board set royalties for events with free admission at \$5.

The Board then examined various ways of setting for all sports events a single rate that would give as realistic a value as possible to music at these events, while corresponding most closely to SOCAN's proposed royalty rates. This examination led the Board to set the rate at 0.05 per cent of ticket sales. Fairness dictated that the Board cap the fees at double the amount that would have been paid pursuant to the 1997 tariff.

The adoption of a new tariff formula required that the Board address the issue of complimentary tickets. Many such tickets go to persons who would not otherwise be able to attend the event (e.g. minor league teams); others are given in the hope of deriving a commercial benefit. For this reason, the Board opted to include in the rate base only half of the value of all complimentary tickets issued for an event. The Board asked that the matter be addressed in the proposed tariff for 2002.

Finally, for practical reasons, the Board decided not to impose retroactively the new regime. The amounts involved were so low that no grave injustice was done to rights holders by this delay.

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Accordingly, the Board certified only the 2001 tariff as a percentage-based tariff.

### **NRCC'S TARIFF 1.C (CANADIAN BROADCASTING CORPORATION – RADIO)**

NRCC and the *Société de gestion des droits des artistes-musiciens* (SOGEDAM) had filed proposed tariffs, one of which was directed to CBC Radio. CBC objected to the proposed tariffs and participated in hearings that took place over nine days. On September 29, 2000, the Board certified the tariff dealing with CBC Radio for the years 1998 to 2002.

As this was the second decision dealing with neighbouring rights, the Board adopted the analysis and conclusions of the commercial radio decision on several issues, including applicable guiding principles, the composition of the eligible repertoire and the reasons why the Board could not determine SOGEDAM's share. The Board also ruled that NRCC should continue to collect all royalties. The only remaining issue was the determination of the amount of royalties that CBC Radio should pay.

CBC Radio has no advertising revenues. It operates in a way that a commercial entity could not justify. This results in the need to use a proxy price. Participants asked that the Board use the royalties that commercial radio stations pay NRCC as a starting point. The Board would have preferred that the royalties be based on the amount of royalties that CBC pays to SOCAN, adjusted to reflect CBC's relative use of the repertoires of these two collectives. Several reasons led the Board to this conclusion, including the following: this is how the Board proceeded with commercial radio stations; setting CBC royalties based solely on CBC data allows CBC to negotiate the royalties that it pays for its musical input, free of regulatory constraints pertaining to the commercial radio industry; this approach makes it possible to set the royalties at a specific amount rather than adopting a tariff

formula; finally, this makes it possible to consider integrating tariff formulas.

The process of collection and analysis of eligible repertoire use data involved several twists and turns which it is not necessary to review in this report. As available data for SOCAN's repertoire was limited to CBC's four main stations, the Board opted, for this time, to use only data relating to those stations.

NRCC's analysis was based on assumptions that the Board would have considered far-fetched under any other circumstances. It involved comparing 1990 data (for SOCAN) to 1998 data (for NRCC). Before making use of such data, major adjustments would have been required, to account among other things for radical changes in the mandate and programming of each network. In the end, the Board eschewed such calculations and opted to fix royalties at a set amount of \$960,000 per year. That amount was more or less what the CBC would have had to pay (\$970,000) had the Board set royalties using other tools, however imperfect, available in these proceedings.

The Board declined to further discount this amount. It concluded that CBC receives subsidies that reflect its content requirements. As before, the Board rejected any discount to account for the benefits of CBC's activities to rights holders. It also rejected arguments that CBC uses portions of the eligible repertoire that are of lesser economic value as well as those dealing with the Corporation's financial situation.

The Board asked participants to consider the possibility of developing a database surveying CBC's use of musical works and sound recordings in its national, regional and local programming. Establishing such a database could simplify some aspects of collective administration, and might well result in a rebate on royalties.

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## **SOCAN'S TARIFF 17.A (PAY AND SPECIALTY TELEVISION SERVICES)**

Conventional television stations are subject to Tariff 2.A; pay and specialty television services are subject to Tariff 17.A. The first decision dealing with Tariff 17.A was issued on April 19, 1996. It targets the transmitter rather than the services for the payment of royalties, sets a single royalty per subscriber for all Canadian specialty (or portfolio) services and sets at 2.1 per cent of subscription revenues the royalties for pay television and American specialty (or non-portfolio) services.

