

# Copyright Board of Canada



Annual Report | 2008-2009



Copyright Board  
Canada



Commission du droit d'auteur  
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-first Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2009.

Yours sincerely,

A handwritten signature in black ink that reads 'Claude Majeau'. The signature is fluid and cursive, with a horizontal line drawn underneath it.

Claude Majeau  
Vice-Chairman and  
Chief Executive Officer



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# Board Members and Staff

as of March 31, 2009

<b>Chairman:</b>	The Honourable Justice William J. Vancise
<b>Vice-Chairman and Chief Executive Officer:</b>	Stephen J. Callary
<b>Members:</b>	Francine Bertrand-Venne Sylvie Charron Jacinthe Th��berge
<b>Secretary General:</b>	Claude Majeau
<b>General Counsel:</b>	Mario Bouchard
<b>Legal Counsel:</b>	M��lissa Lacroix
<b>Director of Research and Analysis:</b>	Gilles McDougall
<b>Senior Clerk of the Board:</b>	Lise St-Cyr
<b>Assistant Clerks:</b>	Lina Boucher Nadia Campanella
<b>Registry Officers:</b>	Micheline Leblanc Tina Lusignan
<b>Manager, Corporate Services:</b>	Ivy Lai
<b>Financial and Administrative Assistant:</b>	Joanne Touchette
<b>Technical Support Officer:</b>	Michel Gauthier
<b>Administrative Assistant:</b>	Manon Huneault





## Chairman's Message

This is the fourth annual report in which I have the opportunity to describe the Board's activities during the past year. It is also noteworthy that on February 1, 2009, the Copyright Board celebrated its 20<sup>th</sup> anniversary. Needless to say, the Board has come a long way since its inception in 1989. Many things have changed since then. Technological advances in copying and communicating works have had a huge and ever increasing impact on the Board's workload. The matters the Board deals with vary considerably and are more complex as a result of new media and the Internet. The Board is now responsible for the certification of tariffs that are estimated to be worth well over \$300 million annually. The increased level of activity has been handled because of the dedication and hard work of the Board's staff.

In 2008-2009, the Board held two hearings. One on April 29, 2008, where it considered the request to establish the private copying tariff for the years 2008-2009. The other, which lasted 12 days during the months of December 2008 and January 2009, jointly examined for the first time all tariff proposals for commercial radio filed by a number of collective societies (SOCAN, NRCC, CSI, AVLA/SOPROQ and ARTISTI) and involving two types of rights: communication and reproduction.

Even though there were only two hearings during the year, the Board was extremely busy. In addition to conducting the hearings, the Board issued

eight decisions. Two of them dealt with the public performance of music: Tariffs 22.B to 22.G (Internet – Other Uses of Music) of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the years 1996-2006, and SOCAN Tariff 9 (Sports Events) for the years 2002-2009. A third certified the tariffs for the retransmission of distant television and radio signals for the years 2004-2008. The Board also issued an interim decision to ensure that the retransmission tariffs as certified would remain in force until the final ones are certified for the period 2009-2013.

On April 22, 2008, the Board denied a request filed by CMRRA/SODRAC Inc. for an interim tariff for online music services for the year 2008. On June 20, 2008, the Board certified the Canadian Broadcasters Rights Agency (CBRA) tariffs for media monitoring for the years 2006-2008. On December 5, 2008, the Board certified the tariff for private copying for the years 2008-2009 and finally, on March 31, 2009, the Board rendered an interim decision on an application for arbitration filed by the Society for Reproduction Rights of Authors, Composers and Publishers of Canada (SODRAC) for the reproduction of musical works by the Canadian Broadcasting Corporation.

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

Fourteen 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 found.

In 2008-2009, the Board initiated procedures leading to three hearings. The first, SOCAN and the Neighbouring Rights Collective of Canada (NRCC) Tariffs 1.C for the public performance of music by the radio of the Canadian Broadcasting Corporation for the years 2006-2009, is scheduled for December 2009. The second, SODRAC Tariff 5 for the reproduction of musical works in video-copies for the years 2009-2012, is scheduled for March 2010. The third, NRCC Tariff 6 for the use of music to accompany dance and fitness for the years 2008-2012, is scheduled for April 2010.

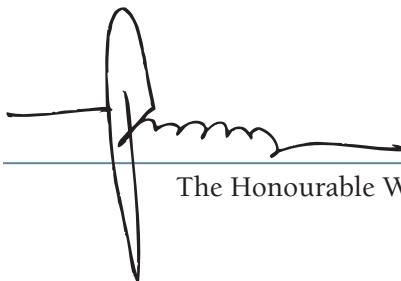
Because the Board did not have the financial resources to hire additional professional and support staff to deal with the increased workload, this translated into unnecessary delays in issuing decisions and created a backlog in the certification of uncontested tariffs, delays which I personally find unacceptable. The Board's inability to issue decisions within a reasonable time is well known in the copyright industry and beyond and contributes to uncertainty among both rights holders and users.

As a result of this, we initiated discussions with the two departments responsible for the copyright legislation, Industry Canada and Canadian Heritage, to increase our budget and we were successful in obtaining an increase of our operating budget.

Effective in fiscal year 2009-2010, both departments have agreed to transfer on a permanent basis the amount of \$215,000 each to the Copyright Board therefore increasing the Board's budget by \$430,000. The increased budget will permit the Board to hire the staff it needs to deal with the increased workload and to fulfill its mandate adequately. I wish to take this opportunity to thank and recognize the positive contribution of those persons in the Departments who made this possible.

