

Copyright Board of Canada



Annual Report • 2010-11

Copyright Board
Canada



Commission du droit d'auteur
Canada

The Honourable Christian Paradis, P.C., M.P.
Minister of Industry and Minister of State (Agriculture)
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-third Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2011.

Yours sincerely,

A handwritten signature in black ink that reads 'Claude Majeau'. The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Claude Majeau
Vice-Chairman and
Chief Executive Officer

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Board Members and Staff



as of March 31, 2011

Chairman: The Honourable Justice William J. Vancise

Vice-Chairman and Chief Executive Officer: Claude Majeau

Members: Jacinthe Thériège
J. Nelson Landry

Secretary General: Gilles McDougall

General Counsel: Mario Bouchard

Legal Counsel: Valérie Demers

Economic Analysts: Elizabeth Robert
Raphael Solomon

Senior Clerk of the Board: Josée Potvin

Assistant Clerk: Nadia Campanella

Registry Officers: Sid J. Bateman
Tina Lusignan

Manager, Corporate Services: Ivy Lai

Financial and Administrative Assistant: Joanne Touchette

Technical Support Officer: Michel Gauthier



Chairman's Message



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

In 2010-11, the Board held four hearings. In April and May 2010, the Board considered an inaugural tariff by Re:Sound Music Licensing Company (Re:Sound, formerly NRCC) for the use of recorded music to accompany dance and fitness activities (Tariff 6). In June 2010, the Board heard two applications for arbitration, namely the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) v. CBC and SODRAC v. Groupe Astral, merged into a single process. Immediately thereafter, the Board examined SODRAC's tariff for the reproduction of musical works embedded in cinematographic works (Tariff 5). This tariff process was also partially merged with the two applications for arbitration. Finally, in June 2010, the Board conducted a joint examination of the Society of Composers, Authors and Music Publishers of Canada's (SOCAN) and CMRRA/SODRAC Inc.'s (CSI) tariffs for online music services.

The Board issued five decisions during the fiscal year. One of these dealt with the public performance of musical works and sound recordings as well as the reproduction of musical works, sound recordings and performers' performances by commercial radio stations. A total of five tariffs were certified covering SOCAN, Re:Sound, CSI, AVLA Audio-Video Licensing Agency (AVLA) and the *Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec* (SOPROQ) (jointly AVLA/SOPROQ) and ArtistI for various years spanning the period 2008 through 2012. This was the first time that such a large number of collectives were heard jointly on tariffs that relate to the use of music by commercial radio stations.

The Board also set an interim Access Copyright tariff for the reprographic reproduction by post-secondary educational institutions for the years 2011-13. In addition, it dealt with two private copying decisions, certifying the private copying tariff for 2010 and for 2011. Finally, the Board issued a decision denying an application by the *Ministère de l'Éducation, du Loisir et du Sport Québec* (MELS) for the use of the soundtrack of a video recording of a speech delivered by Severn Cullis-Suzuki. All of these decisions are described in greater detail in this report.

In the last fiscal year, eight licenses 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.





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 10, 2010. I took this opportunity to discuss the impact, if any, the reviewing courts, in this case the Federal Court of Appeal, have on decisions of the Copyright Board and whether the Court's decisions affect the effectiveness of the Board. The speech is available on the Board's Web site.

In conclusion, I wish to thank my colleagues as well as the Board's staff 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 licenses 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 license.

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 licenses 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 license 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].





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

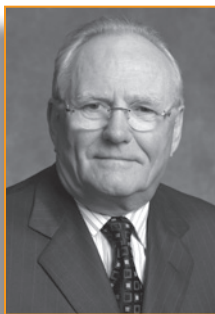


Board members are appointed by the Governor in Council to hold office during good behaviour for a term not exceeding five years. They may be reappointed once.

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.

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



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.





Members



Ms. Jacinthe Th  berge is a full-time member appointed in May 2007 for a five-year term. Prior to her appointment, Ms. Th  berge 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. Th  berge 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. Th  berge is a graduate of the Universit   de Montr  al (LL.B. in 1972).



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 Universit   de Montr  al 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 Qu  bec Bar in 1969. He also obtained a BSc in 1965 and a BA in 1959 from the Universit   de Montr  al.

Note: Detailed information on the Board’s resources, including financial statements, can be found in its Report on Plans and Priorities for 2011-12 (Part III of the Estimates) and the Performance Report for 2010-11. These documents are or will soon be available on the Board’s Web site (www.cb-cda.gc.ca).





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, 2011, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and Re:Sound – formerly known as the Neighbouring Rights Collective of Canada (NRCC) – filed their respective statement of proposed royalties to be collected in 2012; some tariffs cover more than one year.

Hearings

During the fiscal year, the Board held two hearings as follows:

- In April and May 2010, the Board considered an inaugural tariff by Re:Sound for the use of recorded music to accompany dance and fitness activities (Tariff 6). This tariff is to set the royalties to be paid by fitness centres and dance venues for their use of recorded music.
- In June 2010, the Board conducted a joint examination of SOCAN's tariff for the communication to the public by telecommunication of musical works and of CSI's tariff for the reproduction for musical works, both in respect of online music services.

