Speaking Notes for
the Honourable Justice William J. Vancise
Chairman of the Copyright Board of Canada

[Text is in language of delivery]

Annual Convention of the
Canadian Association of Broadcasters
(Business Session – Breakfast with the Copyright Board)

Vancouver, Sunday, November 5, 2006

This morning, I want to do three things. I want to dispel some misconceptions about the role of the Copyright Board of Canada, the way it functions and the way it treats copyright users in general, and broadcasters in particular. I want to explain why the Board and broadcasters disagree on certain issues. I will also give you some suggestions about how to make a point when a tariff is being considered. In doing so, I will stay away from anything that may arise in the context of the commercial radio tariff, which the Federal Court of Appeal recently sent back to us for re-determination.

Let's deal first with misconceptions.

The *first misconception* is that the Board protects the interest of copyright owners more than users. In fact, the Board's role is to maintain a balance between copyright owners and users. It listens to what users and collectives have to say. Some of the factors it takes into account always favour users, not copyright owners. For example, accounting for ability to pay can decrease an otherwise fair tariff; it never increases it. That is why the radio tariff is lower for stations with annual revenues of less than 1.25 million dollars.

A *second* misconception is that the Board increases the users' burden more often than it lowers it. Commercial television stations paid the Society of Composers, Authors and Music Publishers of Canada (SOCAN) 2.4 per cent of their revenues in 1985; that declined to 1.8 per cent in 1997, a saving over 12 million dollars per year. Pay and specialty television services rates decreased from 2.1 to 1.8 per cent in 1997, a saving or more than 6 millions per year. The modified blanket licence allows television stations to lower their royalty payments substantially. Radio stations that play music less than 20 per cent of the time pay at a lower rate, a saving in the order of $3 million per year. In 2002, Stephen Callary, Vice-Chairman of the Board, who could not be here today, told this same association that because of these decisions, the industry had saved between $15 and $20 million per year. Today, that's $20 to $25 million per year. I could go on, but I think you get the point.

La *troisième* perception que je voudrais corriger est celle voulant que la Commission laisse les sociétés de gestion agir à leur guise. Les sociétés ne le croient pas, en tout cas. Elle savent par expérience que nous n'approuvons pas les tarifs à la légère. La Société canadienne de gestion des droits voisins au Canada (NRCC) l'a appris dans le dossier de la musique de fond; elle n'a pas obtenu ni le taux qu'elle voulait, ni un bon nombre des autres modalités qu'elle recherchait. Même lorsque personne ne s'oppose au tarif, la Commission pose des questions et teste la preuve et les arguments des sociétés. La Société canadienne de perception de la copie privée (CPCC) s'en est rendue compte durant les audiences sur la copie privée qui se sont tenues il y a quelques semaines.

Of course, copyright owners and collectives enjoy certain rights. Generally speaking, copyright owners are not forced to join collectives, and collectives in turn are not forced to file tariffs. That is because the Copyright Act, not the Board, says so. If that affects the way you conduct business don't call us, call your MP. That is copyright policy, and we try to avoid "doing" copyright policy.

A fourth and, for today, final misconception is that the Copyright Board does a worse job of setting royalties than its foreign counterparts. In my opinion, the way we do our work compares favourably with other copyright tribunals. To some, we are even the benchmark.

Some complain that Board proceedings cost too much and are too complicated, that the obligations of disclosure are too onerous and, that it takes too long for the Board to render its decisions. Some of these issues are real; they also exist elsewhere. In the United States, consent decree proceedings can stretch over years, even decades. The rebuttal phase of the current proceeding before the US Board dealing with the streaming of recorded music is scheduled to last 25 days; depositions ran in the hundreds of thousands of pages and the US Board had to rule on hundreds of objections to interrogatories. The British hearings concerning music over the Internet were scheduled for two *months* this Fall until the matter was settled in part. In one case, the British Tribunal awarded costs of close to $2 million.

Il faut garder à l'esprit que la Commission est capable d'adapter des procédures à chaque cas. Les parties non représentées par avocat ont constaté que le personnel et les membres cherchent à les accommoder. La Commission cherche habituellement à procéder de façon aussi informelle que possible. Si les participants et leurs procureurs acceptent d'accélérer le processus, de traiter uniquement de questions pertinentes et de demander moins d'information de la part des autres, nous sommes prêts à les aider.

So much then for misconceptions. Let me now say a few words about certain issues where broadcasters and the Board tend not to see eye to eye.

Some say that the Board takes no account of the fact that broadcasters now have to pay for more rights. To a certain extent, this is correct. There are many reasons for that. The first is that section 90 of the Copyright Act states that the emergence of neighbouring rights cannot in itself be used to justify lower rates for SOCAN or CSI [the corporation that acts on behalf of the Canadian Musical Reproduction Rights Agency (CMRRA) and the *Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada*.

(SODRAC)]. The second is that if Parliament creates a right, the Board takes for granted that it must be worth something: would you give something away for free? On the other hand, we do try to account for the fact that other rights have to be remunerated. And ability to pay also has an important role to play here.

It is also said that the Board should merge hearings into related tariffs more often. The Board used to set tariffs for the performance or communication of musical works, period. Now, just for radio, there could be tariffs for the communication and the reproduction of the music and of the sound recordings: that's four potential tariffs. Setting tariffs targeting connected uses requires taking into account the interrelations between the rights, their relative importance and other factors. This is why, from the very first neighbouring rights hearings, the Board set the stage so that the SOCAN and NRCC tariffs could be examined at the same time and even merged. But the Board can't merge the examination of tariffs if no tariffs are filed or, as is the case for the right to reproduce sound recordings, the right is not administered collectively. Also keep in mind that sometimes, it is the objectors who oppose the merged examination of tariff, as the CAB did in 2001 with respect to SOCAN's conventional and non broadcast television tariffs.