Finally, I was invited to speak at two events in my capacity as Chairman of the Copyright Board. First, I spoke at the 2008 Broadcasting Invitational Summit held in Cambridge, Ontario on June 20, 2008. I also spoke at the annual IPIC – McGill Summer Courses in Intellectual Property on August 12, 2008, where I offered my perspective on administration of the *Copyright Act* to the intellectual property community. These speeches are available on the Board's website

I wish to thank my colleagues as well as the personnel for their support and assistance during this very busy year. The Board is fortunate to have expert and support 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 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];



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- 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 31<sup>st</sup> 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

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

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

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

### Chairman



**The Honourable William J. Vancise**, a 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.

### Vice-Chairman & Chief Executive Officer



**Stephen J. Callary** is a full-time member appointed in May 1999 and reappointed in 2004 for a five-year term. Mr. Callary has served as Managing Director of consulting firms, RES International and IPR International; as Executive Director of

TIMEC – the Technology Institute for Medical Devices for Canada; and as President of Hemo-Stat Limited and Sotech Projects Limited. He has extensive international experience dealing with technology transfer, software copyrights and patents and the licensing of intellectual property rights. From 1976 to 1980, Mr. Callary worked with the Canadian Radio-television and Telecommunications Commission (CRTC), the Privy Council Office (PCO) and the Federal-Provincial Relations Office (FPRO). He has a B.A. degree from the University of Montreal (Loyola College) and a B.C.L. degree from McGill University. He was admitted to the Quebec Bar in 1973 and pursued studies towards a Dr.jur. degree in Private International Law at the University of Cologne in Germany.



## Members



**Francine Bertrand-Venne** is a full-time member appointed in June 2004 for a five-year term. Prior to her appointment, Ms. Bertrand-Venne was General Manager of the *Société professionnelle des auteurs et des compositeurs du Québec* (SPACQ). She was

also SPACQ's legal counsel for labour relations under the federal and Quebec status of the artist acts, the *Copyright Act* and the *Broadcasting Act*. Ms. Bertrand-Venne is a graduate of the University of Sherbrooke (LL.B. in 1972). She is a member of the Council of Canadian Administrative Tribunals, the *Association littéraire et artistique internationale* (ALAI Canada) and the *Association des juristes pour l'avancement de la vie artistique* (AJAVA).



**Sylvie Charron** is a full-time member appointed in May 1999 and reappointed in 2004 for a five-year term. Before joining the Copyright Board, she was an Assistant Professor with the University of Ottawa's Faculty of Law (French Common

Law Section) and worked as a private consultant in broadcasting, telecommunications and copyright law. Prior to her law studies, she worked for the Canadian Radio-television and Telecommunications Commission for 15 years. Ms. Charron is a graduate of the University of Ottawa (B.Sc. Biology in 1974, M.B.A. in 1981,

LL.B. in 1992, and LL.L in 2005). Ms. Charron is a member of the Canadian Association of Law Teachers, of the *Association des juristes d'expression française de l'Ontario* (AJEFO), of the Council of Canadian Administrative Tribunals and is former Vice-Chair of the Ottawa Chapter of Canadian Women in Communications and past Executive Director of the Council of Canadian Law Deans.



**Jacinthe Thériberge** is a full time member appointed in May 2007 for a five-year term. Prior to her appointment, Ms. Thériberge 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. Thériberge 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. Thériberge is a graduate of the University of Montreal (LL.B. in 1972).

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*Note: Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2009-2010 (Part III of the Estimates) and the Performance Report for 2008-2009. These documents are or will soon be available on the Board's Web site ([www.cb-cda.gc.ca](http://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

In March 2009, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and the Neighbouring Rights Collective of Canada (NRCC) filed their respective statement of proposed royalties to be collected in 2010; some tariffs cover more than one year.

## Hearings

In 2008-2009, one hearing was held on the following tariffs:

- Commercial Radio: joint examination of SOCAN (2008-2009) and NRCC (2008-2011) Tariffs 1.A [as well as of CMRRA/SODRAC Inc. (CSI) for the reproduction of musical works for the years 2008-2012, of AVLA/SOPROQ for the reproduction of sound recordings for the years 2008-2011, and of ArtistI for the reproduction of performers' performances for the years 2009-2011]. Hearings were held in December 2008 and January 2009. The matter is under advisement.

## Decisions

Two decisions were rendered during the fiscal year.

### **SOCAN Tariffs 22.B to 22.G (Internet – Other Uses of Music) for the years 1996-2006**

On October 24, 2008, the Board certified the second part of Tariff 22 of the Society of Composers, Authors and Music Publishers of Canada (SOCAN). The first part, dealing with online music services, was certified on October 18, 2007.

Tariffs can be set for given users or groups of users, or according to uses irrespective of who makes the use. Use-based tariffs are generally more responsive to variations in types and amounts of consumption. They generally favour users, who need pay only for the rights they need. This is the approach SOCAN proposed to take. The Board however decided to certify a user-based tariff. A use-based tariff might not have adapted to the constantly evolving Internet environment. It might have been difficult to match uses to what actually occurs over the Internet. Finally, those who already require a SOCAN licence for their primary activity tend to use music on the Internet essentially to support that activity. Thus, the decision's analysis dealt with the following items, based on users as defined by the panel.

### **Commercial Radio**

Commercial radio broadcasters use music on their websites in many different ways. First, they generally webcast their conventional radio signal, more or less simultaneously (a "simulcast"). For this activity, SOCAN proposed to use as a proxy

the rate already set for conventional broadcasting, corrected to take into account the higher profitability of Internet activities. The Canadian Association of Broadcasters (CAB) proposed the same starting point, but would have reduced the rate base to account for the fact that many website pages have no audio content. The Board rejected SOCAN's adjustment, used the effective rate applicable to a commercial radio station's conventional signal (4.2 per cent) and left to later the rate base adjustment.

For the audio webcasting done by commercial radio, SOCAN proposed using the conventional radio rate as a proxy, and bringing a number of adjustments, in particular to take into account the fact that there are no station identifications and promotions. The CAB proposed the same approach as for simulcasting. The Board noted that the amount of music contained in audio streams varies considerably. Since no precise data was available on these streams, the Board did not bring any adjustments and applied the same rate as for conventional radio broadcasts.

