Copyright Board of Canada

Annual Report
2009-2010

Copyright Board
Canada

Commission du droit d'auteur
Canada

CANADA

The Honourable Tony Clement, 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 twenty-second Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2010.

Yours sincerely,

Claude Majeau

Claude Majeau
Vice-Chairman and
Chief Executive Officer

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Chairman's Message

This is the fifth annual report in which I have the opportunity to describe the Board's activities during the past fiscal year.

In 2009-2010, the Board held three hearings. One in May 2009, when it considered, as a preliminary issue, whether the Neighbouring Rights Collective of Canada (NRCC) – now renamed Re:Sound – is entitled to equitable remuneration pursuant to section 19 of the *Copyright Act* for a published sound recording that is part of the soundtrack of a motion picture performed in public (NRCC Tariff 7) and a television program communicated to the public by telecommunication (NRCC Tariff 9). In November 2009, the Board examined, again as a preliminary issue whether there exists a sub-category of CDs, described as "professional CDs", that are not ordinarily used to copy music, and to fix the Private Copying Tariff levies for 2010. Finally, in December 2009, in a joint hearing, the Board heard both the SOCAN (2006-2010) and NRCC (2006-2011) tariffs for CBC radio.

The Board issued 14 decisions during the fiscal year. Five dealt with the public performance of music and two of them also included the reproduction of musical works – as follows:

- Satellite Radio Services (SOCAN, NRCC and CSI)
- Background Music Suppliers (SOCAN Tariff 16)
- NRCC Tariffs 7 and 9 [Preliminary Issue]
- Application for a joint hearing re: Online Music Services (SOCAN and CSI)
- Pay Audio Services (SOCAN and NRCC)

Five of the remaining decisions were arbitrations: four to set interim licences and one to determine whether to join two applications. The Board also certified the Access Copyright tariff for educational institutions for the years 2005-2009 and CBRA's tariff for media monitoring for the years 2009-2010.

Finally, it dealt with two private copying decisions. The first, rendered on October 19, 2009, for a request to vary the 1999-2007 certified tariffs and the second to fix an interim tariff for the year 2010.

All of these decisions are described in greater detail in this report.

Ten licences were also issued under the provisions of the *Copyright Act* which permit the use of published works for which the copyright owners cannot be located.

In 2009-2010, the Board considered and ruled on requests for arbitration filed by SODRAC to fix the terms and conditions of licences for the reproduction of musical works by the Canadian Broadcasting Corporation and Les chaînes Télé Astral and Teletoon. The Board ordered that all the arbitrations be heard in a joint proceeding in June 2010.

SODRAC also filed a request for arbitration concerning MusiquePlus. This case is scheduled for November of 2010. SOCAN's and CSI's request for tariffs for online music services will also be heard in June 2010.

Finally, Access Copyright's tariff for the reprographic reproduction of works in its repertoire by provincial and territorial governments for the years 2005 to 2014 is scheduled to be heard in November 2011.

Last year Stephen J. Callary, Vice-President and Chief Executive Officer, and Sylvie Charron, Member, left the Board after serving two five-year terms. Francine Bertrand-Venne also left the Board after serving a five-year term. I thank them for their dedicated service and for their contribution to the Board and to the industry as a whole.

Mr. Claude Majeau, who has distinguished himself as Secretary General of the Board for the last 16 years, was appointed Vice-President and Chief Executive Officer in August 2009 for a five-year term. His professionalism, dedication and expertise will be a great asset to the Board. In addition, Mr. J. Nelson Landry was appointed in February 2010 as a part-time Member for a five-year term. Mr. Landry's experience and knowledge in the area of intellectual property will be valuable to the Board. I welcome both of them.

Finally, in my capacity as Chairman of the Copyright Board, I was invited to speak at the annual IPIC-McGill Summer Courses in Intellectual Property on August 11, 2009. I took this opportunity to highlight the challenges the Board has faced during the last 20 years and how legislative and judicial reform of copyright law have influenced it. The speech is available on the Board's Web site.

On December 1, 2009, a remarkable event was organized by the Copyright Bar to celebrate the Board's 20th anniversary. The celebration was attended by the Honourable Tony Clement, Minister of Industry, former Chairmen, Vice-Chairmen, Board Members and staff. The Minister paid tribute to the Board and also noted some of the challenges that lay ahead. On behalf of the Board, I wish to thank all those who organized this very successful event and those who graciously attended.

In conclusion, I wish to thank my colleagues, past and present, as well as the Board's personnel for their support and assistance during this very busy year. The Board is fortunate to have qualified and dedicated employees who truly bring meaning to the concept of public service. Their expertise and work ethic make the work of the Board possible.

The Honourable Justice William J. Vancise

Mandate of the Board

The Copyright Board of Canada was established on February 1, 1989, as the successor of the Copyright Appeal Board. The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective-administration society. Moreover, the Board has the right to supervise agreements between users and licensing bodies, issue 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.

The *Copyright Act* (the "*Act*") requires that the Board certify tariffs in the following fields: the public performance or communication of musical works and of sound recordings of musical works, the retransmission of distant television and radio signals, the reproduction of television and radio programs by educational institutions and private copying. In other fields where rights are administered collectively, the Board can be asked by a collective society to set a tariff; if not, the Board can act as an arbitrator if the collective society and a user cannot agree on the terms and conditions of a licence.

The Board's specific responsibilities under the *Act* are to:

- certify tariffs for the public performance or the communication to the public by telecommunication of musical works and sound recordings [sections 67 to 69];
- certify tariffs, at the option of a collective society referred to in section 70.1, for the doing of any protected act mentioned in sections 3, 15, 18 and 21 of the *Act* [sections 70.1 to 70.191];
- set royalties payable by a user to a collective society, when there is disagreement on the royalties or on the related terms and conditions [sections 70.2 to 70.4];
- certify tariffs for the retransmission of distant television and radio signals or the reproduction and public performance by educational institutions, of radio or television news or news commentary programs and all other programs, for educational or training purposes [sections 71 to 76];
- set levies for the private copying of recorded musical works [sections 79 to 88];
- rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals, when the copyright owner cannot be located [section 77];
- examine, at the request of the Commissioner of Competition appointed under the *Competition Act*, agreements made

between a collective society and a user which have been filed with the Board, where the Commissioner considers that the agreement is contrary to the public interest [sections 70.5 and 70.6];

- set compensation, under certain circumstances, for formerly unprotected acts in countries that later join the Berne Convention, the Universal Convention or the Agreement establishing the World Trade Organization [section 78].

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

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

Operating Environment

Historical Overview

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

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

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

Bill C-32 (An Act to amend the *Copyright Act*) which received Royal Assent on April 25, 1997, modified the mandate of the Board by adding the responsibilities for the adoption of tariffs for the public performance and communication to the public by telecommunication of sound recordings of musical works, for the benefit of the performers of these works and of the makers of the sound recordings ("the neighbouring rights"), for the adoption of tariffs for private copying of recorded musical works, for the benefit of the rights owners in the works, the recorded performances and the sound recordings ("the home-taping regime") and for the adoption of tariffs for off-air taping and use of radio and television programs for educational or training purposes ("the educational rights").

General Powers of the Board

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

As a rule, the Board holds hearings. No hearing will be held if proceeding in writing accommodates a small 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. This process has been kept simple. Information is obtained either in writing or through telephone calls.

The examination process is always the same. The collective society must file a statement of proposed royalties which the Board publishes in the *Canada Gazette*. Tariffs always come into effect on January 1. On or before the preceding 31st of March, the collective society must file a proposed statement of royalties. 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 opponents will have the opportunity to argue their case in a hearing before the Board. After deliberations, the Board certifies the tariff, publishes it in the *Canada Gazette* and explains the reasons for its decision in writing.

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 and 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 specific 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 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 tariffs, the practicality aspects, the ease of administration to avoid tariff structures that make it difficult to administer the tariff in a given market, the search for non-discriminatory practices, 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.