Decisions

One decision was rendered during the fiscal year, as follows.





July 9, 2010 – Commercial Radio Tariff: SOCAN (2008-2010), Re:Sound (2008-2011), CSI (2008-2012), AVLA/SOPROQ (2008-2011), ArtistI (2009-2011)

A Canadian radio station that broadcasts recorded music off a server must account for six rights. These are:

- the exclusive right to communicate a musical work to the public by telecommunication, administered by the Society of Composers, Authors and Music Publishers of Canada (SOCAN);
- the exclusive right to reproduce the work, administered by the Canadian Musical Reproduction Rights Agency (CMRRA) and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) when acting separately, or by CMRRA/SODRAC Inc. (CSI) when CMRRA and SODRAC are acting together;
- the exclusive right to reproduce a sound recording, administered by the Audio-Video Licensing Agency (AVLA) and the Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec (SOPROQ), jointly AVLA/SOPROQ;
- the exclusive right to reproduce any reproduction of an authorized fixation of a performer's performance for a purpose other than that for which the authorization was given, administered by ArtistI, ACTRA/PRS or AFM Canada;
- the remuneration rights that performers and makers each enjoy when a published sound recording of a musical work is communicated to the public by telecommunication, administered by Re:Sound Music Licensing Company (Re:Sound).

SOCAN, Re:Sound, CSI, AVLA/SOPROQ, and ArtistI filed proposed tariffs separately, for the years 2008-2010, 2008-2011, 2008-2012, 2008-2011 and 2009-2011, respectively. At the request of the sole objector to the tariffs, the Canadian Association of Broadcasters (CAB), the Board examined them jointly. ACTRA/PRS and AFM Canada, who had not filed proposals, were given leave to intervene. This was the first time that the Board has been asked to set tariffs for all those rights at the same time.

The Board considered several legal questions, including the following:

What is the nature of the performer's reproduction right pursuant to subparagraph 15(1)(b)(ii)?

Subsection 15(1) of the *Act* grants to performers a copyright in their performance. The rights granted to a performer pursuant to paragraph 15(1)(b) arise only if the performance "is fixed", whether or not with the consent of the performer. For its part, subparagraph 15(1)(b)(ii) comes into play only if the performer consented to the fixation. If the performer consents to certain uses but not others, the performer retains the copyright over reproductions made for any use other than those for which consent was given. By contrast, to the extent that performers authorize certain reproductions of the fixation of their performance, the reproduction right does not materialize.

Recording contracts determine what a performer authorizes. Since no individual contracts were filed, the Board relied on boiler-plate recording contracts. The Board found that the reproduction right for performers outside Quebec does not materialize, since the contracts typically grant to makers the exclusive right to use their performance for all purposes.





In the province of Quebec, individual recording contracts are as broad as those used elsewhere in Canada. However, in that province, individual contracts are unenforceable if they provide less favourable terms than those stipulated in collective agreements reached pursuant to *An Act respecting the Professional status and conditions of engagement of performing, recording and film artists* (SAA). The Board first rejected CAB's argument that the SAA was invalid legislation, ruling that it was legislation related to labour law in the cultural industries. It then looked at collective agreements reached by the Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ), representing most sound recording makers in Quebec, with the *Union des Artistes* (UdA) and the *Guilde des Musiciens du Québec* (Guilde), making the assumption that as a rule, an agreement only grants the producer what is necessary to pursue the object of the recording agreement, that is, the commercial exploitation of the sound recording. The Board concluded that individual contracts subject to the UdA agreement and signed before 2000 could not grant rights beyond physical media. After that, the agreement authorizes the upload of a copy of a phonogram to a music delivery service (MDS) and the download of that copy to a radio station, but not any subsequent reproductions made using the MDS copy. The Guilde agreement, by contrast, allows performers to authorize makers to use the fixation of their performance for "all purposes". UdA members retain a copyright on certain digital copies made by radio stations, while the copyright of Guilde members never materializes.

In using "works" as they do, are radio stations making protected reproductions?

The CAB contended that some of the broadcasters' reproduction activities are not protected under the *Act*. For an activity to be a "reproduction" protected by the *Act*, it must involve the act of copying a protected work, the copying must be "substantial" and the resulting copy must be in a material form.

The Board distinguished three types of uses: downloads from a MDS, listening to songs off a MDS Web site and simulcasting. The CAB submitted that broadcasters are not liable for the MDS copies for two reasons. First, the MDS makes the copies. Second, a material copy does not exist until a music file is incorporated into a playback system. The Board rejected both arguments.

In the context of Internet transmission, words such as "transfer", "deliver", "download", "send" and "file" are metaphors. The Internet is not used to transfer files but to transmit packets of data. A file that is copied from one computer to another is not shipped from one to the other. Thus, the contention that music files downloaded off a MDS Web site are created on the MDS server, "delivered" to a radio station and then "stored" on the station's computer is factually flawed. The broadcaster itself creates all copies on its server. Furthermore, a copy exists before a file is incorporated into a playback system, since it is available for use by the broadcaster before that. Downloads from a MDS are reproductions in the same way as permanent downloads are. By contrast, using the song audition function offered by a MDS does not involve a reproduction of a substantial part of a work, since the entire song is never downloaded at once.