Commercial radio stations also offer audiovisual webcasting, games and other types of uses. SOCAN proposed that when any site offers multiple types of uses, the highest licence fee apply to the relevant use, and the licence fees resulting from the application of any additional tariff items be discounted by 10 per cent. The CAB labeled this approach "double dipping". There was no evidence on the relative importance of each of type of use on a particular site or the relative importance of music for each type. The only useful conclusion the Board could reach was that all of these activities should be considered at once and be subject to the same rate as all other Internet uses by conventional radio stations.

The CAB had argued for a reduction in the rate base to account for the fact that many web pages have no audio content. The Board agreed. Given the lack of available information, the Board determined that the rate base would be at most 50 per cent of Internet-related revenues. Broadcasters were allowed to further discount the rate base by monitoring and reporting the ratio of audio page impressions to all page impressions on their site.

### ***Non-Commercial Radio***

Non-commercial radio broadcasters also use music in different ways on their websites. For these activities, SOCAN proposed rates between 3 and 3.6 per cent. The National Campus and Community Radio Association proposed the rate which already applies to their conventional activities. The Board agreed with the Association and certified a rate of 1.9 per cent. The rate base was also reduced by 50 per cent, or more if broadcasters report on the importance of audio content.

### ***Commercial Television, Non-Broadcast Television, Pay Audio Services, Satellite Radio Services***

For conventional and non-broadcast television, SOCAN proposed rates of about 4 per cent, based on the 1.9 per cent rate already set for these stations' main activities and corrected to reflect the increased profitability of Internet activities. The CAB proposed the same starting point but asked that it be corrected to take into account the proportion of website activities that do not involve music. The Board rejected SOCAN's analysis based on profitability and certified the applicable rate for conventional activities to television stations' Internet activities. In a similar fashion





to commercial radio, the rate base was reduced, here by 90 per cent, with stations having the possibility to further reduce it.

No evidence was submitted concerning the Internet activities of pay audio services and satellite radio services. The Board used the same approach as for television and certified the same rate that applies to conventional activities, subject to the same rate base reduction as for commercial radio.

***Canadian Broadcasting Corporation (CBC);  
Ontario Educational Communications  
Authority (TVO); Société de télédiffusion  
du Québec (Télé-Québec)***

With respect to CBC, SOCAN proposed rates between 4 and 8 per cent. CBC contended it should pay nothing more for simulcasting, which merely duplicates a conventional over-the-air signal and is just another way of listening to radio. For audio and audiovisual webcasting, CBC proposed a payment based on the tariffs it already pays SOCAN for its conventional radio and television activities. CBC proposed however that two corrections be brought to these tariffs, to take into account the lower value of reusing the material on the Internet (correction of 95 per cent) and the lower use of music on the Internet (correction of 91 per cent).

The Board rejected the approach proposed by SOCAN and essentially adopted what CBC proposed. In the case of audio simulcasting, the Board concluded that some payment should be made but that the lack of evidence prevented it, for now, from certifying a specific tariff. The Board concluded that the current CBC payments already include the right to use SOCAN music in simulcasts. For audio and audiovisual webcasting, the Board established at 90 per cent the correction

for the lower value of content on the Internet, and at least at 85 per cent the correction for the lower use of music on the Internet. As for other tariffs, CBC was allowed to further increase this correction factor by reporting on its Internet activities.

In the case of TVO and Télé-Québec, no specific tariffs were proposed by SOCAN. The Board used the same approach as for CBC.

***Audio Websites***

This category includes websites that use music in the same way as pay audio services. SOCAN proposed a rate of 9 per cent. The objectors proposed using the conventional radio rate, adjusted to reflect the greater use of music by audio websites.

The Board adopted the objectors' methodology. The Board increased the 4.2 per cent effective rate paid by conventional radio by 25 per cent, leading to a rate of 5.3 per cent for services using music 80 per cent or more of their "broadcast time". If music is used between 20 and 80 per cent of the time, the rate is 4.2 per cent, and 1.5 per cent if music use is below 20 per cent.

Again, the Board set the rate base at 50 per cent of the Internet-related revenues, users being allowed to further reduce it by reporting Internet activities. In addition, Canadian sites were allowed to remove from their rate base 95 per cent of visits from outside Canada, while non-Canadian sites were allowed to remove all non-Canadian visits.

***Game Sites***

SOCAN proposed a rate of 4 per cent for game sites. The Entertainment Software Association and the Entertainment Software Association of Canada (ESA) argued that there should be no tariff because game sites do not need access to

the SOCAN repertoire. The Board rejected that argument. Alternatively, ESA proposed that the starting point be the rate applied to low music use pay and specialty television services (0.8 per cent). ESA proposed to further reduce this rate to 0.3 per cent for game downloads and to further apply a correction of 90 per cent to reflect the fact that music represents only a small share of a game's production costs. Finally, it proposed an additional reduction of 95 per cent to represent the Canadian share of the overall traffic on game sites.

The Board partly agreed with ESA and certified a rate of 0.8 per cent, subject to two discounts. As with other categories, game sites were allowed to discount the rate base to account for the relative importance of audio content. Second, to account for the fact that Canadian communications represent a small share of the overall traffic of the average game site, the proportion of the site's revenues that is subject to the tariff was set at 10 per cent, with users having the possibility to further reduce it.

### ***All Other Sites***

There remained a number of disparate sites that use music in different ways but for which the main activity is not related to the use of music, including restaurants, hotels, bars and other business websites. It also included amateur podcasts, social networking sites such as Facebook and MySpace and video sharing sites such as YouTube, as well as sites operated by individuals that use music. These sites might use music in

different ways including audio webcasting as well as audiovisual webcasting and downloading. SOCAN did not provide any analysis or evidence with respect to the quantity and value of the music used on these sites.

Under the circumstances, the Board refused to certify a tariff for this category.

Member Charron dissented in part on this issue. She would have first tried to identify, and set a tariff for, most of the uses that are likely to generate significant royalties. For the rest, she would either have set a tariff at zero or decline to set a tariff altogether.

### ***Minimum Fees***

The Board did not establish a minimum fee with respect to users who already pay royalties pursuant to any of SOCAN Tariffs 1 (Radio) or 2 (Television), but did for the other tariff categories.