Organization of the Board

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

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

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

William J. Vancise

Chairman

The Honourable William J. Vancise, Justice of the Court of Appeal for Saskatchewan, was appointed part-time Chairman of the Board in May 2004 and reappointed in 2009 for a five-year term. Mr. Justice Vancise was appointed to the Court of Queen's Bench in 1982 and to the Court of Appeal for Saskatchewan in November 1983 where he continues to serve. In 1996, he was appointed Deputy Judge of the Supreme Court of the Northwest Territories. Mr. Justice Vancise earned an LL.B. from the University of Saskatchewan in 1960 and was called to the Saskatchewan Bar in 1961. He joined Balfour and Balfour as an associate in 1961 and in 1963 he was named a partner at Balfour, McLeod, McDonald, Laschuk and Kyle, where he became the managing partner in 1972. Mr. Justice Vancise received his Queen's Counsel designation in 1979.

Claude Majeau

Vice-Chairman & Chief Executive Officer

Claude Majeau was appointed as full-time Vice-Chairman and Chief Executive Officer in August 2009 for a five-year term. Since 1993, he occupied the position of Secretary General of the Copyright Board. Before joining the Board, Mr. Majeau worked for the Department of Communications of Canada from 1987 to 1993 as Director (Communications and Culture) for the Quebec Region. From 1984 to 1987, he was Chief of Staff to the Deputy Minister of the same department. Before 1987, he occupied various positions dealing with communications and cultural industries and public policy. Mr. Majeau earned an LL.B. from the Université du Québec à Montréal in 1977 and has been a member of the Barreau du Québec since 1979.

Jacinthe
Théberge

Members

Ms. Jacinthe Théberge is a full-time member appointed in May 2007 for a five-year term. Prior to her appointment, Ms. Théberge was practicing law with the Community Legal Centre of the Outaouais Region in the fields of civil and administrative matters. From 1991 to 2003, Ms. Théberge served as a part-time member of the Canadian Human Rights Tribunal. Recently, she worked in strategic planning as an advisor and analyst in the communications and health technologies sectors. Ms. Théberge is a graduate of the Université de Montréal (LL.B. in 1972).

J. Nelson
Landry

J. Nelson Landry was appointed in February 2010 as a part-time member for five years. Most recently, Mr. Landry served as an arbitrator in intellectual property. From 2002 to 2005, he was an instructor of the Patent Agent Training Course – Infringement and Validity at the Intellectual Property Institute of Canada. In 2003, he taught part-time at the Université de Montréal and from 1969 to 2002, Mr. Landry was a senior partner at Ogilvy Renault. Mr. Landry obtained a BCL from McGill University in 1968 and was called to the Québec Bar in 1969. He also obtained a BSc in 1965 and a BA in 1959 from the Université de Montréal.

*Note: Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2010-2011 (Part III of the Estimates) and the Performance Report for 2009-2010. These documents are or will soon be available on the Board's Web site (**www.cb-cda.gc.ca**).*

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.

Filing of Tariff Proposals

On March 31, 2010, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and Re:Sound Music Licensing Company (Re:Sound) – formerly known as the Neighbouring Rights Collective of Canada (NRCC) – filed their respective statement of proposed royalties to be collected in 2011; some tariffs cover more than one year.

Hearings

In 2009-2010, two hearings were held:

- May 2009: Re:Sound Tariffs 7 and 9 [Preliminary Issue].
- December 2009: SOCAN and Re:Sound Tariffs 1.C (CBC Radio) for the years 2006-2010 and 2006-2011 respectively.

Decisions

Three decisions were rendered during the fiscal year, as follows.

June 19, 2009 – SOCAN Tariff 16 (Background Music Suppliers) for the Years 2007-2009

Two SOCAN tariffs deal explicitly with background music. Tariff 15.A allows users to obtain a licence directly from SOCAN. Tariff 16 allows suppliers of background music services to communicate music to their subscribers and to authorize its public performance in the subscribers' premises. In March of 2006, 2007 and 2008, SOCAN filed statements of royalties for the use of its repertoire by those suppliers for the years 2007, 2008 and 2009.

SOCAN wanted Tariff 16 to be more consistent with Tariff 15.A. To this end, SOCAN asked the Board to abandon the industrial premises categories; increase the royalty rate to 15 per cent; include in the rate base not only subscription fees, but also the fees suppliers receive to include advertising in the service; switch to a minimum fee per licensee instead of per premises served; limit the deduction for subscriber equipment costs to amounts that are "reasonable and verifiable"; add music reporting requirements; modernize and simplify the wording and application of the tariff.

Two groups of users objected to the proposed tariffs: suppliers of pre-programmed musical content to commercial establishments and broadcasting distribution undertakings who provide background music to some establishments, in addition to audio and video signal packages to their mostly retail subscribers.

They asked that the rate remain at 7.5 per cent of the amount paid to the supplier, maintaining that SOCAN ignored their contribution to the value of its repertoire and that Tariff 15.A was not an appropriate proxy.

SOCAN's experts concluded that Tariff 16 fees should be equal to, or higher than, Tariff 15.A fees for a number of reasons, including the fact that the value of background music has increased over time. By contrast, the objectors' experts identified differences which they found significant and not accounted for in SOCAN's analysis, including the cost savings and higher compliance rate that are achieved through music suppliers. The objectors added that the increased competition resulting from new entrants in this market as well as from other sources of music (Internet, iPods) would tend to push the price down.

The Board first proceeded to select a benchmark. It agreed that Tariff 15.A may be helpful but noted that SOCAN's analysis was not sufficiently complete to be useful. Given that the objectors, as is too often the case, did not propose an alternative approach, the Board concluded that the existing rate of 7.5 per cent was the most reliable starting point.

Two adjustments could then be made. The first accounts for increased efficiency in delivering background music; in principle, SOCAN is entitled to a share of these efficiencies. However, since the record provided little guidance on how to estimate that share, the existing rate was not adjusted on that account.

The second adjustment concerns multiple uses of the SOCAN repertoire. When a background music service is delivered by transmitting a signal, two uses of the repertoire are made. Transmitting the signal triggers a communication of the music, while playing it in the subscriber's establishment triggers a performance of the same music. Most suppliers use cable or satellite, but some deliver a CD or a hard-drive-based system. Suppliers should not pay for transmissions if they do not transmit.

Also, not all services purport to authorize their subscribers' performances. If it is true that a supplier who warns its clients not to play the transmitted music without paying royalties to SOCAN does not authorize the public performance of SOCAN's repertoire (something that is up to the courts to determine), the supplier may be liable for transmitting the music but not for music being played. The tariff must take this into account.

The solution was to set one rate for transmitting the signal and a second for authorizing clients to play in public music provided by the service. This in effect reversed a 1996 decision, in which the Board had set a single rate for both uses.

The rate for the performance remained at 7.5 per cent. The rate for the transmission was set using a ratio of 0.3, based on ratios set in, or derived from, earlier decisions. The Board concluded that the ratio should be similar to that of commercial radio.

Most stations could function without server copies of the music they play but choose not to for reasons of efficiency. Similarly, transmitting is economically essential in part of the background music supply market, while in another, transmitting simply does not occur. Consequently, the rate for the transmission was set at 2.25 per cent.

The Board continued to apply a minimum fee to each premises, as opposed to a minimum tariff per supplier. To do so, it relied on recent decisions where it used a formula based on a proportion of 2/3 of the actual average amount generated by the tariff rate per user. Information provided by the parties allowed the Board to estimate at $400 the average subscription revenue per premises per year, resulting in minimum fees of $20 for playing music and of $6 for transmitting it.

Some suppliers charge clients separately for including in-house advertising in the service. These revenues were added to the rate base since they already attract royalties in the many instances where a subscriber is not charged separately for the service. Both sides agreed that a certain amount should continue to be excluded from the rate base to account for a subscriber's equipment costs. Since there was no indication that suppliers overcharge for equipment, the Board did not impose a limit on this amount.

Small cable transmission systems are entitled to a preferential rate. They received a 50 per cent discount.