Cable operators, direct broadcast satellite operators (DBS) and pay and specialty television networks objected to proposed Tariff 17.A for the years 1996 to 2000. Many factors, including an (unsuccessful) application for judicial review of the first decision and intense negotiations between interested parties, delayed the hearing of this matter. Seven days were required to deal with it, ending on September 27, 2000. On February 16, 2001, the Board issued its decision.

The Board noted that the situation had changed dramatically. The number of signals and the revenues they generate had more than doubled. The Board had reduced from 2.1 per cent to 1.8 per cent the royalties paid by conventional television stations. The number of DBS subscribers had increased from a few thousand to over one million.

Everyone agreed to maintain the current formula for Canadian specialty services, while doubling the royalties over five years. The Board was asked only to address the issue of the amount of royalties payable for non-portfolio services for the years 1997 to 2000, basically to decide whether or not the reduction from 2.1 to 1.8 per cent which conventional stations now enjoyed should be reflected in Tariff 17.A.

SOCAN asked the Board to stick to the 1996 rate of 2.1 per cent in the absence of any change in

the factors relevant to the setting of a price. Objectors argued instead that the new rate of 1.8 per cent should be used as a starting point. According to them, the issue before the Board was not why the tariff paid by conventional television stations had decreased. Unless the reasons that led to this decrease challenged the nature of the links that the Board had identified between the two sectors, the Board needed only to acknowledge the change.

The certified tariff reflects the terms of the agreement reached by the parties, for the reason, among others, that any change to the situation would entail considerable costs and inconvenience. Nevertheless, the Board invited participants to consider the possibility of adopting for portfolio services, over the short or medium term, a tariff based on the tariff applicable to non-portfolio services.

The Board did not find it necessary to engage debate over the notion of proxy and whether or not it should be used once a price has been established. It preferred to focus on the 1996 decision's finding that conventional television broadcasters and specialty services operate in similar industries, compete for the same inputs, and offer viewers a similar product: programming. The tariff for one should not create a competitive imbalance. The best way to avoid this seems to ensure that, all things being equal, a single price is applied equally to the entire commercial television industry. The Board went so far as to encourage convergence of the tariffs applicable to both of these sectors, expressing the opinion that in future, the best way to promote consistency may be to merge the tariffs and opening the door to common hearings for the whole industry.

The Board mentioned two factors that might trigger a price adjustment with respect to some sector of the industry or a single undertaking. The first is the use of music, more specifically the amount of protected music used. The second is the portion of operating expenses attributable

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to programming expenditures or the portion of programming expenditures accounted for by the royalties paid to SOCAN. The parties agreed that there were no significant differences in these regards between the services and conventional television at the moment.

Tariff 2.A had yet to be certified for 1998 and subsequent years. The Board considered certifying a tariff based on the decision to be made regarding Tariff 2.A. For practical reasons, it decided not to do so. The number of participants, the complexity of the mechanisms for sharing the burden of royalties and the requirement for SOCAN to proceed with regular distributions that need not be subsequently reviewed, were so many factors which warranted a final ruling.

DBS operators added that the tariff should discount what they called the digital dividend. They rightly maintained that they provide viewers some benefits such as better picture, better sound and more choice, that have little to do with the intellectual property they deliver. The Board viewed this as a non-issue. Royalties payable pursuant to Tariff 17.A are based only on what transmitters pay for programming. No account is taken of their revenues. Furthermore, any benefits that copyright owners of music may reap as a result of DBS undertakings expanding market demand for non-broadcast signals are no more, no less, than the benefits so reaped by other suppliers of creative inputs, including the services themselves.



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## RETRANSMISSION OF DISTANT SIGNALS

### *Background*

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

to address the issues raised in JumpTV's objection ensured that the matter would be dealt with in a timely fashion, some time during the next reporting year.