The following table summarizes the rates as well as the minimum fees the Board established in this decision.



## CERTIFIED RATES

	RATE AND RATE BASE (Except for C, the Rate Base is always Internet-Related Revenues)	RATE BASE DISCOUNT ("At least" means the discount can be increased by reporting to SOCAN)	
		Discount for Non-Audio Page Impressions	Discount for Non-Canadian Page Visits
<b>B. Commercial Radio</b>	1.5% if low music use 4.2% otherwise	At least 50%	0
<b>C. Non-Commercial Radio</b>	1.9% of gross Internet operating costs	At least 50%	0
<b>D. Commercial Television, Non-Broadcast Television, Pay Audio Services, Satellite Radio Services</b>	Applicable rate pursuant to main tariffs (2.A, 17, Pay Audio Services, Satellite Radio Services)	At least 50% for music video, pay audio and satellite radio services  At least 90% for any other service	0 for Canadian service  At least 90% for any other service
<b>E. CBC, TVO, Télé-Québec</b>	10% of the total amount payable pursuant to Tariffs 1.C, 2.B, 2.C or 2.D	At least 85%	0
<b>F. Audio Websites</b>	1.5% if music use is 20% or less, subject to an annual minimum fee of \$28  4.2% if music use is more than 20% and less than 80%, subject to an annual minimum fee of \$79  5.3% if music use is 80% or more, subject to an annual minimum fee of \$100	At least 50%	<b>Canadian Site</b> 95% of non-Canadian visits, if a report is made to SOCAN 0 otherwise  <b>Non-Canadian Site</b> At least 90% (all non-Canadian visits count)
<b>G. Game Sites</b>	0.8%, subject to an annual minimum fee of \$15	0, unless a report is made to SOCAN	<b>Canadian Site</b> 95% of non-Canadian visits, if a report is made to SOCAN 0 otherwise  <b>Non-Canadian Site</b> At least 90% (all non-Canadian visits count)

### **SOCAN Tariff 9 (Sports Events) for the years 2002-2009**

On January 23, 2009, the Board certified SOCAN Tariff 9 (Sports Events) for 2002-2009.

Relying heavily on comments in a previous decision of the Board, SOCAN had sought for 2002 to 2004 an increase from 0.05 to 1.6 per cent of gross receipts from ticket sales, subject to a minimum fee of \$64 for a per event licence and \$107.90 for an annual licence.

The Canadian Association of Fairs and Exhibitions, the Canadian Football League (CFL), the Federation of Canadian Municipalities, Lacrosse Inc., Manitoba's Amateur Sport Community – Sport Manitoba, the Montreal Expos, NBA Properties, Inc., the National Hockey League (NHL) and Canadian Clubs, Rogers Blue Jays Baseball Partnership, Sport Canada, Synchro Canada, the Winnipeg Goldeyes Baseball Club and Toronto Phantoms Football objected to the proposal. All considered the proposed increase to be exorbitant. The NHL pointed out, for example, that a club with annual ticket revenues of \$30 million would see its fees increase from \$15,000 to \$480,000.

SOCAN then offered to set the royalties at the same 0.05 per cent rate as in 2001 for January to June 2002, at 0.055 per cent for July to December 2002, at 0.06 per cent for 2003 and at 0.065 per cent for 2004, still subject to a minimum fee of \$64 per event or \$107.90 per year.


In June 2004, SOCAN confirmed it had concluded identical agreements with the NHL (ending June 30, 2012) and the CFL (ending December 31, 2011). The agreements provide for the rates to be set according to SOCAN's offer up to 2004, and then to increase by 0.005 percentage point each year up to 0.10 per cent in 2011, with no minimum fee. SOCAN later confirmed it had concluded similar agreements with the Blue Jays and NBA Properties.

The statements of proposed royalties SOCAN filed for 2005, 2006 and 2007 reflected the agreements. SOCAN again requested a minimum fee of \$64 per event, but did not include the option of an annual licence. There were only two objectors to the proposals, who later withdrew.

SOCAN later withdrew its request for a minimum fee, proposing to postpone a review of this issue until 2012, but asked that the \$5 fee per event be maintained when admission is free. Following this new proposal, objectors either withdrew, were deemed to have withdrawn, or maintained their objections without providing the additional information requested by the Board.

For 2008 and 2009, SOCAN filed statements reflecting its agreements. There were no objections.





What SOCAN was asking the Board to certify led to the doubling of fees in 2011. This was a substantial increase. However, even when doubled, the rate remained relatively low, especially when compared to other SOCAN tariffs. Consequently, the Board certified the rates as proposed. The Board also accepted SOCAN's proposal to postpone the examination of the minimum fee issue.

Some users objected to the retroactive application of the tariff. The *Act*, not a decision by the Board, allows SOCAN to collect fees retroactively as soon as a tariff becomes effective. SOCAN had filed statements for each year since 2002. The Board was therefore obliged to certify the tariff retroactively to that year. The Board noted however that SOCAN intended to waive collecting any retroactive increase, except from those with whom it had already reached an agreement that included rate increases.

Tariff 9 generated royalties amounting to \$176,440 for 2001. The number of licences issued was 250. In 2006, the tariff generated \$313,348, an increase of over 75 per cent from 2001, for a slightly lower number of licences, i.e., 221. The interim tariff having remained the same as in 2001, this substantial fee increase was essentially a result of the implementation of SOCAN's agreements with the major league sports.

For their part, users that were not subject to an agreement would be required to pay on average an additional \$80 per year. The Board concluded that this increase would not be a source of major financial difficulty for users, especially since the lack of a minimum fee was to the advantage of smaller users.





# 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 2009 in accordance with section 70.13 of the *Act*:

- Tariff filed by ACTRA PRS/AFM for the reproduction, in Canada, of performers' performances by commercial radio stations for the year 2010.
- 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 2010.
- Tariffs filed by CMRRA/SODRAC Inc. (CSI) for the reproduction of musical works, in Canada, by online music services and by multi-channel subscription radio services for the year 2010.
- Tariffs filed by Access Copyright for the reprographic reproduction, in Canada, by educational institutions for the years 2010-2012 and by provincial and territorial governments for the years 2010-2014.