The tariff was harmonized to the extent possible with NRCC Tariff 3 pertaining to background music. Suppliers are required to provide music use information that allows SOCAN to more effectively distribute royalties, with a phase-in provision to allow services to adjust their data collecting practices.

September 16, 2009 – NRCC Tariffs 7 (Motion Picture Theatres and Drive-Ins – 2009-2011) and 9 (Commercial Television – 2009-2013) [Preliminary Issue]

On March 28, 2008, NRCC filed proposed tariffs for the performance or the communication of published sound recordings of musical works embodied in movies shown in a cinema or in programs broadcast on television. The Motion Picture Theatre Associations of Canada objected to Tariff 7. Several broadcasting distribution undertakings, broadcasters and other users objected to Tariff 9.

Films and television producers often incorporate pre-existing published sound recordings of musical work in the soundtrack of movies or television programs. Some of these recordings are in NRCC's repertoire.

Yet, the definition of sound recording found in section 2 of the *Act* expressly excludes "any soundtrack of a cinematographic work where it accompanies the cinematographic work". At the objectors' request, the Board accepted to address, as a preliminary issue, the question of whether a pre-existing sound recording that is subsequently incorporated into a soundtrack is a sound recording within the meaning of the definition.

NRCC argued that a pre-existing sound recording remains a sound recording even when it is embedded in a soundtrack. The plain meaning of "soundtrack" as used in the *Act* refers to the aggregate of the sounds embodied as a compilation in a soundtrack and as a result the sounds of a pre-existing sound recording which is part of the compilation cannot be part of or referred to as the soundtrack.

The objectors argued, on the other hand, that a plain reading of the definition of "sound recording" excludes the soundtrack of a cinematographic work when it accompanies that work. The exclusion is designed to allow the movie's copyright owner to exploit the work without risking a veto from anyone who contributed to its audio components, as long as the owner has entered into an appropriate contractual relationship with these contributors.

The exclusion in the definition of "sound recording" can affect pre-existing sound recordings incorporated into a soundtrack in one of only three ways. First, the recording is no longer entitled to any protection as a sound recording. Second, the recording remains a sound recording, except when it is part of a soundtrack that accompanies a movie. Third, the recording remains a sound recording even when it is part of a soundtrack that accompanies a movie. NRCC defended the third interpretation; the objectors argued for the second, which the Board adopted.

To resolve the issue, the Board had to interpret the defined term "sound recording" and the undefined term "soundtrack" in regard to the principles of statutory interpretation, including trying to ensure that the statute is internally coherent and to avoid interpretations which create illogical or unnecessary distinctions between groups or individuals.

The Board rejected the distinction between the soundtrack and its components part as proposed by NRCC. To accept it would require adding words to the definition such as "aggregate" or "any part of a" before "soundtrack". Therefore, if the soundtrack is not a sound recording when it accompanies the movie, neither are the sounds of which it consists.

NRCC's reasoning would have led to the absurd result that every performer, maker and author of each recording incorporated into a soundtrack could veto the rental of the movie, while the copyright owner of the movie itself cannot prevent this rental. The objectors' interpretation was the only one to produce consistent logical results, especially since it was consistent with the meaning and purpose of other sections of the *Act*. Under this interpretation, the unauthorized copying of a pre-existing musical track off a prerecorded DVD would probably not violate the copyright in the sound recording, while copying the same track off a soundtrack released as a CD clearly would. This is a logical consequence of the approach used in dealing with movies and is consistent with what happens to all performances pursuant to subsection 17(1) of the *Act* or to the right of performers who authorize the fixation of a performance pursuant to section 15.

The exclusion set out in the definition of "sound recording" applies to the soundtrack and all of its components, including any incorporated pre-existing sound recording. That recording remains a "sound recording" and the exclusion only applies when the soundtrack accompanies the movie. Copyright in the sound recording is not extinguished. The soundtrack and any pre-existing sound recording embedded in a movie are, and remain, sound recordings when they do not accompany the movie.

Although it was not necessary to examine the legislative history of the relevant provisions, the Board nevertheless noted four events related to legislative activity surrounding the amendments to the *Act* which confirmed its opinion. First, the definition of "sound recording" was amended at the Committee stage so as to ensure that a soundtrack would not be a sound recording. Second, departmental officials never once mentioned television or movies when they discussed the section 19 remuneration rights. Third, the intention was to align Canadian legislation with the Rome Convention, which requires no protection in the case of the use of a sound recording in a soundtrack. Fourth, everyone who spoke on this issue before the Committee had clearly understood that there was no intention to include television broadcasts within the scope of section 19. If the statements of these speakers had been wrong, departmental officials would have corrected them.

The Board refused to consider the contractual practices common in the phonographic and film industries. Interpreting legislation based on contractual practices would put the cart before the horse.

Proposed Tariffs 7 and 9, having no valid legal foundation, could not be certified. Consequently, they were struck.

[NOTE: This decision currently is the subject of an application for judicial review filed by NRCC (File:A-433-09)]

January 15, 2010 – SOCAN and NRCC Tariffs for Pay Audio Services for the Years 2003-2006

In March 2006, 2007 and 2008, SOCAN filed proposed tariffs for the telecommunication of musical or dramatico-musical works by pay audio services in 2007, 2008 and 2009.

In March 2006, NRCC filed proposed tariffs for the telecommunication of published sound recordings embodying musical works and performers' performances of such works by these same services for the years 2007 to 2011.

SOCAN asked that the royalties remain at 12.35 per cent of affiliation payments while NRCC sought an increase from 5.85 to 15 per cent. Small systems would continue to enjoy a 50 per cent discount.

In the end, the collectives and the objectors agreed to maintain the status quo for the years 2007 to 2009. As a result, on January 15, 2010, the Board certified for that period a tariff identical to the 2003-2006 tariff. Based on data provided by SOCAN, the Board estimated that the tariff would generate royalties of about $4.5 million per year, with SOCAN collecting approximately two thirds of this amount.

The Board remained seized of NRCC's proposed tariff for 2010 and 2011.

In addition, two decisions dealt with both rights of public performance and reproduction of music, as follows.

April 8, 2009 – Satellite Radio Services Tariff (SOCAN: 2005-2009; NRCC: 2007-2010; CSI: 2006-2009)

SOCAN, NRCC and CMRRA-SODRAC Inc. (CSI) filed proposed tariffs for the use of their repertoire by satellite radio services for the above-referenced years. Sirius Satellite Radio and Canadian Satellite Radio Inc. (CSR) objected to the proposals. The examination of the tariffs was consolidated at the request of the services.

The collectives revised their proposed tariffs substantially through the course of the proceedings. SOCAN's final proposal was a rate of 13 per cent of gross income, NRCC's was 4 per cent, and CSI's was 2.9 per cent for a service that does not authorize subscribers to reproduce musical works and 5.8 per cent for a service that does, with monthly minimum fees of \$0.29 and \$0.58 per subscriber. CSR argued that the rate should be lower than for commercial radio. Sirius proposed SOCAN rates of between 2.0 and 2.6 per cent, NRCC rates of between 0.5 and 0.7 per cent and CSI rates of between 0.48 and 1.14 per cent.

Legal Issues

CSI's claim with respect to the right to reproduce music raised four legal issues. The first involved copies initiated in Canada but made in the U.S. and copies initiated and made in the U.S. by American third parties. The Board had to decide whether Canadian or American copyright law applied to these copies. The Board concluded that the choice of law should be based on the rule of territoriality. With respect to the first copies, the reproduction, though initiated in Canada, occurred in the U.S. The situation was the same as if an Ottawa resident triggered her residential thermostat from an Internet café in New York. The furnace would be turned on from New York, but in Ottawa. With respect to the second copies, the services would be liable for them only if authorizing from Canada an act that occurs abroad is an authorization "in Canada". The Board concluded to the contrary that the mere act of authorizing in Canada is not actionable under the Canadian *Copyright Act* where the primary infringement occurs abroad. Since the Board only has jurisdiction to set tariffs under the Canadian *Act*, it could not set a tariff for either copies.