In a previous decision dealing with commercial radio, the Board had presumed that simulcasting activities include reproductions. Since there was no evidence in favour or against this presumption presented at this hearing, the Board applied the presumption once more.





Are radio stations liable for these reproductions?

The CAB argued that a MDS already authorizes broadcasters to make reproductions. The issues to be decided were whether and to what extent a MDS has the required authority to grant licenses. Insofar as authors are concerned, neither CSI nor its members have any relationship with any MDS. Similarly, performers who are ArtistI members have no relationship with any MDS. Owners of sound recordings do. And since AVLA and SOPROQ act as non-exclusive agents of their members, they cannot stop makers from licensing certain uses to a MDS.

Agreements between labels, MDS and broadcasters make it clear that MDS are agents of the labels. However, the terms of the agreements limit the authorization to the initial encrypted and decrypted copies; subsequent copies are not covered by the license and as such, are subject to the tariff.

Having dealt with these and other legal questions, the Board considered the positions of the parties.

SOCAN proposed that its main rate be increased from 4.4 to between 4.7 and 5.2 per cent of revenues. Re:Sound proposed an increase from 2.1 to 2.24 per cent. CSI requested an increase from 0.8 to 1.32 per cent. AVLA/SOPROQ and ArtistI asked for a top rate of 4 and 2.43 per cent respectively, subject to a repertoire adjustment. The CAB proposed a rate of 2.9 per cent for all rights required to play music on a commercial radio station.

SOCAN and Re:Sound argued that their rates should rise, due mainly to an increase in music use; they also asked that royalties be calculated on gross income. CSI gave three reasons for increasing its rate. First, the SOCAN rate has increased. Second, music use has increased. Third, CSI now holds a larger share of the repertoire. AVLA/SOPROQ asked that their rate be set using an independent valuation methodology. ArtistI proposed to set its rate based on a comparison with the CSI rate. The CAB asked that all rights be valued as a single input and claimed the right to deduct from the rate base the fair market value of the cost of production services provided to advertisers pursuant to turn-key contracts.

The Board considered and rejected the three economic methodologies proposed by the parties for the valuation of music by commercial radio.

The CAB proposed to update and adjust somewhat the methodology which the Board had used in its most recent decision dealing with commercial radio. The Board refused, stating that this model could only serve to measure long-term trends. In the absence of altered long-term circumstances, the rate should remain the same.





The Board rejected the first methodology proposed by AVLA and SOPROQ because it assumed a perfect correspondence between music use and advertising revenue. The Board could not accept that if music, even weighted by listeners, accounts for a certain percentage of total advertising revenues, it necessarily follows that the same percentage of listeners are attracted to the station and retained because of music.

The second methodology proposed by AVLA and SOPROQ identified the value of music reproductions with the difference in cost savings between music and talk stations. Differences in the financial performance of music and talk stations can result from many factors which the model does not take into account, including audience levels, station size, broadcasting frequency band and reliance on on-air personalities. Cost differences between music and talk content could also be explained by increases in the cost of talk content.

In the end, having reviewed the history of earlier tariffs and having rejected all valuation methodologies presented to it, the Board opted for stability. Until 2005, the SOCAN rate had remained basically unchanged for more than 25 years. The Re:Sound rate was first set in 1999, as a function of the SOCAN rate. In 2005 and 2008, using different methodologies and considering a number of factors that could impact on the value of music, the Board increased the effective SOCAN rate to 4.2 per cent and derived the Re:Sound rate using the same formula as in 1999. A new balance was created. Stable rates avoid administrative costs associated with rate changes. The only issue left as a result was music use, and the evidence did not establish whether the increase in music use was a sufficiently permanent trend to warrant a permanent adjustment in the rate. Consequently, the rates for SOCAN and Re:Sound remained the same.

By contrast, the Board adjusted the CSI rates to reflect the recent increase in the SOCAN rates and the increase in CSI's share of the repertoire. As for SOCAN, the Board declined to further adjust the CSI rate to reflect any increase in music use since 2005.

The starting point for the ArtistI and AVLA/SOPROQ rates was the CSI rate. As is the case for the communication right, the value to radio stations of the reproduction right of musical works is equal to that of the sound recording. The value of the reproduction right in the sound recording is ascribed equally to the performance and the sound recording, whether or not the performer's 15(1)(b)(ii) copyright materializes. If it does, the value of the performance is attributed to the performer; if not, that value is attributed to the maker. The rate for ArtistI was arrived at by multiplying half the CSI rate by the repertoire share represented by the collective.