## Hearings

In December 2008 and January 2009, the Board held a joint hearing on five tariff proposals for commercial radio. One of the proposals was filed by CSI for the reproduction rights of musical works for the years 2008-2012, another by AVLA/SOPROQ for the reproduction of sounds recordings for the years 2008-2011, and another by ArtistI for the reproduction of performers' performances for the years 2009-2011. The other two were for performing rights. The matter is under advisement.

## Decisions

Two decisions were rendered during the fiscal year.

### Reproduction of Musical Works by Online Music Services (2008)

On March 30, 2007, CMRRA/SODRAC Inc. (CSI) filed a statement of proposed royalties for the reproduction of musical works by online music services in 2008. The Canadian Association of Broadcasters, the Canadian Recording Industry Association, Apple Canada Inc. and Apple Inc., Puretracks, Bell, Rogers Communications and TELUS objected to the proposed tariff.

The following day, the Board certified the *CSI Online Music Services Tariff, 2005-2007*. Pursuant to section 70.18 of the *Act*, the 2005-2007 tariff continues to apply on an interim basis until a new tariff is certified.



The proposed tariff targets the same users (for different rights) as SOCAN Tariff 22.A (Internet – Online Music Services), which the Board certified on November 24, 2007 for the years 1996 to 2006. The SOCAN tariff is the subject of applications for judicial review. SOCAN has not asked the Board to start the examination of its proposed tariffs for 2007 and beyond.

Because the Board tends to examine tariffs that target the same users all at once, and because the examination of SOCAN Tariff 22.A would not occur until at least 2009, CSI asked that its proposed tariff be heard on an expedited basis and separately from future versions of SOCAN's tariff. On February 21, 2008, the Board denied the application.

On March 6, 2008, CSI applied, pursuant to section 66.51 of the *Act*, for an interim tariff that would be different from the 2005-2007 tariff in three ways. On April 22, 2008, the Board denied the application.

CSI asked to eliminate the 10 per cent discount applied in the 2005-2007 tariff to account for the fact that this was a new tariff. The tariff did not provide a mechanism by which the discount may be lifted at the end of its intended life. CSI argued that the delay in certifying a CSI tariff for 2008 would deprive right holders of royalties to which the Board already determined they were entitled, that the elimination of the discount would allow CSI to offset some of its expenses, and that some online music services were fledgling operations, making the collection of retroactive payments difficult. The objectors countered that since the bulk of online operations are controlled by established

leaders, collection risks associated with the eventual imposition of retroactive payments were minimal. They also submitted that the established Board practice is to simply extend existing tariffs on an interim basis. They further argued that cost recovery is not a supporting argument for an interim tariff, at least for a collective society with significant income. The Board agreed with the objectors.

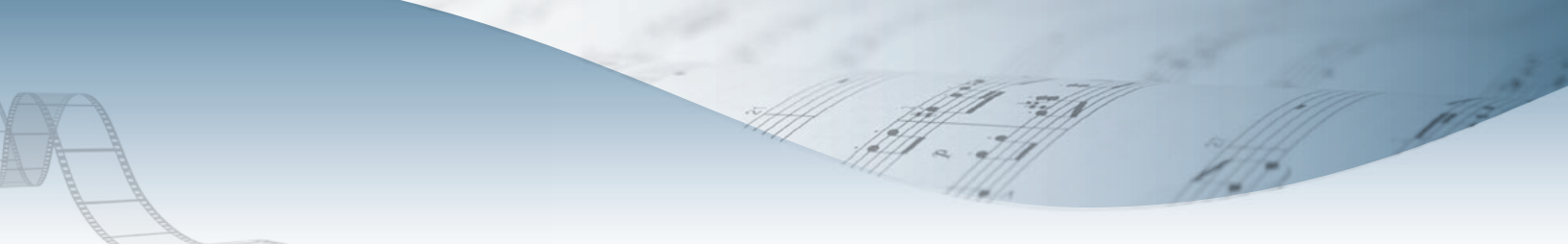
Pursuant to the 2005-2007 tariff, online music services must provide detailed information on musical works and sound recordings, but only if the information is available to the service. That information is “owned” by the record companies; services do not always have it. CSI claimed that the information is essential and that services should always be required to provide it. The objectors argued that complying with the additional reporting requirements would necessitate considerable time and resources, and that CSI had not produced any evidence demonstrating its need for the additional information. The Board concluded that it was too early to alter the current system in the absence of concrete evidence as to its efficacy.

Finally, CSI requested some changes in the wording of the tariff to avoid unnecessary confusion, in particular that it be clear that the amounts to be reported and paid are in Canadian dollars. The Board ruled that the changes were not necessary.

#### **Fixation and Reproduction of Works and Communication Signals, in Canada, by Commercial and Non-Commercial Media Monitors, 2006-2008**

On June 20, 2008, the Board certified the *CBRA Commercial Media Monitoring Tariff 2006-2008* and the *CBRA Non-Commercial Media Monitoring*





*Tariff 2006-2008.* These tariffs, which are administered by the Canadian Broadcasters Rights Agency (CBRA), target the fixation and reproduction of the programs and communication signals of Canadian private broadcasters by commercial and non-commercial media monitors.

No one challenged the proposed commercial tariffs. The Deputy Attorney General of Canada, acting on behalf of a number of federal departments and agencies, the governments of Alberta and Ontario, the Canada Science and Technology Museum Corporation and the Canadian Museum of Civilization Corporation took issue with one or both of the proposed non-commercial tariffs. All ultimately withdrew their objections, some after having reached an agreement.

The proposed tariffs contained a significant number of differences when compared with the *CBRA Commercial Media Monitoring Tariff 2000-2005* and the *CBRA Non-Commercial Media Monitoring Tariff 2001-2005*. Once all objections were withdrawn, CBRA proposed, and the Board accepted, to examine these differences according to a simplified, written process.