The second issue was whether the 4 to 6 second buffer copy that is stored at all times in the RAM of every satellite radio receiver is a reproduction of a substantial part of a work. For the copy to be a protected reproduction, it must contain three elements: copying, substantiality and material form. Since the buffer copy clearly is copying in a material form, the question was reduced to whether the 4 to 6 second buffer is a substantial part of an entire work. The test for so deciding is more qualitative than quantitative. The buffer copy is a rolling buffer. At no time does a subscriber possess a series of 4 to 6 second clips which when taken together would constitute a substantial part of the work. At no time is there a choice as to what goes in or when it comes out. The copy is not substantial.

The third issue was whether Internet-based streaming of the satellite services' signals involves a substantial reproduction. The stream is copied temporarily to the buffer of a computer. The buffer never exceeds ten seconds. The Board concluded that the ten-second buffer is also not sufficiently "substantial" and therefore, that the copies in the buffer are not protected reproductions.

The fourth issue was whether the services were liable for copies made using the extended buffer, radio replay, pause and rewind features or for the sampling of programming content for promotional purposes by retail outlets. The services would be liable only if they "authorized" the copies made by subscribers and retail outlets. The Board concluded that they did. All these options are dependent on third-party decisions to use them. However, the services are not passive. They can program receivers to prevent copying. Subscribers who stop paying for the service no longer have access to content stored in their receivers. The services' commercial interests are tied to the ability of subscribers to use the features. In a word, the services' activities are not content neutral. Finally, there was nothing that would lead to conclude that the services could claim the fair dealing exception with respect to the activities of retail outlets, since nothing suggested that retailers or potential purchasers used that music for research or private study.

Economic Models

The collectives put forward four economic models based on willingness-to-pay, Shapley value, global societal efficiency and the use of a benchmark.

Under the willingness-to-pay model, the collectives claimed that the services should be willing to pay the same for their music as what they pay to car manufacturers to obtain new subscribers. Their experts estimated that amount at 45 per cent of the services' revenues. According to a survey, 86 per cent of current subscribers would not continue to subscribe to the satellite radio if there were no music. This led the collectives' experts to conclude that the services should be willing to pay 39 per cent of their revenues for music. The Board rejected this model because it was based on the unfounded assumption that the services should be willing to pay the same amount for a new subscriber-month, whether it is attracted by the music offerings of the service or from an agreement with a car manufacturer.

In the Shapley value model, the experts considered a hypothetical agreement between five members of a potential coalition: the services and four content providers (Music, News, Sports and Talk & Entertainment). Using survey data, they estimated that music should receive 34 per cent of revenues.

The Board rejected this model because it relies heavily on a survey where respondents were questioned on hypothetical scenarios and because the Board lacked enough information to be able to test the variations and the stability of this model. The Board added that the parties could eventually further develop and better use this approach if they agreed on the model and the data collection methodology.

In the efficiency model, the experts set the optimal tariff as the rate where the efficiency gain from additional music content offsets the efficiency loss from a reduced number of subscribers. They estimated the efficiency loss using survey data and the efficiency gain using a government report documenting the production costs and lifetime revenues of an album. The Board rejected this model because it was not based on high quality data, leading to results that were unreliable and unstable.

In the benchmark model, the experts used the digital pay audio (DPA) services and commercial radio tariffs as proxies for satellite radio. The Board had certified a rate of 26 per cent for the communication of music by DPA, before adjusting for repertoire. The ratio of the value of the reproduction right to the value of the communication right in commercial radio is 1 to 3.2. Using this ratio implies a rate of 8.1 per cent for the reproduction right and a total rate of 34.1 per cent. Survey data showed that 86 per cent of subscribers would stop listening to satellite radio if music were removed. Multiplying the 34.1 per cent rate by 0.86 yielded a total royalty rate of 29 per cent for satellite radio.

The Board's Approach

The Board's starting point for setting the SOCAN rate was the 13 per cent rate established by the Board for DPA.

The Board first adjusted the rate for the fact that the DPA rate is at the "wholesale" level, while the rate for satellite radio is at the "retail" level. There are essentially two functions of satellite services: programming and non-programming activities such as the cost of using the satellite, the cost of subsidizing the receivers and the cost of providing customer services. Each of these functions represents about 50 per cent of total costs. The "wholesale to retail" adjustment was made by reducing the rate to account for non-programming costs, which yielded 6.5 per cent.

The Board then segregated music and low-music use channels. Music channels, being 72 per cent of the channels, use music 83.2 per cent of the time. Since DPA services use music 100 per cent of program time, the 6.5 per cent rate must be adjusted by the proportion of 0.832. This results in a rate of 5.41 per cent. About 97 per cent of music used on satellite radio is part of SOCAN's repertoire. That adjustment yields 5.25 per cent.

For low-use stations, the Board used commercial radio as the proxy. Had the Board applied a rate of 76.1 per cent (the percentage of broadcast time of music in commercial radio) instead of 83.2 per cent to adjust for music use, the final rate for SOCAN would have been 4.8 per cent for music channels instead of 5.1 per cent. This corresponds to the increase in the value of music the Board applied to the proxy while keeping the use of music at the same level. The 4.8 per cent figure is 14 per cent higher than the commercial radio rate of 4.2 per cent. Applying this 14 per cent to the low-use rate of 1.5 per cent, the adjusted rate became 1.71 per cent.

The services cannot allocate their revenues to music or non-music channels. Thus, the Board certified a single rate of 4.26 per cent – a weighted average of the rates for all channels.

The parties agreed that 27 per cent of the music used on the satellite music channels was in NRCC's repertoire. That ratio was applied to the SOCAN uncorrected rate for repertoire to produce a blended rate of 1.18 per cent for NRCC.

For CSI, the Board concluded that the reproductions involved in the programming operations were similar to those made by commercial radio. For these reproductions, the Board began by applying the ratio of the reproduction to the communication right for commercial radio (1 to 3.2) to the SOCAN uncorrected blended rate of 4.33 per cent. This produced a rate of 1.33 per cent. However, most programming copies are made outside the country. Ten per cent of the channels each service offers are programmed in or from Canada. Therefore, a first adjustment for programming copies yielded a rate of 0.13 per cent (or 1.33 per cent x 0.10).

The Board also set at 95 per cent the discount for a service when no work is transmitted to subscribers using copies on a server located in Canada.

For the extended buffer and replay functions, the Board set the relative value of the reproduction and communication rights identically to the relative value the Board set for on-demand streaming by online music services – a ratio of 0.61. Applying this ratio to the 4.33 per cent uncorrected SOCAN rate, the Board obtained a rate of 2.66 per cent. This rate applies only if a subscriber's receiver offers at least one of the relevant features.

Finally, the Board set the rate for reproductions initiated by the subscribers. It relied on the ratio of the rates certified for reproduction and communication of limited downloads by online music services – 0.94. Applying this ratio to the SOCAN rate of 4.33 per cent, the Board arrived at a reproduction rate of 4.11 per cent. Again, this rate applies only if a subscriber is able to make such reproductions.

A final adjustment was needed to account for the use of CSI's repertoire. The Board applied an average music use of 70.5 per cent to all types of reproductions. This led to final rates of 0.10 (or 0.005 when no work is transmitted to subscribers using copies on a server located in Canada) for programming copies, 1.87 for extended buffer and replay and 2.90 per cent for subscriber-initiated copies.

Additional Considerations

The Board set the rate base as everything that is paid for the service, including activation, termination and access fees. The base excludes revenues from the sale of receivers and agency commissions.

The Board certified minimum fees per subscriber per month indicated in the table below. These minimums are based on two-thirds of what the full rates generate on a subscription fee of $15 per month.

To take into account the difficult financial situation of the industry, the Board applied a 25 per cent discount from 2005 to 2007, the latter being the first year where the three tariffs apply together. A discount of 10 per cent applied for 2008 and 2009, after which no discounts were applied. Hence, the Board certified the full NRCC rate for 2010.