Since makers "own" most of the value of performances embedded in sound recordings, the starting point for the AVLA/SOPROQ rate was in effect the full CSI rate, though the value of the performance and of the sound recording were calculated separately. That rate was adjusted on several accounts. First, the value of the original MDS reproductions was removed since these are already licensed. Second, what a performer "owned", whether or not a collective had filed a tariff, was deducted. Finally, the amounts were discounted to reflect AVLA/SOPROQ's repertoire share.





CAB had asked that a lower rate be set for talk radio stations. The Board refused to do so, rather favouring harmonization and simplification of the tariffs.

The Board accepted in principle that revenues associated with production services are not advertising revenues and should not be included in the rate base. However, nothing on the record would have allowed the Board to remove these revenues from the rate base, because of the way production services are bundled with advertising contracts. Since the Board found it important to have the same rate base for all collectives, it set the rate base as gross income.

The rates for all collective societies are summarized in the following table.

Rates Certified by the Board, in Percentage of Gross Income

	SOCAN	Re:Sound	CSI	AVLA/SOPROQ	Artisti
Low Music Use Stations					
For revenues not exceeding \$625,000	1.5	0.75	0.135	0.113	0.003
For revenues above \$625,000 but not exceeding \$1.25M	1.5	0.75	0.259	0.234	0.005
For revenues above \$1.25M	1.5	0.75	0.434	0.405	0.008
Other Stations					
For revenues not exceeding \$625,000	3.2	1.44	0.304	0.278	0.006
For revenues above \$625,000 but not exceeding \$1.25M	3.2	1.44	0.597	0.564	0.011
For revenues above \$1.25M	4.4	2.1	1.238	1.192	0.023

Note: The Re:Sound rates are subject to subparagraph 68.1(1)(a)(i) of the Act which sets the amount broadcasters pay on advertising revenues not exceeding \$1.25 million at \$100 per year.





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 2011 in accordance with section 70.13 of the *Act*:

- Tariff filed by ACTRA PRS/MROC for the reproduction, in Canada, of performers' performances by commercial radio stations for the year 2012.
- Tariff filed by ArtistI for the reproduction, in Canada, of performers' performances by commercial radio stations for the years 2012 to 2014.
- Tariff filed by AVLA/SOPROQ for the reproduction, in Canada, of sound recordings by commercial radio stations for the years 2012 to 2017.
- Tariffs filed by CMRRA-SODRAC Inc. (CSI) for the reproduction of musical works, in Canada, by non-commercial radio stations for the year 2012, and by online music services for the year 2012.
- Tariff filed by the Educational Rights Collective of Canada (ERCC) for the reproduction and performance of works or other subject-matters communicated to the public by telecommunication by educational institutions, in Canada, for the years 2012 to 2016.
- 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 2012.

Hearings

During fiscal year 2010-11, the Board held the following hearing, which also dealt with two applications for arbitration:

- In June 2010, immediately after hearing two applications for arbitration, namely SODRAC v. CBC and SODRAC v. Groupe Astral, merged into a single process, the Board examined SODRAC's tariff for the reproduction of musical works embedded in cinematographic works (Tariff 5). This tariff process was also partially merged with the two applications for arbitration.
- In June 2010, the Board conducted a joint examination of CSI's tariff for the reproduction of musical works and of SOCAN's tariff for the communication to the public by telecommunication of musical works, both in respects of online music services.





Decisions

One decision was rendered during the fiscal year, as follows.

March 16, 2011 – Access Copyright’s Interim Tariff for Post-Secondary Educational Institutions for the Years 2011 to 2013

On March 31, 2010, Access Copyright (Access) filed a proposed tariff for reprographic reproduction by post-secondary educational institutions. The final tariff was to apply from January 1, 2011. The licenses that governed the relations between Access and the institutions were to expire on that date. However, hearings into the matter will not start until much later, and a final tariff will be certified only after that.

On October 13, 2010, Access applied for an interim decision that would ensure that the existing licensing regime would continue to apply, with some exceptions, until the Board certifies a final tariff. Seventeen objectors opposed the application.

On December 23, 2010, the Board granted the application and issued an interim tariff. On March 16, 2011, the Board issued the reasons for its decision. The interim tariff maintained the *status quo*, such as it existed in the Association of Universities and Colleges of Canada (AUCC) model license, to the extent possible. This includes a fee of \$3.58 per full-time equivalent student.

Over the years, the Board has developed a number of principles in dealing with applications for interim decisions, in keeping with the leading authority on the nature and purpose of interim decisions. An interim decision serves above all to counteract the negative consequences caused by the length of the proceedings. An interim decision may be issued to prevent a legal vacuum. Interim decisions are made expeditiously on the basis of evidence often insufficient for the purposes of the final decision, and even in the absence of any evidence. Generally, the best way to achieve the purposes of an interim decision is to maintain the *status quo* while preventing a legal vacuum. Finally, an interim decision does not determine the merits of any issue to be settled in a final decision; it does not prejudice the final result.