CBRA asked that the tariffs be increased to reflect the fact that owners of other works used by media monitoring services often charge a premium for multiple uses of the same item by the same customer. However, rather than further adding to reporting requirements by adopting the sometimes complex formulas used to calculate these additional payments, CBRA suggested it would be more efficient to simply increase the overall rate from 9 to 10 per cent in 2007-2008. Since no one objected, the Board certified the tariffs at the rates CBRA proposed, i.e., 9 per cent in 2006 and 10 per cent in 2007-2008.

In response to requests from its users, CBRA also asked that the tariffs be extended to some forms of downloads of excerpts. The tariffs incorporate the change, which cannot result in unfairness to media monitors.

Finally, the non-commercial tariff was broadened to apply to municipal governments.





## Arbitration Proceedings

Pursuant to section 70.2 of the *Act*, the Board can set the royalties and other terms 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 2008-2009, the Board received four applications for arbitration.

On November 14, 2008, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) asked the Board to set the terms and conditions of a licence for the reproduction of musical works by the Canadian Broadcasting Corporation (CBC) from that date until March 31, 2012. The licence would authorize the use of SODRAC's repertoire for a wide variety of CBC activities, including conventional television and radio, specialty channels, webcasting, simulcasting of radio programming, DVDs of programs as well as the sale and licensing of programs to third-party broadcasters.

On December 19, 2008, SODRAC asked the Board to set the terms and conditions of a licence for the reproduction of musical works by Les chaînes Télé Astral and Teletoon (Astral) from that date until August 31, 2012. The licence would authorize reproductions made in the context of the programming and broadcasting activities of the specialty television channels for which Astral holds, either by itself or with others, a broadcasting licence from the CRTC, with the exception of Musique-Plus and MusiMax.

On March 6, 2009, the *Association québécoise de l'industrie du disque, du spectacle et de la vidéo* (ADISQ) asked the Board to set the terms and conditions of a licence for the reproduction onto phonograms, between January 1, 2009 and December 31, 2012, of musical works in SODRAC's repertoire by record labels that are members of ADISQ.

On March 19, 2009, SODRAC asked the Board to set the terms and conditions of a licence for the reproduction of musical works into musical videograms and CD/DVD sets marketed by members of ADISQ from July 1, 2004 to December 31, 2012.


### Decisions

One decision was rendered during the fiscal year.

#### **SODRAC-CBC: Interim Decision (March 31, 2009)**

As stated above, SODRAC asked the Board on November 14, 2008 to set the 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 asked that the Board issue an interim licence.

Two agreements triggered these applications. The first would have expired on August 17, 1995 had it not been for a provision stating that it continued to apply until replaced. It allowed CBC to reproduce works for delayed radio or television broadcasting and in connection with ancillary activities. The second, which expired on June 30, 2005, allowed the use of SODRAC's repertoire in CBC programming merchandise such as DVDs.



SODRAC proposed that the interim licence be different from earlier agreements in several respects. CBC did not object to the issuance of an interim licence but argued that it would be more appropriate to simply extend the application of both agreements on an interim basis.

An interim decision is used to avoid negative consequences caused by the length of proceedings. In most cases, the best way to achieve this is to maintain the *status quo*. Sometimes, changes in circumstances tend instead to favour the adoption of new rules. In this instance, the Board did a bit of both. It did not set additional royalties for any activity that existed or was foreseeable in 1992, the year in which the first agreement was signed, and set symbolic additional royalties for new uses.

As a result, the application was granted with respect to conventional television, La Première Chaîne radio, Radio One and Radio-Canada International (\$520,000), to video-copies of

programs (rates set in the agreement), to radio simulcasting (\$1 per month) and to the sale and licensing of CBC programs to third-party broadcasters (\$1 per transaction), was granted in part with respect to webcasting (\$1 per month instead of \$650) and was denied with respect to RDI and Newsworld (\$100 per month) and to Espace Musique and CBC Radio 2 (\$100 per month). With respect to the sale and licensing of CBC programs to third-party broadcasters, the Board also imposed additional reporting requirements for two reasons. First, this type of transaction is now more frequent than in the past. Second, a transactional model is most frequently used for this type of licence.

SODRAC asked that the licence apply as of November 14, 2008, the day it filed its application. CBC did not object to this. At one time, the Board doubted whether a decision issued pursuant to subsection 70.2(2) of the *Act*, or the interim decision that precedes, could apply retroactively to the date of the application. This is no longer an issue. The Board, as arbitrator, finds itself substituted to the will of the parties. It can accordingly impose on them whatever they themselves could have agreed to. Clearly, a copyright owner and a user can agree to licence past uses.



# 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 2008-2009.

## Hearings

No hearings were held in 2008-2009.

## Decisions

Two decisions were rendered during the fiscal year.

### **Retransmission of Distant Television and Radio Signals for the years 2004-2008**

On December 12, 2008, the Board certified the tariffs for the retransmission of distant television and radio signals for the years 2004 to 2008.


On March 31, 2003, the Border Broadcasters Inc., the Canadian Broadcasters Rights Agency Inc. (CBRA), the Canadian Retransmission Collective, the Canadian Retransmission Right Association (CRRA), the Copyright Collective of Canada, the Society of Composers, Authors and Music Publishers of Canada (SOCAN), the Major

League Baseball Collective of Canada Inc. (MLB) and FWS Joint Sports Claimants Inc. (FWS) jointly filed a proposed tariff for the retransmission of distant television signals. All but two of the collectives filed for a term of five years. MLB filed for one year and FWS filed for three. SOCAN, CBRA and CRRA also filed a proposed tariff for the retransmission of distant radio signals for 2004 to 2008. On March 30, 2004, MLB filed a proposed television tariff for 2005 to 2008. The following day, the Direct Response Television Collective (DRTVC), representing copyright owners in infomercials, filed a proposed tariff for 2005. On March 29, 2005, DRTVC filed a proposed tariff for 2006 to 2008.