### *Decision of the Board*

On December 8, 2000, following applications by the Canadian Copyright Collective and the Society of Composers, Authors and Music Publishers of Canada (SOCAN), the Board set interim royalties to be paid for the retransmission of distant radio and television signals for the year 2001 similar to those certified for the year 2000. The Board opted to deal separately with the objection filed by 2000051 Ontario Inc. (JumpTV), who had asked that the interim tariff deal with the offering of signals over the Internet. The answer to its concerns did not lie in denying retransmitters and collectives the benefits of a stable business environment, but in dealing swiftly with its requests.

JumpTV's objection relied on the proposition that those who use the Internet to offer broadcast signals can benefit from the compulsory licensing scheme set out in section 31 of the *Act*. Collectives disagreed with this proposition, and asked that the matter be settled in a tiered hearing where the issue of whether the offering of over-the-air broadcasts over the Internet can qualify as retransmission would be addressed first. A notice dated December 21, 2000 set the matter in motion. The Board announced that it would consider JumpTV's application for an interim tariff moot if the collectives undertook not to attempt to collect royalties from JumpTV pursuant to the December 8 interim tariff; the Board received the appropriate notifications shortly thereafter. Further directions contained in the notice dealing with, among other things, how

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## PRIVATE COPYING

### *Background*

The private copying regime entitles an individual to make copies [a “private copy”] of sound recordings of musical works for that person’s personal use. In return, those who make or import recording media ordinarily used to make private copies are required to pay a levy on each such medium. The Board sets the levy and designates a single collecting body to which all royalties are paid. Royalties are paid to the Canadian Private Copying Collective (CPCC) for the benefit of eligible authors, performers and producers.

The regime is universal. All importers and manufacturers pay the levy. However, since these media are not exclusively used to copy music, the levy is reduced to reflect non-music recording uses of the media.

Private copying levies are paid in respect of the right to reproduce sound recordings and the other underlying copyright subject-matters they contain, nothing else. It is important for that reason to always keep in mind that the final product (the recorded CD) and each of the components used to create this product (blank medium, reproduction right, CD burner, time and effort required to make copy, etc.) are not the same.

### *Hearing*

A pre-hearing conference took place in June 2000 and a seven-day hearing was held during the months of October and November 2000 on private copying.

### *Decision of the Board*

On December 15, 2000, following a hearing which ended November 28, 2000, the Board certified the tariff for the years 2001 and 2002, increasing the royalties from 23.3¢ to 29¢ for audio cassettes, from 5.2¢ to 21¢ for CD-Rs and CD-RWs, and from 60.8¢ to 77¢ for CD-R Audio, CD-RW

Audio and MiniDiscs. On January 22, 2001, the Board issued the reasons for its decision.

Generally, CPCC relied on the approach used earlier by the Board while asking that the rates be doubled for CD-R Audio, CD-RW Audio and MiniDiscs, trebled for audio cassettes and increased tenfold for CD-Rs and CD-RWs. The Canadian Storage Media Alliance (CSMA) objected to any increase in the levy.

At the outset, the Board found that the situation had evolved significantly in at least four respects. First, private copying was now a commonplace activity, due in part to the flexibility, speed and user-friendliness of the tools used to create digital private copies. Second, sales of digital media had continued to grow. The Board expected sales to increase from 49 million units in 1999 to 78.5 million in 2000, 113 million in 2001 and 138 million in 2002. On the other hand, sales of blank audio cassettes have fallen much more rapidly than expected. Third, while the price of audio cassettes has risen, that of digital media has dropped dramatically, even with the levy. Fourth, the role of the Internet was growing at an impressive rate, though the impact of measures aimed at controlling music availability over the Internet remained uncertain.

On the whole, the Board stuck to the existing tariff structure and used the same formula to derive the rate of the levy (the 1999-2000 Annual Report reviews this formula step by step). The most significant changes were as follows.

First, the Board went further in its analysis of the ancillary nature of the private copying activity. A prerecorded CD is in fact a set of characteristics, including the right to reproduce the sound recording. It is not unreasonable therefore to argue that, other things being equal, this right should attract an identical remuneration. This being said,

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a number of factors tend to reduce or increase the economic significance of the activity.