The Board explained its decision to grant the application on a number of grounds. A licensing regime allowing the Institutions to use the repertoire of Access has been in place since 1994. An interim decision will prevent legal voids: absent such a decision, some Institutions will use the repertoire without authorization where one is needed. An interim decision will provide certainty until the Board certifies a final tariff without imposing a single licensing solution; instead, it will add a tool Institutions can use to comply with their copyright obligations. Granted, this was the first time the Board extended the *status quo* in the context of an inaugural tariff filed pursuant to the general regime, in a market where previous licensing arrangements existed. This was not reason enough to refuse the decision, especially since existing agreements were so similar in their essence and so prevalent in the marketplace as to operate as a *de facto* tariff. *Status quo* is a matter of fact, not of form.





The objectors opposed the application on a number of grounds. They argued that the Board lacked jurisdiction in the circumstances of this case, that the conditions for issuing an interim decision had not been met, that this was not an appropriate case for issuing such a decision and that the remedy sought did not preserve the *status quo*. The Board concluded that while arguments as to whether the Board could or should issue an interim decision misrepresented the Board's powers or the relevant facts, some did have merits.

In the course of dealing with the objectors' arguments, the Board provided answers to numerous legal and policy issues including the following.

As a rule, the duty to inform falls on users to inform rights holders of their intent to use something protected by copyright, not on rights holders to inform users of what they own or of the terms under which they issue licenses.

The entitlement of a copyright owner to control protected uses of her works by others is statutory, not contractual. No contract is needed for a user engaged in an unauthorized protected use to be obligated to the copyright owner. Therefore, it is wrong to suppose that users are free to make protected uses of the works of others once an agreement allowing those uses has expired or that the entitlement to collect royalties expires when a license expires. The only thing that ends with the license is the user's entitlement to use the repertoire, not the rights holder's entitlement to be paid.

The Board's power to issue interim decisions is found in section 66.51 of the *Act*. It is an express power, not an inferred one.

An interim tariff is not like an injunction. An injunction prevents a person from doing what he or she would otherwise be free to do. An interim decision settles the terms according to which a person may, if he or she so wishes and without the consent of the copyright owner, make protected uses that would otherwise require a permission that can be withheld.

An interim tariff is not mandatory. An institution that does not require a license need not comply with the tariff. It can avoid its application by purchasing the work, negotiating a license to copy the work with Access or its affiliates, not using any work in the repertoire of Access or engaging only in conduct exempt from liability.

It is neither legally impossible nor unfair to set an interim tariff can be set without knowing exactly the works to which it will apply. A collective society's repertoire changes daily, if not hourly. While it is often possible to determine, at any point in time, if a specific work or list of works is in a repertoire, it is never possible to determine all that it contains. This will remain true even if a collective could legitimately claim to represent all that is protected by copyright, if only because "all that is protected by copyright" always remains indeterminate.





Some objectors argued that the Institutions' copying practices have changed so significantly that the Board ought to set a nominal fee. These arguments were based on conjecture and prejudged the very debate that this matter is all about: the advent of Internet may not have resulted in the paperless institution.

Arguments that the interim application raised anti-competitive concerns were also rejected. Access is not a monopoly in at least two respects. It does not represent the world repertoire and what it does is represented on a non-exclusive basis. The users remain free to deal directly with its affiliates. Also, the Board's mandate is not to protect users against potential abuse of monopoly power by collectives, but to maintain a balance in the relevant markets.

Though the interim tariff should preserve the *status quo*, it cannot license a use that the final tariff does not target. Thus, the Board refused to include musical works in the interim tariff. To preserve the *status quo*, the interim tariff includes an indemnity clause even though the Board had already ruled such clause unnecessary in Access tariffs. The issue would need to be revisited later on in these proceedings. The licensing of digital copies was included as an option in the interim tariff, even though objectors claimed they did not wish to use the option.

The reasons ended by commenting on the wording of the interim tariff. To the extent possible, it tracks the wording of the AUCC model license. Changes were made only where necessary. Wherever the AUCC model license left it open for an Institution and Access Copyright to agree on certain terms, the terms of the latest agreement were incorporated by reference to the tariff. Finally, the existing list of works that are expressly excluded from the license was maintained, as it is a necessary adjunct to the indemnity clause that was also maintained.



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 license 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 license.

In June 2010, the Board heard two applications for arbitration, namely SODRAC v. CBC and SODRAC v. Groupe Astral, merged into a single process. SODRAC's Tariff 5 for the reproduction of musical works embedded in cinematographic works was also partially merged with the two applications for arbitration.

Decisions

The Board rendered no decision during the fiscal year.

Requests

The Board received no request for arbitration in the year 2010-11.

On July 27, 2010, after having been informed that an agreement had been reached between the parties, the Board confirmed that it would not proceed with an arbitration request filed by SODRAC on September 3, 2009, with regard to MusiquePlus.



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

The Canadian Broadcasters Rights Agency Inc, the Canadian Retransmission Right Association and the Society of Composers, Authors and Music Publishers of Canada filed a radio retransmission tariff for 2012 and 2013.

Hearings

No hearings were held in 2010-11.

Decisions

No decision was rendered during the fiscal year.





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, 2011, the Canadian Private Copying Collective (CPCC) filed a statement of proposed levies to be collected for private copying for the years 2012 and 2013.