Bell ExpressVu, the Canadian Cable Television Association, Star Choice Television Network, TELUS Communications Inc., Quebecor Media Inc. and Videotron Ltd. objected to one or more of the tariffs. All collectives except SOCAN objected to DRTVC's tariff proposal for 2005.

A number of factors contributed to making the examination of the proposed tariffs a much too long process. Among them were changes to existing regulations that had to be reflected in a new tariff and as such, complicated the process. Protracted negotiations on a rate increase and on the allocation of royalties among collectives also contributed in drawing out the process. On May 20, 2005, the Board was informed that the key issues in dispute in the television tariff had been resolved. On December 6, 2007, a further draft television tariff was submitted. There were ongoing discussions with the parties on the wording of the tariff.





Settlement negotiations on the radio retransmission tariff were equally successful. On July 7, 2005, the Board was advised that the final allocation of royalties between the collectives was settled. On February 14, 2006, the Board received copy of a memorandum of agreement and a draft of the radio tariff reflecting this agreement.

The radio and television royalties payable by small retransmission systems remained the same. For all other systems, the radio tariff was increased from 5 to 12¢ per subscriber, per year from the outset, while the television tariff increased by 15¢ per subscriber, per month over the life of the tariff, from between 20¢ to 70¢ to between 35¢ and 85¢. The Board concluded that these significant increases were justified for several reasons. First, the objectors who agreed to the increases represent retransmitters of all sorts. Second, the retransmission market has evolved considerably since 1990; in particular, the number of distant signals available has grown substantially. Third, the rates had remained the same since 1990 in

the case of the television tariff, and since 1992 in the case of the radio tariff, while the Consumer Price Index had increased by more than 45 per cent.

The Board estimated that in 2007, the television tariff would generate \$85 million in royalties, while the radio tariff would generate over \$1 million. This reflected both the increase in the tariffs and the continued growth in the number of subscribers.

### **Retransmission of Distant Television and Radio Signals for the years 2009-2013**

At the request of all retransmission collectives, the Board extended indefinitely and on an interim basis, the application of the *Television Retransmission Tariff, 2004-2008* and of the *Radio Retransmission Tariff, 2004-2008*. These tariffs will remain in force, unless modified, until the final tariffs are certified for the period starting January 1, 2009.





# 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 January 22, 2009, CPCC filed a statement of proposed levies to be collected for private copying for the year 2010.

## Hearings

In 2008-2009, one hearing was held on the proposed tariffs for the years 2008-2009.

## Decisions

One decision was rendered during the fiscal year.

## Private Copying 2008-2009

On December 5, 2008, the Board certified the *Private Copying Tariff, 2008-2009*.

Originally, the proposed tariff targeted digital audio recorders such as iPods and MP3 players. On January 10, 2008, the Federal Court of Appeal ruled that a tariff could not be imposed on these devices. As a result, the Board struck out all portions of the proposed tariff dealing with digital audio recorders. Since CPCC had already indicated it was no longer seeking to levy removable electronic memory cards, the proposed tariff finally targeted only audio cassettes, recordable and rewritable CDs and MiniDiscs.

Partly as a result of the decision of the Federal Court of Appeal, the Canadian Storage Media Alliance, the Canadian Association of Broadcasters, the Canadian Broadcasting Corporation, the Canadian Wireless Telecommunications Association and Dataware Corporation withdrew from the proceedings. The sole remaining objector, the Retail Council of Canada, stated it would not present evidence or call witnesses but would maintain a “watching brief”. Consequently, CPCC was the only party left to participate in the process. In order to expedite matters and to properly protect the public interest, the Board sent to CPCC a number of questions in advance of a one-day hearing held on April 29, 2008.



### **Analysis**

The Board has always applied or examined the “Stohn/Audley model” (a valuation model proposed by CPCC and developed by these experts) before certifying the private copying tariff. That model has always used the amount of remuneration received by rights holders from the sale of a prerecorded CD as the proxy for the amount they should receive for private copying. Yet, both CPCC and the Board have always felt that an alternative, and possibly better proxy would be the market for digital downloads.

There have always been several obstacles to using that digital proxy. They relate to the degree of maturity of the digital download market and to the unavailability of information in respect of some of the three types of rights holders (composers,

performers and record makers). The Board concluded that the digital proxy was still not robust enough to be useable in these proceedings. The Stohn/Audley model, based on the prerecorded CD proxy, continued to be sufficiently reliable to be of help in setting the rates.

### **Audio Cassettes**

Based on the evidence, the Board estimated that 26.1 million private copies were made onto audio cassettes in 2006-2007. This number has decreased consistently since 1998. It is lower than the number of personal musical copies made onto either DVDs or memory cards, which are not yet subject to a levy. The percentage of all private copies made onto audio cassettes declined from 4 per cent in 2005-2006 to 2 per cent in 2006-2007. However, it remains that 57 per cent of audio cassettes are being used to copy music, a much higher ratio than the corresponding number (7 per cent) for DVDs. The Board thus concluded that audio cassettes continue to be ordinarily used by individuals to copy music.

Using the Stohn/Audley model, the Board obtained a rate of 28¢ for audiocassettes. It nevertheless certified a rate of 24¢, as proposed by CPCC.





### **CDs and MiniDiscs**

The Board estimated the percentage of all CDs bought by individuals at 54.1 per cent and the proportion of CDs bought by individuals that were used to copy music at 53 per cent. These proportions were similar to what the Board used in the preceding decision, and accorded with the Board's overall perception that the recordable CD market is both mature and stable.

As it had done in the past, the Board excluded paid downloads and promotional tracks from its calculations. Finally, the Board estimated that the average number of tracks copied on a CD had increased from 15 to 18.4, reflecting the broader use of compression technologies to copy musical files.

The rate the Board obtained for CDs was 37¢. The rate it certified was 29¢, as proposed by CPCC.