For example, consumers seem reluctant to ascribe great value to intangible contents if the container has little value. It is true that the value of the content is not based on the value of the container; indeed, the value of the former is often much greater than that of the latter. This being acknowledged, as things now stand, consumers would probably resist any attempt to set the price of the reproduction right required for private copying at the same level as the reproduction right used to produce a prerecorded CD.

On the other hand, and in the longer term, the fact that some of the characteristics of a prerecorded CD (distribution, packaging) are absent from a private copy could favour some of the remaining characteristics. The contribution of the rights-holders remains the same. It is even possible to reduce the price to consumers while increasing the revenues of rights-holders. Also, most copies are of individual tracks or selections made to produce compilations rather than copies of complete albums. It may be that consumers will eventually agree to pay more for the music they want as long as they do not have to pay for the music they do not want.

In 1999, the Board had discounted its proxy by one-half for the reason, *inter alia*, that consumers copy mainly what they already own. This time, the Board discounted the levy attributable to second copies (half of all copies) by 50 per cent; it then discounted all other copies by 25 per cent to account for the fact that even where a private copy is the only one owned by the person making it, consumers still would pay less for the music than is paid in this regard for prerecorded CDs. The net adjustment to account for the ancillary nature of the copying activity was therefore 37.5 per cent.

Second, the Board adjusted the levy to reflect the fact that audio recording media have a capacity for more music than is contained on a typical prerecorded CD. The Board had declined to make the adjustment in 1999 on the grounds that

consumers primarily copied complete albums and that some technical ability was required to make a compilation on a CD. These factors had become much less significant since.

Third, for legal, practical and public policy reasons, the Board agreed with CPCC that it should take into account the fact that more than 20 per cent of all audio cassettes are zero-rated, and excluded these cassettes from the calculation of the levy.

The Board continued to believe that it cannot create exemptions and that the tariff cannot serve as a mechanism allowing certain users to purchase media without having to pay the levy. Nevertheless, it relied on the following reasons to account for zero-rated sales in the calculation of the amount of the levy. First, this does not involve creating exceptions or including the scheme in the tariff. All that is done is to take into account, in setting the amount of the levy, a mechanism that is now a market reality. Second, a tariff that did not take the zero-rating scheme into account would not be a fair tariff, since it would impose on authors the cost of what is now an essential element of the system. Third, this approach ensured that a more targeted group, more likely to engage in private copying, bore the cost of the regime. Far from weakening the nexus between the activity and the medium on which the levy is paid, it strengthened it.

It is also worth drawing the reader's attention to some of the figures used in calculating the amount of the levy, as they show significant market changes in private copying practices. Thus, the Board concluded that the proportion of audio cassettes purchased by consumers that are used to make private copies had dropped from 80 to 65 per cent. That change was attributable in part to a major shift from analog to digital private copying. The Board also concluded that consumers purchased 45 per cent of all CD-Rs and CD-RWs (up from 20 per cent) and that of those, 56 per cent were used to make private copies (up from 40 per cent).

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The Board decided not to phase in the increase in the levy. That amount was the logical conclusion of the approach the Board considered the fairest under the circumstances. Furthermore, the price of digital media could not keep on falling indefinitely. It was consequently important to take advantage as quickly as possible of the structural changes taking place in the market if manufacturers and importers were to have the opportunity to make the necessary adjustments while at the same time minimizing the apparent impact of the levy on consumers.

The decision anticipated that the levy would raise approximately \$26.9 millions in 2001 and \$32.3 millions in 2002.

Less than nine months elapsed between the publication of the proposed tariff and that of the approved tariff on December 15, 2000. The Board noted that this would have been impossible to achieve without the diligent cooperation of CPCC, CSMA and their counsel.

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## ARBITRATION PROCEEDINGS

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

### *Agreement*

On August 25, 2000, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) filed a notice with the Board that an agreement had been reached with the *Association québécoise de l'industrie du disque, du spectacle et de la vidéo* (ADISQ) on royalties and related terms and conditions of a licence for the reproduction of works of SODRAC's repertoire. Pursuant to subsection 70.3(1) of the *Act*, the Board did not proceed with the application filed by SODRAC in 1999 and so advised the parties on September 5, 2000.