Hearings

No hearings were held during the fiscal year.

Decisions

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

November 2, 2010 – Tariff for 2010

On January 22, 2009, the Canadian Private Copying Collective (CPCC) filed its Private Copying Tariff for 2010, asking to maintain the current rates of \$0.24 for audio cassettes and \$0.29 for CDs and MiniDiscs.

The Canadian Association of Broadcasters filed and then withdrew its objection. Z.E.I. Media Plus Inc. (ZEI) objected to claim that “professional CDs” should not be subject to the tariff.

ZEI argued that data CDs are not a single, homogeneous kind of medium and that professional CDs are not ordinarily used by consumers to copy music. ZEI further argued that any characteristic that serves to distinguish two types of CDs with respect to their ordinary use cannot be ignored if the private copying regime is to be fair and equitable.





CPCC argued that a medium can only be divided into different types if there are technological or physical (intrinsic) distinctions that cause a type of CD to not be used to copy music. Conversely, extrinsic characteristics should not be used to establish that a distinct type of CD exists.

Parliament intended the private copying regime to be sensitive to market realities and to have the flexibility to adapt to a changing environment. The regime is designed to allow the Board maximum flexibility to include and exclude the required elements in order to be as fair as possible to all concerned and to reinforce the nexus that is required to maintain the constitutionality of the regime. That being said, if professional CDs were to be treated differently from other CDs, there would have to be at least one stable characteristic that could be used to distinguish them from other CDs. Furthermore, such characteristic should not be capable of easy manipulation for the purpose of avoiding the tariff. As a rule, intrinsic characteristics should be preferred over extrinsic ones, though the distinction between the two is far from easy to draw in some instances.

On the whole, professional CDs are not branded while other CDs are. However, there is no clear definition of an unbranded CD. Branding is not a stable characteristic: an unbranded CD can be branded at any time after importation or manufacturing. This creates enforcement issues: no levy is payable on CDs that are branded only after the importer has disposed of them. Also, branding is not a characteristic that tends to affect the likelihood of a consumer purchasing the CD or using it to copy music.

The Board rejected the claim that bulk packaging distinguishes professional CDs. Packaging is a clear example of an extrinsic, inherently unstable characteristic that can easily be manipulated for tariff avoidance. Furthermore, packaging of CDs at the retail level can have a bulk flavour. ZEI also asserted that professional CDs do not comply with the requirements of the *Consumer Packaging and Labelling Act (CPLA)*. Many CDs are sold to consumers that do not comply with the *CPLA*; this and all other characteristics proposed by ZEI were not sufficiently obvious and stable to be verifiable.





Accordingly, the Board found that there are no stable characteristics of professional CDs that allow them to be distinguished from commercially available CDs.

Furthermore, for professional CDs not to be levied, use of them for private copying must be so low as not to meet the statutory definition of “audio recording medium”. Actual consumer use of professional CDs to copy music is not so marginal that they fail to meet the statutory definition. ZEI’s own sales data made it clear that consumer access to professional CDs is not trivial. The proportion of professional CDs reaching consumers is not negligible, and consumers who purchase such CDs are just as likely to use them to copy music as other CDs. Accordingly, the Board did not exclude professional CDs from the Private Copying Tariff.

The Board considered the usage of cassettes, CDs and MiniDiscs for private copying. Less than one per cent of private copies are made on cassettes. Their use for copying music has become marginal and no longer merits a private copying levy. Use of CDs for private copying is decreasing but remains quantitatively significant. Absent any new information on the use of MiniDiscs for private copying, the Board retained CDs and MiniDiscs in the Private Copying Tariff.

The Board accepted expert testimony to the effect that 80 per cent of private copying is done of selected tracks, rather than whole albums. Noting that online music services charge an average premium of 40 per cent for single tracks relative to the per-track price of whole albums, the Board computed an adjustment of 32 per cent to the value of CD copying to account for selection.

Other than this adjustment, the Board resorted to the valuation model used in previous private copying decisions. The CD and MiniDisc rate for 2010 was computed to be \$0.29: the increase for single-track copying compensates for decreases in other factors in the valuation model. The valuation model also indicated authors, performers and makers should receive respectively 58.2 per cent, 23.8 per cent and 18 per cent of the total royalties. The Board approved this allocation.





December 17, 2010 – Tariff for 2011

On March 31, 2010, CPCC filed its proposed Private Copying Tariff for 2011.

The proposed tariff asked for a levy on audio cassettes. When certifying the Private Copying Tariff for 2010, the Board had decided that audiocassettes should no longer be subject to a levy. The updated data CPCC filed at the Board's request no longer made reference to this type of media. The Board treated the matter as settled.

The updated data CPCC filed were substantially different from the data submitted for the 2010 tariff. They indicated that substantially more tracks had been copied and that while the number of blank CDs sold had decreased significantly, unit sales to individuals had remained more or less the same.