Others would like the Board to take foreign (meaning US) royalty rates into account more often. That is understandable. For all sorts of reasons, performing royalty rates tend to be lower in the US than in Canada. We find US and other foreign rates informative. We sometimes use them as a reality check. Generally, though we do not use foreign prices as starting points. Markets are different. Rights are different. Often we do not know how prices were arrived at. On the whole, then we think that we are better off looking at what happens in Canada.

A final point concerns the contributions that broadcasters make to the artistic community in general, and to the music industry in particular. The CAB has asked the Board to lower the tariffs on account of these contributions for at least 20 years, and the Board has always refused. The reasons for this remain the same. First, to act as CAB asks would be to account for the public policy decisions of others, something the CAB has said it does not want the Board to engage in. Second, the Board sets tariffs because the Act creates rights. It has no say on the nature or existence of the rights. By contrast, the CRTC decides whether or not to impose the contributions in the first place. It can abolish the contributions; we cannot abolish the tariffs. Third, the players who get the money are not always the same. FACTOR/MUSICACTION programs target the production of records. The Board's tariffs provide remuneration not only to record

producers, but also to performers, authors and composers. Is it logical then to ask that their royalties be discounted on account of FACTOR/MUSICACTION?

I come now to how best to make your views known to the Board when a tariff is under examination. For starters, looking at us like at the CRTC may not always be a good idea. We are small; they are big. They hold a power of life and death; we just regulate the price of a few creative inputs. Broadcasting policy is their bread and butter; copyright policy is not ours. Both the CRTC and the Board are rate regulating bodies, but the Board functions as an administrative tribunal. We need evidence; and because we're small, we have to rely largely on you to provide us with that evidence. We are not bound by rules of evidence, but we must rule based only on the evidence we have, after it has been tested by collectives and objectors. That is why we hear witnesses, and why these witnesses are sworn and cross-examined. By contrast, it is possible for the CRTC to handle applications without hearing witnesses: even in competing licence applications, the filings of the applicants can speak for themselves.

What then, can you do to best get your point across? You can start by looking at how the Board goes about setting tariffs. In a nutshell, it examines the economic arguments and models presented to it. It looks at similar uses. It favours models that are reliable, stable and for which the information needed is readily available. If none is available, it will occasionally define an area of confidence within which a rate can be set.

Lorsqu'elle fixe les taux pour des droits reliés, la Commission cherche les indices dans la Loi et dans le marché lui permettant de décider si les prix devraient ou non être différents. Toutes choses égales, le répertoire de la NRCC vaut la même chose que celui de la SOCAN parce que la Commission n'a rien trouvé dans la Loi ou ailleurs qui justifie que le prix soit différent. En copie privée, par contre, il était clair que les droits des interprètes et des producteurs valaient ensemble davantage que ceux des auteurs, et la Commission en a tenu compte dans l'établissement du prix et du partage des redevances.

When many rights are used, talk about their relative importance. Radio pays three times as much to play music as they do to copy it because radio can operate (although with difficulty) without copying music, but not without playing it. By contrast, ringtone suppliers pay twice as much to *copy* music as they do to telecommunicate because for them, plays are less important than copies. In the world of the Internet, it may well be that the ratios will vary depending on whether what is involved is a permanent download or a stream.

The Board always considers the value of music for users. Value is given in relation to the benefits it provides to users. A higher contribution to revenues or profitability would tend to indicate a higher value of music: users within that group would generally be ready to pay a higher price for the music. This makes it important for you to provide the Board with information that will help it determine the value of music to you. Provide us with the best possible evidence on how you see music contributing to your industry and your individual stations, with well researched analysis on what the value of music is, and on how to set a tariff accordingly. Don't tell us that it's important to you and then ask to pay close to nothing for it. Tell us how you use the right and what value you derive from that use. If the use is one that is new to you, tell us why you decided to make that use, the sort of efficiencies you have derived from that new use and the sort of costs that are associated with that new use. If the use is one you already make, tell us whether the use has increased, decreased or remained the same in quantity, in importance and in relation to other creative inputs.

Past experience shows that broadcasters have been very reluctant to share relevant information with the Board. The Board has complained about this in the past, calling the conduct of some radio station operators "systematic obstruction".

The worst thing to do is to only provide evidence that seeks to discredit the collective's proposed approach. Collectives will get a tariff, because they're entitled to one. The best way to respond to a collective's proposed methodology is to suggest a better alternative that the Board can accept and use. That is how the radio industry got the low music use discount. You cannot expect the Board to adopt the alternative approach you want if it does not know what that alternative approach is and why it may be helpful. And you cannot expect those whom you ask to present your case to the Board to develop a persuasive argument if you don't give them the materials — the evidence — that they need to do their job properly. If you refuse to fund the studies and expert analysis necessary to support an alternative approach, there is little that they can do. The Board requires proof and you have an obligation to provide your lawyers with the resources they need. Good advocacy will only get you so far.

In conclusion, I want to thank you for your invitation to speak to you and invite your questions. I have with me from the Copyright Board, Mr. Claude Majeau, Secretary General, Mr. Mario Bouchard, General Counsel and Mr. Gilles McDougall, Director of Research, and we are gladly willing to respond to your questions.