### *Hearing*

In May 2000, a pre-hearing conference and a five-day hearing took place on an application filed by SODRAC in 1999 pursuant to section 70.2 for the use of its repertoire by MusiquePlus inc.

### *Decision of the Board*

On August 31, 1999, SODRAC asked that the Board set the terms and conditions of a licence for the use of its repertoire by MusiquePlus inc. between September 1, 1999 and August 31, 2002. On November 16, 2000, the Board issued its decision.

From the outset, the Board noted that any attempt at characterizing the decision as a precedent would be ill-advised. This was the first time that the Board dealt with the reproduction right for musical works. It was also the first time that the

Board addressed a matter governed by section 70.2 of the *Act* and settled a dispute rather than certifying a tariff applicable to all users within a given group. Finally, the decision endorsed the understandings reached by the parties without the Board feeling the need to consider their appropriateness.

SODRAC is a collective society which administers the reproduction right in musical works. Unlike the situation in the performance rights sector, SODRAC is not alone in the business of the collective administration of reproduction rights. Indeed, it does not invariably hold all of the rights on titles that are part of its repertoire.

MusiquePlus inc. operates two French-language specialty television services: MusiquePlus and MusiMax (the services). The services derive their revenues from advertising and subscriptions. MusiquePlus inc. is a partner in a company which produces programs designed mainly for the services, and occasionally retailed to other broadcasters.

At the core of the services' programming is the video-clip, which relies on musical content for its very existence. Music represents 90 per cent of the services' air time; approximately one third of that music comes from SODRAC's repertoire. Both services rely heavily on program repetition during their broadcast day. They make a lot of copies of musical works, and broadcast only copies they have made. The services use the reproduction right in such way as to generate significantly greater added value, compared to conventional broadcasters.

SODRAC asked 1.58 per cent of the revenues of MusiquePlus and 1.8 per cent of those of MusiMax. It also requested inclusion in the licence of several conditions dealing with, among other things, the fixation, reproduction, use and storage of authorized copies. MusiquePlus inc.

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proposed instead a flat rate of 0.15 per cent, and questioned SODRAC's right to control the use of the reproductions it authorizes or to be remunerated for such use.

The parties agreed to take as a starting point the royalties that SODRAC receives from the TVA and TQS networks, adjusted to take into account the fact that the services make greater use of music. They also agreed that the royalties should be based on the revenues of the services. SODRAC would have increased the rate to take into account the fact that the services make greater use of foreground music and the large number of copies made of the same clip. MusiquePlus inc. would have lowered the rate to take into account the fact that the services air the same programs several times. The Board rejected any adjustment for these factors.

The number of copies is of little importance, especially since SODRAC gets paid according to the revenues generated by broadcasting activities. For the same reason, there was no need to evaluate intermediate copies. Likewise, there was no need to reduce the rate on the ground that the services rerun the same programs and frequently repeat the most popular clips. Reruns occur as a means of generating additional income; a rate based on income takes this factor into account. It may be presumed that viewers attach greater value to the broadcast they are watching, no matter whether or not it is a rerun, than to an alternative program. Finally, licences negotiated freely usually limit the number of authorized broadcasts, which shows that reruns have value. Neither did the Board take into account the fact that the services use a high proportion of foreground music, as SODRAC had not shown that the distinction was relevant from the user point of view.

After alluding to certain methodological difficulties, the Board set out to calculate the royalties, using on the whole the approach put forward by the participants. It set a single rate of 0.87 per cent of income. Applying this rate, the

amount of royalties payable for the year ending August 31, 1999 would have been \$163,560.

The dispute also raised a number of subsidiary issues. Thus, SODRAC wanted to collect royalties for the use of music on the services' Web sites. Since these sites are used to attract viewers, the Board concluded that the value of the copy made should be assessed on the basis of the viewing value of the program towards which an attempt is made to attract the visitor.