Full and Certified Rates (as a Percentage of Total Revenues)

	Full Minimum Rates*	Full Rates	Certified Rates				
			2005	2006	2007	2008-09	2010
SOCAN	$0.43	4.26%	3.19%	3.19%	3.19%	3.83%	
NRCC	$0.12	1.18%	–	–	0.89%	1.07%	1.18%
CSI							
• Programming (with play copies)	$0.01	0.10%	–	0.07%	0.07%	0.09%	
• Extended buffer and replay	$0.19	1.87%	–	1.40%	1.40%	1.69%	
• Storing individual songs and block programming	$0.29	2.90%	–	2.17%	2.17%	2.61%	

* Minimum rates are also discounted by 25 per cent in 2005, 2006 and 2007, by 10 per cent in 2008 and 2009, and are undiscounted in 2010.

[NOTE: This decision currently is the subject of two applications for judicial review: one filed by Sirius Canada Inc. (File: A-209-09) and the other by CMRRA-SODRAC Inc. (File: A-210-09)]

October 8, 2009 – Application to Merge the Examination of SOCAN and CSI Tariffs for Online Music Services

On February 21, 2008, the Board denied a request on the part of CMRRA-SODRAC Inc. (CSI) to set in motion the examination of its proposed online music services tariff, preferring to deal with CSI's tariff at the same time as SOCAN's, who was not prepared to proceed at that time.

On August 25, 2009, CSI renewed its request that the examination of its tariff proceed, jointly with SOCAN's. CSI advanced three reasons for renewing its request. First, SOCAN was willing to proceed as long as issues related to previews, under judicial review, were left in abeyance. Second, the fact that SOCAN's tariff was under review did not justify postponing the hearings. Third, further delays would prejudice CSI and SOCAN. Retroactive collection of royalties is often problematic, especially where the relevant market evolves very rapidly.

Objectors to the tariffs challenged the application on five grounds. First, CSI's application was the same proposal, based on the same arguments that the Board had already rejected. Second, examining the tariffs before the Courts disposed of the applications for judicial review of SOCAN Tariff 22.A (Internet – Online Music Services) would be wasteful. Third, CSI had failed to show that a delay would be prejudicial. Fourth, holding issues relating to previews in abeyance made no sense. Fifth, all of SOCAN Tariff 22 (Internet), not just item 22.A, ought to be examined at the same time as CSI's online music services tariff.

On September 25, 2009, the Board granted the application, for reasons that were provided on October 8. First, whether a delay would cause prejudice was largely irrelevant when deciding to proceed with the examination of a proposed tariff, as opposed to any interim measure. Second, awaiting the outcome of judicial review proceedings was not advisable in this instance once the issue of previews was segregated. Third, the Board preferred to examine SOCAN Tariffs 22.A and 22.B-G separately. Fourth, segregating previews was not as difficult as the objectors contended.

General Regime

Background

Sections 70.12 to 70.191 of the *Act* give collective societies that are not subject to a specific regime the option of filing a proposed tariff with the Board. The review and certification process for such tariffs is the same as under the specific regimes. The certified tariff is enforceable against all users; however, in contrast to the specific regimes, agreements signed pursuant to the general regime take precedence over the tariff.

Filing of Tariff Proposals

The following tariff proposals were filed with the Board in March 2010 in accordance with section 70.13 of the *Act*:

- Tariff filed by Access Copyright for the reprographic reproduction, in Canada, by post-secondary educational institutions for the years 2011-2013.
- Tariff filed by ACTRA PRS/MROC for the reproduction, in Canada, of performers' performances by commercial radio stations for the year 2011.
- Tariff filed by the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) for the reproduction of musical works embedded in a music video, in Canada, by online music services for the year 2011.
- Tariffs filed by CMRRA-SODRAC Inc. (CSI) for the reproduction of musical works, in Canada, by non-commercial radio stations for the year 2011, by online music services for the year 2011 and by satellite radio services for the years 2011-2013.
- Tariff filed by the Canadian Broadcasters Rights Agency (CBRA) for the fixation and reproduction of works and communication signals, in Canada, by commercial and non-commercial media monitors for the years 2011-2013.

Hearings

No hearing was held in 2009-2010.

Decisions

Two decisions were rendered during the fiscal year, as follows.

June 26, 2009 – Access Copyright's Tariff for Educational Establishments for the Years 2005-2009

Access Copyright, the Canadian Copyright Licensing Agency (Access) is a collective society that acts for authors and publishers of protected works published in books, magazines, journals and newspapers. On March 31, 2004, it filed for the first time a proposed statement of royalties for the reproduction of its repertoire by primary and secondary level educational institutions in Canada outside Quebec. All Ministries of Education outside Quebec and every Ontario school board objected to the proposed tariff.

Its filing was the culmination of a long process going back as far as 1988, when CANCOPY (as Access was then known) sought to licence photocopying at the primary and secondary school levels.

The process leading to the hearings was long. Up until April 2005, the parties discussed how to conduct a study to estimate the volume and nature of copies made in educational institutions and Ministries of Education ("volume study"). On April 15, 2005, the Board approved a schedule leading to hearings in January 2007. The lengthy interval was intended to allow for the collection and analysis of the study data. The analysis ran into difficulties, which led to the hearings being delayed until June and then October 2007.

Access initially proposed a rate of $12 per full-time equivalent (FTE) student, but later revised it to $8.92. The objectors proposed a rate of $2.43.

Legal Issues

This case raised three legal issues.

The first was the extent to which schools can avail themselves of the fair dealing exception. A copy made pursuant to the exception can be made for free. The parties disagreed on the ambit of the exception. For example, Access argued that it did not apply where education, not research or private study, was the dominant purpose. The objectors maintained that virtually everything that is copied for class purposes is for allowable purposes and as such, fair dealing.

The Board started its analysis by stating a number of propositions, including the following. Fair dealing, being a user's right, must be interpreted liberally. The exception applies only to certain allowable purposes. Dealings for an allowable purpose are not *ipso facto* fair; fairness is assessed separately.

The Board first considered whether there existed a "practice" in the institutions under review that would constitute a "dealing" within the meaning of the exception. Nothing in the record indicated that institutions had implemented measures aimed either at restricting photocopying only to fair dealing or at separately documenting dealings that are fair from those that trigger remuneration.

Next arose the issue of whether the dealings were for allowable purposes. Even though the Board mostly accepted as fact that a copy was made for the purpose stated in the survey, it still offered a few comments. First, as soon as a dealing involves an allowable purpose, the analysis must proceed to the next step without looking at the relative importance of the purpose; the predominant purpose analysis is relevant to the fairness of the dealing. Second, research does not entail an investigation, a search or a close study and must be interpreted broadly. It occurs provided that effort is put into finding, regardless of its nature or intensity. Third, fair dealing for the purposes of criticism applies only to dealings carried out in the context of the criticism itself; research in contemplation of criticism is research. Fourth, criticism need not involve a communication to the public: sending a critical commentary to the author of a book, a clearly private communication, is criticism.

There remained the issue of whether the dealings were fair. The Board examined the issue using the six factors identified by the Supreme Court of Canada in *CCH Canadian*: purpose, character and amount of the dealing, alternatives to the dealing, nature of the work and effect of the dealing on the work. The Board paid special attention to the fact that textbook sales have shrunk by 30 per cent in 20 years. Several factors contributed to this decline, including resource-based learning and the use of class sets, which would be impossible without using the repertoire of Access. This led the Board to conclude that photocopies compete with the original to an extent that makes the dealing unfair.

Based on these findings, the Board applied the fair dealing exception to single copies made for use of the person making the copy and single or multiple copies made for third parties at their request for the purpose of private study, research, criticism or review, whether or not another, non-allowable purpose was involved. On the other hand, the Board concluded that multiple copies made for use of the person making the copies and single or multiple copies made for third parties without their request did not benefit from the exception. Their main purpose is instruction or non-private study, and the extent of their use, as explained above, made the dealing unfair.