Generally, a tariff should reflect trends of markets to which it applies. Reacting to short term changes creates instability and uncertainty. Based on the evidence, the Board concluded that the updated data did not reflect a long trend and should not be used to set the levy. Sales of blank CDs are contracting rapidly and will become insignificant within the next few years. In this context, information CPCC is able to obtain, especially that derived from surveys, necessarily becomes less reliable.

Other results were intuitively questionable. For example, the Board did not believe that the number of copies onto CDs has gone up by more than 50 per cent in one year. Finally, the relevance of some data would need to be re-examined if market changes were as rapid as the data implied.

That being said, CPCC asked only that the rate remain the same and the Board saw no reason to lower it. The Board certified a rate for blank CDs of \$0.29, identical to the rate it had certified for the previous year. However, the Board removed the levy on MiniDiscs. Fewer than 8,000 were reported sold in Canada in 2009; consequently, these were not longer being ordinarily used for private copying.



Unlocatable Copyright Owners



Pursuant to section 77 of the *Act*, the Board may grant licenses 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. Licenses granted by the Board are non-exclusive and valid only in Canada.

During the fiscal year, 30 applications were filed with the Board and eight licenses were issued as follows:

- *John S. Long*, North Bay, Ontario, for the reproduction of the article entitled “The White Dog Feast” written by Joseph Vanasse in 1907.
- *University of Athabasca*, Athabasca, Alberta, for the digital reproduction and communication to the public of community newspapers.
- *Lauren Bergen*, Lasqueti Island, B.C., for the reproduction of a bilingual book entitled “New Students’ Edition, Enlarged and Revised, A New Method for the Pianoforte / Nouvelle “Édition des élèves”, Augmentée et Revisée, Une nouvelle méthode pour le piano” written by James Bellack, translated by F. Raynaud and published by Whaley, Royce and Co. in 1917.
- *Société Radio-Canada*, Montreal, Quebec, for the reproduction of excerpts of three musical works in a television program.
- *National Film Board of Canada*, Montreal, 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 and communication to the public by telecommunication of a work created by Sidney Clark Ells.
- *Canadian Coast Guard*, Sydney, N.S., for the reproduction of “Chaudières marine, questions et réponses” as translated by W.D. Ewart from “Marine Boilers Questions and Answers” by G.T.H. Flanagan and published in 1984 by Stanford Maritime, London, UK.
- *PCF Angle Mort Film Inc.*, Montreal, Quebec, for the reproduction, synchronization and public performance of an extract of a television series entitled “Maria del Barrio”.





On October 15, 2009, the *Ministère de l'Éducation, du Loisir et du Sport Québec* (MELS) applied to the Board for a licence for the use of an unlocatable copyright owner's work in order to use the soundtrack of the video recording of a speech delivered by Severn Cullis-Suzuki at the Earth Summit held in Rio de Janeiro in 1992. The MELS intended to perform the soundtrack in public in the course of a test.

The Board concluded that there is no need to issue a licence in the circumstances because the MELS falls under the exception set out in subsection 29.4(2) of the *Act*, that is, an educational institution performing a work publicly required for a test or examination. Furthermore, the soundtrack is not commercially available. Finally, the soundtrack does not appear to be part of the repertoire of a collective society.





SOCAN Tariff 22.A (Internet – Online Music Services) 1996-2006

Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2010 FCA 123

On October 18, 2007, the Board certified SOCAN Tariff 22.A for the communication to the public by telecommunication of musical works by Internet online music services. The decision was the subject of five applications for judicial review.

Relying on *CCH Canadian v. Law Society of Upper Canada (CCH)*, the Board concluded that listening to a preview of a musical work constituted fair dealing for the purpose of research pursuant to section 29 of the *Copyright Act* and could not as such be subject to the payment of royalties.

SOCAN objected to the Board's interpretation of the word "research", arguing that it must involve systematic research, critical analysis or scientific enquiry carried out in a formal setting. Previews as allowed by online music services have none of the characteristics required to fall within the concept of research.

The Court recognized that "research" has many meanings. Aside from its primary and ordinary meaning, which refers to the action of looking or searching and the effort to find something, the word also carries a secondary, intellectual meaning, namely the mental effort to discover new knowledge. In this case, the Court concluded that the Board did not err in deciding to give the word research its primary and ordinary meaning. Purchasing a download involves an effort on the part of the consumer who is searching for a copyright subject-matter that she is attempting to locate and wishes to ensure its authenticity and quality before obtaining it. Listening to previews assists in this investigation. While there is no doubt that the offering of previews bears advantages for online music services, the Court concluded that the issue of previews must be considered from the point of view of the person for whom they are intended, that is, the consumer. In this respect, the purpose of previews is to assist the consumer in seeking and finding the desired musical work.

Having determined that listening to a preview involved dealing in a musical work for the purpose of research, the Board then asked itself whether the dealing was fair. To do so, it analyzed the dealing in view of the six factors set out in the *CCH* decision, namely the purpose, character and amount of the dealing, alternatives to the dealing, the nature of the work and the effect of the dealing on the work. The Board concluded that the dealing was fair.