The licence also targeted compilations intended for airlines. The Board used as a starting point a rate of 3 per cent, the rate which the application of the formula used to set the main rate would have triggered; that rate is then discounted to account for the use of music which is not in SODRAC's repertoire. Under the licence, only the making of a master tape is allowed. It is up to the airlines to go to SODRAC if they need a licence in this regard.

MusiquePlus inc. asked that it be allowed to reproduce its programs for sale to other broadcasters. SODRAC did not want to grant a blanket licence for this use, adding that the Board cannot oblige it to grant a blanket licence covering all of its repertoire. The Board concluded that it had the power to issue the licence requested: SODRAC administers a licensing scheme covering the contemplated use and MusiquePlus inc. wanted a licence. The licence was limited to the resale of programs first produced for broadcast by the services, since apparently, no programs were being produced for the exclusive use of third parties. MusiquePlus inc. may sell these programs to whoever it thinks fit, without having to first ensure that the buyer holds a SODRAC licence. However, it is required to keep SODRAC informed of program sales, so that SODRAC can take any measures it deems necessary.

MusiquePlus inc. claimed that SODRAC, in an attempt to limit the purposes for which copies made pursuant to the licence might be used,

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sought to introduce the notion of a destination right. That right, which does not exist in Canada, allows rights holder to demand additional royalties from third parties when there is a change in the destination of an otherwise legally acquired copy. For its part, SODRAC argued that it merely sought to include in the licence terms and conditions that are customary in the business.

The Board agreed with SODRAC. The collective was not requesting that MusiquePlus inc. pay for copies it acquires from third parties, but only for those copies that it acknowledges making itself. Neither did it ask to be paid for any subsequent changes of destination of the copies made pursuant to this licence, presuming that MusiquePlus inc. might dispose of them. Finally, it did not request control of the use of copies made by parties other than MusiquePlus inc., but only control of the use made by MusiquePlus inc. of the copies it makes.

Since what was involved was a contractual issue, a determination had to be made as to whether SODRAC could, contractually, seek to oversee the use by MusiquePlus inc. of the copies it made. In this regard, the principle of freedom of contract should prevail. Canadian copyright law appears to allow, but does not require, the setting up of such contractual conditions. In fact, agreements by which MusiquePlus inc. acquires programming, like those under which it licenses its own, appear to include provisions dealing with the uses that may be made of a copy. Since what was involved here was an arbitration, the Board found itself substituted to the will of the parties and could accordingly impose on them whatever they could have agreed to themselves.

The licence also authorizes, for the purpose of self-promotion, the synchronization of any musical work used in a program with images excerpted from the same program, subject to any provisions to the contrary that may be found in agreements entered into by SODRAC with foreign collective societies. SODRAC is required

to provide any documentation to this effect to MusiquePlus inc. so that it can act accordingly.

The parties agreed that the licence was to come into force on September 1, 1999. The Board had already ruled in this same decision that it could impose on the parties whatever they could have agreed to. Since there was no doubt that the parties could, at the time the decision was issued, have agreed to a licence coming into force on September 1, 1999, the Board was able to grant the parties' request.

The Board consulted the parties while developing the text of the licence. Their numerous suggestions have greatly helped to simplify and clarify the wording. The Board intends to make use of this process more often in the future.

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## UNLOCATABLE COPYRIGHT OWNERS

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

By their very nature, applications made pursuant to section 77 of the *Act* are as varied as there are protected uses. Sometimes, the issues raised are quite novel. Sometimes success is achieved not by issuing a licence but by helping the applicant to contact the copyright owner whose whereabouts had until now remained unknown.

To date, the Board knows of only one instance of a copyright owner claiming royalties for a licence issued by the Board. This person had inherited his brother's rights. During an Internet search, he noted that his brother's name was mentioned on the Board's Web site. He was subsequently able to contact the copyright collective to which the royalties had been paid and to establish ownership of the work for which the licence had been issued.

In 2000-2001, the Board issued the following 17 licences, totalling 96 licences issued since the Board's inception in 1989.