The second legal issue was whether the exception set out in subsection 29.4(2) of the *Act* applied in this instance. Educational institutions are allowed to make copies "as required for a test or examination". However the exception does not apply if a work is "commercially available", which includes situations where a licence is available from a collective society. The objectors argued that "commercially available" concerns only examinations in published form. The Board disagreed, and concluded that the exception did not apply to the extent that Access offered a licence at a reasonable price.

A third issue concerned whether works of non-affiliated rights holders who had cashed a royalty cheque were part of the repertoire for the purposes of this case. Access distributes royalties on the basis of surveys on the use of its repertoire. Access has always distributed royalties to non-affiliated rights holders whose works are "captured" by these surveys. The Board concluded that by cashing a royalty cheque, non-affiliated rights holders retroactively and implicitly grant Access the power to act on their behalf, but only in respect of copies captured by the survey. That, however, sufficed to include all these copies in the calculation of the royalties, since the parties agreed to consider the volume survey data as representative of copying patterns for all institutions and throughout the period covered by the tariff.

Analysis

Access and the objectors agreed on the methodology for the volume study. They also agreed to rely entirely on the study data to determine how many photocopies triggered remuneration and to set the tariff using a three-step methodology: determine the volume of photocopies triggering remuneration, determine the value of a photocopy and divide the total value of photocopies by the number of FTE students.

The objectors agreed for the most part with the approach put forward by Access to determine the number and value of photocopied pages. That said, they proposed making several adjustments to Access' calculations.

Based on the results of the volume study, the number of photocopied pages during the 2005-2006 school year was estimated at 10.3 billion. The Board made several deductions to this number to account for unpublished or unknown documents (7.2 billion), consumables and reproducibles (2.8 billion) and fair dealing (1.6 million). Documents in the public domain or on the exclusion list, documents containing public domain material, unidentified documents, pages photocopied in ministries of education and school boards as well as works of non-affiliated rights holders were also deducted. Photocopied pages of unknown documents triggering royalties as well as photocopied pages for ministry examinations and distance education were added to this total. These adjustments led the Board to set at 246 million the number of photocopied pages that triggered remuneration. Using Access' apportionment, the Board then determined the volume triggering remuneration by type of document at 213 million pages from books, 17 million from newspapers and 16 million from magazines.

In setting the value of a photocopied page, the Board used as a reference price the separate retail prices of books, newspapers and magazines. The Board then made a number of adjustments. First, it made a deduction to reflect the fact that educational institutions usually receive discounts on the suggested retail price. Second, it deducted from the retail price the portion that does not correspond to remuneration for the creative contribution of authors and publishers in the various types of works. Finally, it made an upward adjustment to account for the fact that a photocopied page has a higher value, compared to every page of a book, by the mere fact that it was picked.

Based on these adjustments, the Board determined the value of a photocopied page at 9.20¢ for books, 1.26¢ for newspapers and 0.95¢ for magazines. The Board then multiplied the value per page attributed to each type of document by the corresponding number of pages photocopied to determine the total value of the photocopied pages for each type. The sum of these values corresponded to the total payments that the educational institutions concerned should make for 2005-2006. The Board then divided this total value by the number of FTE students in 2005-2006 which resulted in a final rate of $5.16 per FTE student.

The total royalties estimated for 2005-2006 were at $20 million, which represented approximately 0.05 per cent of costs in elementary and secondary education. While the education system was capable of dealing with the increase in the long term, in the short term some account had to be taken of the fact that the royalties generated were more than double that which was paid under the earlier licence, which was approximately $9 million. Therefore, the Board applied a discount of 10 per cent for the first four years of the tariff, yielding a FTE rate of $4.64 and total royalties for 2005-2006 at just under $18 million. The full rate of $5.16 per FTE student applied in 2009.

[NOTE: This decision currently is the subject of an application for judicial review filed by the objectors (File: A-302-09)]

February 13, 2010 – CBRA's Tariff for Media Monitoring for the Years 2009 and 2010

In March 2008, the Canadian Broadcasters Rights Agency (CBRA) filed proposed statements of royalties for the fixation and reproduction of the programs and communication signals of Canadian private broadcasters by commercial and non-commercial media monitors for the years 2009 and 2010. The proposals were essentially identical to the tariffs certified for the years 2006 to 2008. No one challenged the proposed commercial tariff. The Province of Ontario and the Government of Canada filed objections to the non-commercial tariff proposal. Both ultimately withdrew their objection after having reached an agreement with CBRA. On February 13, 2010, the Board certified tariffs for the years 2009 and 2010 that are in essence identical to the 2006-2008 tariffs, subject to a few changes in the wording.

Arbitration Proceedings

Pursuant to section 70.2 of the *Act*, on application of the society or the user, the Board can set the royalties and the related terms and conditions of a licence for the use of the repertoire of a collective society subject to section 70.1, when the society and a user are unable to agree on the terms of the licence.

In 2009-2010, the Board received one application for arbitration.

On September 3, 2009, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) asked the Board to set the royalties and the related terms and conditions of a licence for the reproduction of musical works by MusiquePlus inc. (Chaînes MusiquePlus et MusiMax) for the period September 1, 2005 to August 31, 2012.

During the fiscal year, the Board initiated another procedure concerning requests for arbitration filed by SODRAC for the reproduction of musical works by the Canadian Broadcasting Corporation and *Les Chaînes Télé Astral*, A Division of Astral Broadcasting Group Inc. and Teletoon (Astral); these requests were joined to be heard in June 2010.

Decisions

The Board rendered the following decisions during the fiscal year.

ADISQ-SODRAC: Two Interim Decisions (April 6 and May 28, 2009)

On March 6, 2009, the *Association québécoise de l'industrie du disque, du spectacle et de la vidéo* (ADISQ) filed a request for arbitration of a licence allowing its members to reproduce on phonograms works in the repertoire of SODRAC from January 1, 2009 to December 31, 2012. On March 19, SODRAC requested in turn that the Board set royalties, terms and conditions of a licence allowing members of ADISQ to reproduce in videograms works from the repertoire of SODRAC from January 1, 2004 to December 31, 2012.

On April 6, 2009, at the request of the parties and to allow record producers to continue receiving public funding made available to assist in creating sound recordings, the Board issued a first interim decision duplicating the licences filed by the parties, adding that the applications for interim decisions by ADISQ and SODRAC will be examined later. On May 28, the Board maintained its decision of April 6, insofar as it is compatible with the powers that the *Act* confers upon the Board.

Phonograms

Relying on the parity clause contained in the previous licence, ADISQ requested that the interim licence rate be the same as that granted to the Canadian Recording Industry Association (CRIA), 8.1¢ per track, rather than the 9.1¢ set in the previous licence. ADISQ also requested that one fourth of the amounts paid pursuant to the interim licence be held in trust until the final decision. ADISQ argued that it would be easier for one of its members to make a single payment for additional royalties rather than for SODRAC to ask for refunds from a large number of rights holders. For its part, SODRAC requested that the status quo be fully maintained, challenged the interpretation of the parity clause put forward by ADISQ and argued that the Board should not take on the role of the arbitration mechanism provided in the licence.

Since the parties disagreed on the interpretation of the parity clause as well as on its application, the Board refused to embark on this debate in the context of an interim decision. It preferred to impose on the parties precisely what they had already agreed upon, leaving it up to the Board to decide whether to deal with the issue in its final decision.

The Board also rejected the request that a share of royalties be paid in trust, finding it wiser to require that royalties be paid without delay than to risk being confronted with an insolvent debtor. If the Quebec record industry was in the precarious situation described by ADISQ, it is probable that one or more of its members will find it difficult to fulfil its obligations if the licence rate increased.

Videograms

On July 1, 2007, the parties signed an interim master licence for video-clips and CD/DVD sets dated back to July 1, 2004. SODRAC requested that this licence be converted into an interim licence of the Board. ADISQ, arguing that certain provisions of the agreement may not be compatible with the nature of the powers that the *Act* grants the Board, asked that the decision reflect the terms of the agreement, not duplicate them. For its part, SODRAC argued that the text of the agreement was appropriate at this stage of the process.