The Board estimated that the rates it set would generate total royalties of about \$29 million in 2008. That amount is similar to what CPCC has collected on average in the past, in spite of the increase in the rate for CDs. This reflects the fact that blank CD sales should go down.

### **Application by Z.E.I. Media Plus Inc.**

On May 30, 2008, Z.E.I. Media Plus Inc. (Z.E.I.) sought to intervene in the proceedings and to vary all past tariffs, claiming that certain types of recordable CDs are not ordinarily used by consumers to copy music and as such, cannot be subject to a private copying levy. On July 17, 2008, the Board allowed Z.E.I. to intervene and set in motion a paper process that would allow creating the evidentiary record required to deal with Z.E.I.'s allegations.

On November 6, 2008, CPCC requested that the Board certify a tariff for 2008-2009 without waiting to deal with Z.E.I.'s application to vary. At the same time, CPCC undertook to either refund or not to collect any levy on recording media which the Board might decide ought not to be levied as a result of Z.E.I.'s application.

The Board remains seized of Z.E.I.'s application to vary the current and all past tariffs. The record was perfected on March 27, 2009 and the matter is currently under consideration.

## 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, 28 applications were filed with the Board and 14 licences were issued as follows:

- *National Film Board of Canada*, St-Laurent, Quebec, for the reproduction and incorporation in a documentary film of a cartoon by Stewart Cameron.
- *McGraw-Hill Ryerson Limited*, Whitby, Ontario, for the reproduction in a textbook of a letter written by Rita Schindler published in the *Toronto Star* on December 30, 1990.
- *NYM Ministries, Dryden*, Ontario, for the mechanical reproduction of three songs.
- *Production GFP (III) inc.*, Montreal, Quebec, for the communication to the public by telecommunication of television programs excerpts.
- *The Buchanan Library of Lethbridge College*, Lethbridge, Alberta, for the digital reproduction and communication to the public of a photograph of Donald W. Buchanan (photographer unknown) and a painting by William Robert Welch.
- *1390040 Ontario Limited (If You Love Our Children Productions)*, Toronto, Ontario, for the synchronization, reproduction and public performance of a piece of film footage.
- *The Friends of the North Vancouver Museum & Archives Society*, Vancouver, British Columbia, for the reproduction, in a picture book, of a postcard labelled “The Ship of the Seven Seas” produced by Ronald Huck Agency and printed by Lawson Graphics Pacific Ltd. (year of publication unknown).
- *Mireille Barrière*, Montreal, Quebec, for the reproduction in a book of two photographs of Colette Boky taken by Georges Tinguely (Studio Lausanne of Montreal).
- *Société Radio-Canada*, Montreal, Quebec, for the reproduction of three musical works (excerpts) in a television program.
- *Catherine Sénart*, Montreal, Quebec: two licences for the mechanical reproduction of the musical work entitled *Le temps est bon* written by Stéphane Venne and published by JFM Investments Inc. in 1972.
- *University of Waterloo Library*, Waterloo, Ontario, for the posting, on the university’s intranet site, excerpts of the book entitled “Leningrad Diary” written by Vera Inber (translated by Serge M. Wolff and Rachel Grieve) and published in 1971 by St. Martin’s Press, New York.
- *Kathleen W. Hansen*, Courtenay, British Columbia, for the adaptation, mechanical reproduction and communication to the public by telecommunication of an excerpt of the musical work entitled “Vancouver Calls Me” written by William Templeton and published by The Vancouver Summer Entertainment Council in 1940.
- *Barbara Deanne Cobb-Zygadlo*, Calgary, Alberta, for the reproduction of six images of aliens (source unknown) in a Master’s thesis.





## Court Proceedings

### **Tariffs 22.A (Internet – Online Music Services) and 22.B-G (Internet – Other Uses of Music)**

On November 16, 2007, SOCAN filed with the Federal Court of Appeal an application for judicial review of the Board's decision of October 18, 2007 certifying the Internet tariff for online music services (Tariff 22.A). On November 19, Shaw Cablesystems, Bell Canada, Rogers Communications Inc., Puretracks Inc., TELUS, the Entertainment Software Association and the Entertainment Association of Canada, and the Canadian Recording Industry Association also filed applications.

On February 1, 2008, the Court issued an order which, in practice, postponed the examination of the applications for judicial review of the Tariff 22.A decision until the Board disposed of the rest of Tariff 22.

The Board certified the rest of Tariff 22 (22.B-G) on October 24, 2008. On November 24, 2008, SOCAN filed an application for judicial review of that decision.

On February 10, 2009, the Court ordered that all applications targeting Tariff 22.A be heard together and that the application targeting the rest of Tariff 22 be heard immediately thereafter by the same panel.

### **SOCAN Tariff 24 (Ringtones) – 2003-2005**

On September 18, 2008, the Supreme Court of Canada dismissed with cost the application for leave to appeal of the Canadian Wireless Telecommunications Association from the judgment of the Federal Court of Appeal dated January 9, 2008, that dismissed the Association's application for judicial review of the Board's decision of August 18, 2006 certifying SOCAN Tariff 24 (Ringtones).



## 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 payable under the agreement, as well as the related terms and conditions.

During the fiscal year, 596 agreements were filed with the Board.

Access Copyright, The Canadian Copyright Licensing Agency, which licenses reproduction rights such as digitization and photocopy, on behalf of writers, publishers and other creators, filed 334 agreements granting educational institutions, language schools, non-profit associations, copy shops and others a licence to photocopy works in its repertoire.

The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) filed 257 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 in 2008-2009 concerned educational institutions, municipalities, municipal libraries and other users.

Access Copyright and COPIBEC have also filed two agreements they jointly entered into with the Bank of Canada and with Organon Canada Inc.

The Audio-Video Licensing Agency (AVLA), a copyright collective that administers the copyright in some master and music video recordings, filed one agreement.

Finally, the Canadian Broadcasters Rights Agency (CBRA) filed two agreements it entered into with the provinces of British Columbia and Ontario for media monitoring. CBRA represents various Canadian private broadcasters who create and own radio and television news and current affairs programs and communication signals.