- *National Library of Canada* (NLC): three licences were issued authorizing the digital reproduction and communication to the public of works on NLC's Web site (1) for works on Oscar Peterson in the exhibition "Oscar Peterson - A Jazz Sensation, Une sensation jazz"; (2) for book cover illustrations in the exhibition "The Secret Self: An Exploration of Canadian Children's Literature"; and (3) for excerpts of works in the exhibition "The Canadian Memory/ Mémoire du Canada".
- *Supreme Court of Canada*, authorizing the reproduction of a photograph of Justice J.W. Estey in a book commemorating the 125<sup>th</sup> anniversary of the creation of the Supreme Court of Canada.
- *Guérin Éditeur Limitée*, Montreal, Quebec, authorizing the reproduction of an excerpt of a poem written by Louise Dulude-Bennett, in a textbook to be published by the applicant.
- *Éditions du Vermillon*, Ottawa, Ontario, authorizing the reproduction of an excerpt of a work written by Rodolphe Girard, in an anthology prepared by René Dionne. *Hilda M. Dueck*, Toefield, Alberta, authorizing the reproduction of a single copy of prints of Elwin (or Edwin) Edwards' paintings *A June Morning* and *September Eve* for personal use.
- *Conseil de la langue française*, Quebec, Quebec, authorizing the reproduction of a book cover published by Granger Frères in 1956 and a cartoon by Henri Letondal, in a work published by the applicant and Fides.
- *Judy Dueck*, Toefield, Alberta, authorizing the reproduction of a single copy of the print of Elwin (or Edwin) Edwards' painting *September Eve* for personal use.
- *Canadian Institute for Historical Microreproductions* (CIHM), Ottawa, Ontario, authorizing the reproduction of 44 works, for preservation, cataloguing and distribution of early Canadiana in print form, microfiches or CD-ROMs.
- *Harcourt Canada Limited*, Toronto, Ontario, authorizing the reprint of a book written by Robert B. Moore.
- *Donald Rutherford*, Abbotsford, B.C., authorizing the reproduction of various articles published in the *Wainwright Star*



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newspaper during the years 1908 to 1918 in a reference book on the history of Wainwright, Alberta during these years.

- *Eileen Roycroft*, Simpson, Saskatchewan, authorizing the mechanical reproduction of musical works on CD-ROM, namely “The Storm” by Henry Weber, arranged by Mort Glickman, “Laughing Water” by R.H. Agar, “Edelweiss Glide Waltz” by F.E. Vanderbeek, “Royal March” by S.E.P. Winner, and “The Whip-Poor-Will’s Song” original melody by Harrison Millard arranged by Miss Ida.
- *The Beaver (Canada’s History Magazine)*, Winnipeg, Alberta, authorizing the reproduction of an image of Kenneth Keith Forbes’ painting “Girl Ironing”.
- *Abigail Richardson*, Toronto, Ontario, authorizing the musical adaptation for choir of Kathryn Munro’s [also known as Kathryn Tupper] poems *Now Winter Comes*, *Noel* and *At Christmastide*, and the musical adaptation for tenor and piano of the same author’s poems *Ghosts*, *The Deserted House* and *Dusk*.
- *Pierrot Concerts*, Ottawa, Ontario (for The Somers Recording Project), authorizing the use and mechanical reproduction of Diana Skala’s poem “A Bunch of Rowan” adapted by Harry Somers in the musical work of the same name and published by Broadcast Music, Inc. in 1948.
- *Groupe Beauchemin éditeur ltée*, Laval, Quebec, authorizing the reproduction of an illustration of Séraphin Poudrier created by Michèle Goudro as per Claude-Henri Grignon’s instructions and published in Claude-Henri Grignon’s novel *Un homme et son péché* by *Les Éditions internationales Alain Stanké* in 1977.

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## COURT DECISIONS

### *SOCAN's Tariff 2.A (Commercial Television)*

On April 6, 2000, the Supreme Court of Canada dismissed with costs SOCAN's application for leave to appeal from the decision of the Federal Court of Appeal issued on March 19, 1999, which dismissed the application for judicial review of the Board's decision issued on January 30, 1998 dealing with Tariff 2.A (Commercial Television Stations) for the years 1994 to 1997 [see page 22 of the 1998-1999 Annual Report].