The Board, recognizing that the interim agreement clearly includes provisions that would not find their way in a final decision, agreed with SODRAC. The Board maintained the interim agreement insofar as it was compatible with the powers that the *Act* confers upon the Board. The other course of action would have been to rewrite the licence, which could be long and difficult. The only object of this interim decision was to maintain the status quo until the Board reaches a final decision and to allow the market to continue to function. It would remain possible to revisit the issue if SODRAC or a music label attempts to interpret unreasonably the provisions of the interim agreement.

SODRAC-CBC and SODRAC-Astral: Request to join the two arbitrations (August 27, 2009)

On November 14, 2008, SODRAC asked the Board to set the royalties and the related terms and conditions of a licence for the reproduction of musical works in its repertoire by the Canadian Broadcasting Corporation (CBC) between November 14, 2008 and March 31, 2012. On December 19, 2008, SODRAC made a similar request in respect of Les Chaînes Télé Astral, A Division of Astral Broadcasting Group and Teletoon (Astral) for the period starting on November 14, 2008 and ending on August 31, 2012. On June 5, 2009, the CBC asked the Board to combine the review of its case with Astral. The latter agreed to the consolidation; SODRAC opposed it.

The CBC gave two main reasons in support of its request. First, consolidation would save time and money because the cases have enough points in common. Second, the decision in one matter is bound to have some precedential value in the other. SODRAC, on the other hand, argued that the Board could not consolidate the application, that the request was premature and untimely, that it would delay the Astral application and create problems related to Astral's and CBC's confidential information. None of these reasons convinced the Board.

SODRAC argued that the request for consolidation of arbitrations was inadmissible for several reasons, including that SODRAC could not be forced to go to joint arbitration simply because two users have a common activity. The Board concluded that the arbitration could be requested by a user, a collective or their representatives. Users unable to come to an agreement with a collective after separate negotiations could file a single application for arbitration. The *Act* offers no guidelines for the arbitration process.

SODRAC argued that the consolidation was untimely because negotiations with the two companies had been conducted separately, common points were rare and ultimately the only one would be the value of reproduction rights relative to communication rights. The Board concluded that even if there were a single common issue, it was the most important one. If the systems used or repertoire uses were different, the type of evidence that would serve to establish them probably would be more or less the same. In any event, the two cases overlapped in many respects.

SODRAC had exaggerated the problems that could result from handling confidential information. As for the burden to which SODRAC referred, assuming there were one, it could ask the Board to have Astral and CBC take it on.

The Board also concluded it would be unrealistic to think that a joint review could be ordered later. Once different timetables had been established, it would be hard to then bring them in line.

SODRAC argued that since the Astral application was ready to proceed and the CBC application was not, consolidation would delay the Astral application. The Board concluded that the two cases were at the same stage and that if consolidation made things more complicated, Astral and CBC would bear most of that burden.

The Board therefore granted the request and combined the examination of the files.

SODRAC-CBC: Amendment to Interim Decision (October 13, 2009)

On November 14, 2008, SODRAC asked the Board to set the royalties and the related terms and conditions of a licence for the reproduction of musical works in its repertoire by the CBC from that date until March 31, 2012. SODRAC also requested that the Board issue an interim licence effective from that same date.

Two agreements triggered these applications. The first reached in 1992, granted to the CBC [TRANSLATION] "for all its services, components and networks as well as to all its affiliate stations, [...] the authorization [...] to reproduce: (a) for delayed radio or television broadcasting or by any other technical means of broadcasting, or (b) for use on any other mechanical medium in connection with activities ancillary to the purpose of the CBC, by all means in use or to be used, the current and future repertoire of SODRAC [...]." The second, reached in 2002, allowed the use of the SODRAC repertoire in CBC programming merchandise. SODRAC proposed to set as interim fee for certain channels the lump sum provided in the 1992 agreement, and then to add separate charges for newer services and channels. The CBC did not object to the issuance of an interim licence, but argued that it would be more appropriate to extend on an interim basis, the application of the 1992 and 2002 agreements without any changes.

The CBC argued that the 1992 agreement allowed it to use the SODRAC repertoire in all its operations; SODRAC disagreed. SODRAC asked for the payment of additional royalties, higher than a symbolic $1 value, in respect to two types of activities: those that could not have been contemplated when the 1992 agreement was reached and others that existed or could be foreseen at the time.

On March 31, 2009, the Board granted in part the application of SODRAC. On the whole, it adopted the 1992 and 2002 agreements. No additional royalties were set for activities that existed or were foreseeable in 1992, because the agreement already clearly targeted them. However, the Board set symbolic additional royalties for new uses. The interim licence specifies that it targets every CBC activity that requires a SODRAC licence. Uses are subject to the terms and conditions set in the 1992 agreement, except for uses listed in the 2002 agreement that are subject to the terms of that agreement. The sale and licensing of programs to third parties are also subject to the reporting requirements proposed by SODRAC.

SODRAC asked that the licence apply as of the day it filed its application, November 14, 2008. The CBC did not object to this. A copyright owner and a user clearly can agree to licence past uses. The Board thus made the interim licence effective as of November 14, 2008.

On October 13, 2009, at the request of SODRAC and given the consent of the CBC, the Board modified the interim decision issued on March 31 by adding a $1 royalty for CBC's wireless services and two specialty channels.

SODRAC-Astral: Interim Decision (December 14, 2009)

On December 19, 2008, SODRAC asked the Board to set the interim and final royalties, terms and conditions of a licence for the specialty television channels which Les Chaînes Télé Astral, A Division of Astral Broadcasting Group and Teletoon (Astral) operates alone or with others, excluding MusiquePlus and MusiMax, for the period from December 19, 2008 to August 31, 2012. On January 12, 2009, SODRAC filed a proposed final licence. Later that month, the parties asked the Board to stay its review of the application for an interim licence to allow negotiations to resume. Negotiations broke down on August 27, 2009. On September 1, SODRAC asked the Board to issue an interim licence and filed an amended draft interim licence.

Astral objected to the issuance of an interim licence for the reason that it did not need one. It argued that independent producers from whom it acquires programming are required to clear all necessary rights. It asked the Board to rule that the "licences" producers purport to grant Astral suffice for now. Alternatively, Astral submitted that the interim licence should be free, questioned the Board's jurisdiction in connection with channels that were not specifically named in the December 19, 2008 letter and took issue with the reporting requirements on two grounds. First, if the interim licence is not based on revenues, Astral should not be required to report these amounts. Second, these requirements should not apply back to the date on which the licence application was filed.

In reply, SODRAC submitted that by allowing Astral to use its repertoire pursuant to its agreements with producers, Astral would be treated differently than the rest of the industry. SODRAC argued that the income reporting requirements were necessary to facilitate the retroactive application of the final licence.

The Board granted the application for an interim licence. One of the purposes of an interim decision is to prevent a legal vacuum. Such a vacuum exists when a user draws on a repertoire without authorization. The disagreement on the need for a licence creates a potential legal vacuum; it is specifically in this type of situation that an interim licence is useful.

When an agreement exists between the parties, it is generally preferable to extend that agreement on an interim basis. Where there is no agreement or when new uses are involved, the Board prefers to establish a symbolic royalty for the purpose of the interim licence, unless the context requires a different approach. In this case, the context required establishing a non-symbolic royalty.

The Board concluded, on a preliminary basis and based on the information available, that allowing Astral to use the SODRAC repertoire without paying any royalties would result in an imbalance that must be offset at least partially by setting a non-symbolic interim royalty. The Board concluded that the interim amount being asked, i.e., one-fifth of the final amount sought, was reasonable on its face. The proposed tariff formula reflected the Board's previous decisions. Moreover, the interim licence does not require that Astral disclose its financial data since the royalty is a set sum. The Board however noted that these data will become necessary if the tariff formula proposed by SODRAC is chosen.

Retransmission of Distant Signals

Background

The *Act* provides for royalties to be paid by cable companies and other retransmitters for the retransmission 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.

Filing of Tariff Proposals

No tariff proposals were filed in 2009-2010.

Hearings

No hearings were held in 2009-2010.

Decisions

No decision was rendered during the fiscal year.

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 media.

Filing of Tariff Proposals

On March 31, 2010, the Canadian Private Copying Collective (CPCC) filed a statement of proposed levies to be collected for private copying for the year 2011.

Hearings

One hearing was held in 2009-2010 on an application filed by Z.E.I. Media Plus Inc. to vary the tariff for the years 1999 to 2007.

Decisions

Two decisions were rendered during the fiscal year, as follows.

September 22, 2009 (reasons dated October 19, 2009) on an application to vary the tariff for the years 1999 to 2007

On May 30, 2008, Z.E.I. Media Plus Inc. (ZEI), a Canadian distributor of many types of recording media, asked the Board to issue an interim tariff for 2008 and 2009, to reopen the proceedings dealing with the tariff for the same period (which by then was unopposed and under advisement), to authorize ZEI to intervene in the reopened proceedings and to vary the tariffs the Board had previously certified for the years 1999 to 2007.

ZEI filed the application as a result of a sequence of events. First, the Board had always set a single rate for all recordable data CDs. Second, ZEI had always been of the view that certain types of recordable CDs ("professional" CDs) were not ordinarily used by consumers to copy music and as such, could not be subject to a levy, irrespective of what the tariffs provide. As a result, ZEI had never paid private copying royalties on professional CDs. Third, CPCC had initiated an action against ZEI before the Federal Court of Canada for moneys CPCC claimed were owed to it. This was when ZEI realized that the existence of certified tariffs might preclude it from arguing before the Court that professional CDs should not be subject to a levy. In essence, the application asked the Board to clarify the issue.

On July 17, 2008, the Board reopened the examination of the 2008-2009 tariff, allowed ZEI to intervene in the proceedings and set in motion a process so as to provide it with the evidentiary record required to deal with ZEI's allegations.

On December 5, 2008, the Board certified a final tariff for 2008-2009 based on CPCC's assurance that it would either refund or not collect royalties on recording media which the Board might decide ought not to be levied as a result of ZEI's application to vary.

On September 22, 2009, the Board dismissed ZEI's application to vary the 1999 to 2007 tariffs.

ZEI contended that the issues were whether the Board can retroactively vary its decisions and whether it should do so in the circumstances of this case. According to ZEI, the parameters within which the Board could exercise its discretion to vary were broad and discretionary. Also, ZEI submitted that the Board's power to vary ought to be examined in the context of the Board's duty to determine a fair and equitable tariff.

For its part, CPCC contended that the Board cannot retroactively vary tariffs. CPCC also raised a number of arguments of an equitable nature. A retroactive variance would destabilize the entire regime. It would be difficult or impossible to determine who overpaid and by how much. Any refund would necessarily result in a net loss to CPCC, since it would not be possible for the Board to account for the removal of professional CDs from the regime, which should result in higher levies on the remaining CDs. Finally, the doctrine of laches ought to preclude ZEI from availing itself of an essentially equitable remedy given the time it took for it to raise the issue.

In dismissing the application to vary, the Board relied essentially on three reasons.

First, even if the Board were to accept that ZEI was diligent in pursuing its remedies once it understood what the law stood for, this did not justify its inaction up until that time. Ignorance of the law is no excuse. CPCC is under no duty to advise anyone of the right to object to proposed tariffs, or its interpretation of the previously certified tariffs or of the impact of the rules governing collateral attacks of Board decisions before the Federal Court or another court of law.

Second, while it would have been helpful if CPCC had provided the Board more information on marketing channels, packaging and other such issues, there was nothing on the record that could lead the Board to conclude that CPCC had not acted in good faith in its selection of the information filed in evidence during past tariff proceedings.

Third, and most importantly, equity favoured stability in this case. A retroactive variation as far back as 1999 would have inevitably caused uncertainty and disruption, possibly on a large scale.

December 16, 2009 (Interim Tariff for 2010)

CPCC filed a proposed tariff for private copying in 2010. Hearings dealing with the proposed tariff were held on November 24 and 25, 2009. The matter was under advisement at the end of the reporting period. On December 16, 2009, the Board granted CPCC's application to extend to 2010, on an interim basis, the application of the *Private Copying Tariff, 2008-2009.*

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 the applicants to make reasonable efforts to find the copyright owner. Licences granted by the Board are non-exclusive and valid only in Canada.

During the fiscal year, 26 applications were filed with the Board and 10 licences were issued as follows:

- *Fireship Press*, Tucson, Arizona, U.S.A., for the reproduction, in Canada, of the work entitled “Tecumseh: A Chronicle of the Last Great Leader of His People” written by Ethel T. Raymond, published by Glasgow, Brook and Company, Toronto, between 1914 and 1916 in the book series “The Chronicles of Canada”.
- *Chenelière Éducation*, Montréal, Quebec, for the reproduction of two nursery rhymes in an educational textbook.
- *National Film Board of Canada*, Edmonton, Alberta, for the use of portions of a book cover artwork created by Elizabeth Jensen.
- *Greg Martin*, Edmonton, Alberta, for the mechanical reproduction of the musical work entitled “My Woman Has A Black Cat Bone” written by Ivory Lee Semiens and published by Clarity Music Inc. (c. 1958).
- *Nathalie Hamel*, Québec, Quebec, for the reproduction of a photograph taken by Léon Bernard and published in the magazine “Perspectives” in 1968.
- *Marilynne Feeney*, Waterloo, Ontario, for the reproduction of prayers in a book.
- *Les Productions de la ruelle*, Montréal, Quebec, for the synchronization, streaming and communication to the public by telecommunication of an excerpt of the musical work entitled “Chanson du carnaval” written by Roger Vézina and published by “Disques Mérite” in 1956.
- *National Film Board of Canada*, Montréal, Quebec, for the reproduction of a text written by Agathe Martin-Thériault and published in the magazine “Cinéma Québec” in 1972.
- *NeWest Press*, Edmonton, Alberta, for the reproduction of excerpts of two articles published in “Land of Red and White” by the Frog Lake Community Club, Heinsburg, Alberta in 1977.
- *Roman Catholic Bishop of Kamloops*, Kamloops, B.C., for the reproduction and distribution of three colouring books published by Guild Press, New York.

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 pursuant to section 70.5 of the *Act* within 15 days of its conclusion, shields the parties from prosecutions pursuant to section 45 of the *Competition Act*. The same provision grants the Commissioner of Competition 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 and the related terms and conditions of the licence.

In 2009-2010, 506 agreements were filed with the Board.

Access Copyright, The Canadian Copyright Licensing Agency, which licenses reproduction rights such as digital licensing and photocopy rights, on behalf of writers, publishers and other creators, filed 305 agreements granting various health and educational institutions, dioceses, municipalities and other users a licence to photocopy works in its repertoire.

The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) filed 127 agreements. COPIBEC is the collective society which authorizes in Quebec the reproduction of works from Quebec, Canadian (through a bilateral agreement with Access Copyright) and foreign rights holders. The agreements filed were concluded, amongst others, with various health and social services agencies, educational institutions, municipalities, libraries and day-care centres.

The Audio-Video Licensing Agency (AVLA) is a copyright collective that administers the copyright in master audio and music video recordings, and licences the exhibition and reproduction of music videos and the reproduction of audio recordings for commercial use. AVLA filed 71 agreements.

Finally, the Canadian Broadcasters Rights Agency (CBRA) filed three agreements for media monitoring: one with the Province of Alberta and two with the Government of Canada. CBRA represents various Canadian private broadcasters who create and own radio and television news, current affairs programs and communication signals. CBRA represents various Canadian private broadcasters who create and own radio and television news and current affairs programs and communication signals.