### *Private Copying*

On December 17, 1999, the Board set the levies to be paid pursuant to the private copying regime for 1999 and 2000. Members of the Canadian Storage Media Alliance challenged that decision on the ground that the Board has misinterpreted the definition of "audio recording medium" set out in section 79 of the *Act* in ruling that blank CDs were media "of a kind ordinarily used by individual consumers" for the purpose of making private copies.

On June 14, 2000, the Federal Court of Appeal dismissed the application for judicial review. The issue, though one of law, fell squarely within the jurisdiction of the Board. It was polycentric in nature, dealing with the interests of artists, manufacturers, importers, consumers who record sound, consumers who do not record sound and others. The purpose of the regime was mainly an economic one. Accordingly, even absent a privative clause, considerable deference was due to this Board on this question.

The Court ruled that the Board, in interpreting the provision, had correctly focussed on usage by individual consumers, not the use of the product generally. The object of the regime is to compensate rights holders for private copying activities. Such a scheme has to rely on rough estimates. The main goal was to be as fair and equitable as possible to rights holders, those who

use their works as well as those upon whom the levy may be imposed but who do not copy the work. The Court also noted that the Board, after concluding that the products in question fell within the definition, reduced the levy to reflect the fact that only a small proportion of the products were actually used to record music. In the Court's view, such a result seemed more in harmony with the statutory scheme.

### *Retransmission*

On December 24, 1998, pursuant to subsection 76(1) of the *Act*, the Board designated the Canadian Retransmission Right Association (CRRA) as the collective society from which certain rights owners would be entitled to claim retransmission royalties [see page 15 of the 1998-1999 Annual Report]. CRRA challenged that decision on the grounds, among others, that the relevant works (television scripts) were not amenable to retransmission, that the relevant rights holders were not eligible to claim under the "orphans" provision of the retransmission regime, that there was no applicable tariff and that CRRA was unable to deal with the relevant claims. On August 28, 2000, the Federal Court of Appeal ruled that the sole issue that the Board had decided was the designation of CRRA as the collective society from which certain owners of copyrights could make a claim for a share of royalties. In coming to its conclusion, the Board had made no error which warranted the Court's intervention. Accordingly, the application for judicial review was dismissed.

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## AGREEMENTS FILED WITH THE BOARD

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

In 2000-2001, 384 agreements were filed with the Board, totalling 2,910 agreements filed since the Board's inception in 1989.

The Canadian Copyright Licensing Agency (CANCOPY), which licenses reproduction rights, such as photocopy rights, on behalf of writers, publishers and other creators, filed 199 agreements granting various institutions and firms a licence to photocopy works in its repertoire. These agreements were concluded with various educational institutions, public libraries, corporations, non-profit associations and copy shops.

The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) filed 150 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 rightsholders. COPIBEC was founded in 1997 by *l'Union des écrivaines et écrivains québécois* (UNEQ) and the *Association nationale des éditeurs de livres* (ANEL). Most of the agreements filed in 2000-2001 have been concluded with municipalities in the Province of Quebec.

The Audio-Video Licensing Agency (AVLA), which is a copyright collective that administers the copyright for the owners of master and music video recordings has filed, for its part, 32 agreements.

The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) filed one agreement which it reached with the *Association québécoise de l'industrie du disque, du spectacle et de la vidéo* (ADISQ). SODRAC administers royalties stemming from the reproduction of musical works. It represents some 4,000 Canadian songwriters and music publishers as well as the musical repertoire of over 65 countries.

Finally, the Canadian Broadcasters Rights Agency (CBRA) filed one agreement pertaining to commercial media monitoring. CBRA represents various Canadian private broadcasters that create and own radio and television news and current affairs programs and communication signals.

Furthermore, an Amending Agreement made between CANCOPY, COPIBEC and the Government of Canada was filed clarifying and modifying the authorities, privileges, roles and responsibilities of the parties in relation to the initial agreement which was reached in May 1994. This agreement authorizes the photocopying of any published work whose authors or publishers are represented by the two collectives for the period April 1, 1991 to March 31, 2001.