With respect in particular to the amount of the dealing, the Board said that streaming a preview to listen to it once is a dealing of a modest amount when compared to purchasing the whole work for repeated listening. SOCAN submitted that the Board should have used a different yardstick. Rather than considering each preview individually, it suggested measuring the amount and determining the fairness of the dealing by considering the aggregate number of users and previews and the resulting hours of listening. In SOCAN's view, the volume of the previews taken as a whole is such that, should it have been granted the opportunity to submit evidence during the hearing, the Board would have had no choice but to conclude that the dealing was not fair.





The Court concluded that the Board's decision with respect to the fairness of the dealing, including the amount of the dealing, was not unreasonable. However, it expressed its surprise that the Board addressed the issue of whether the exception might apply to previews of its own initiative, without it being raised by the parties and without giving them the opportunity to make submissions. While its conclusions would have remained unchanged, the Court nonetheless expressed that the Board should have heard the parties.

On March 24, 2011, the Supreme Court of Canada granted leave to appeal the decision.

Bell Canada v. Society of Composers, Authors and Music Publishers of Canada, 2010 FCA 220

In its decision certifying SOCAN Tariff 22.A, the Board also concluded that the transmission of a music download to a member of the public was a communication to the public by telecommunication.

Online music service suppliers filed two applications for judicial review of this arm of the Board's decision. In the two cases, they argued that the transmission of a download to an individual customer is a private communication and that it does not become public simply because, in distinct transactions, other consumers download the same work. Having noted that in *CCH*, the Supreme Court of Canada concluded that the fax transmission of a single copy of a published work to a single individual was not a communication to the public, they argued that the same reasoning should apply to the transmission of a music download to an individual customer.

SOCAN also relied on *CCH*, pointing to a statement in the decision according to which a series of repeated fax transmissions of the same work to numerous recipients might constitute a communication to the public. It argued that the transmission of a download necessarily was a communication to the public, given the nature of the activities of on-line music services.

As regards the standard of review, the Court held that because the Board is a specialized tribunal, which deals extensively with copyright matters, and the *Act* is its home statute, the Board's decision is entitled to deference with respect to its interpretation of the *Act*. Since the Board is entitled to deference on pure questions of law as well as on findings of fact, it necessarily follows that the Board is entitled to deference on questions of mixed facts and law involving the application of its home statute to the facts of a case.

The Court first set aside a number of earlier decisions referred to by the parties as unhelpful, either because they had been decided at a time when the definition of musical work was significantly different than today or because they dealt with the notion of public performance, not public telecommunication.





The Court then proposed that whether or not a communication is made “to the public” is a function of two factors: the intention of the communicator and the reception of the communication by at least one member of the public. On the one hand, a communication is “to the public” when it is intended to be received by the public. On the other, without at least one actual recipient, there is no communication, merely an intention of doing so. Beyond a single recipient, every transmission is a communication to the public, beginning with the first one.

Speaking to *CCH*, the Court noted that the decision involved circumstances where there was no evidence of an intention to communicate to the public. Thus, while the Supreme Court held that a fax transmission of a single copy of a published work intended to be received by a single individual was not a communication to the public, it did not foreclose the possibility that one could communicate to the public one person at a time. On the other hand, notwithstanding the statement in that same decision according to which a series of repeated fax transmissions of the same work to numerous recipients might constitute a communication to the public, the Court dismissed as fundamentally flawed the argument that the volume of transmissions, in and of itself, can transform private communications into a communication to the public.

The Court also offered the view that the commercial nature of a communication is not determinative of the communicator’s intent and includes, for example, peer to peer file sharing.

As a result, the Court concluded that the Board’s finding that a download of a musical file to a single user is a communication of the musical work to the public by telecommunication fell within a range of acceptable outcomes and therefore was reasonable.

On March 24, 2011, the Supreme Court of Canada granted leave to appeal the decision.

Entertainment Software Association and Entertainment Software Association of Canada v. Society of Composers, Authors and Music Publishers of Canada and CMRRA/SODRAC Inc., 2010 FCA 221

The Entertainment Software Association (ESA) challenged the Board’s decision to subject Internet game sites to the tariff.

ESA argued that the Board erred in finding that the download of a video game containing music involves the communication to the public by telecommunication of that music. The Court disposed of the issue in *Bell Canada*, reviewed earlier.

ESA also argued that no music tariff should apply to video game sites given the minor role that music plays in these games. The Court found that the Board’s decision to set a tariff as soon as any amount of SOCAN’s repertoire is used was reasonable. Under the SOCAN regime, there is no right of compensation without a certified tariff. Such a regime does not lend itself to the application of a *de minimis* rule.





ESA argued that SOCAN had failed to present sufficient evidence to allow the Board to establish a fair tariff. Again, the Court concluded that Board's decision was reasonable. The collective administration regime set out in the *Act* depends upon the certification of tariffs. It should not be hampered by an overly rigid approach to the assessment of the basis upon which a tariff is certified. SOCAN cannot be denied a tariff simply because it has not "proven its case".

Finally, ESA argued that the Board had failed to give effect to evidence that its members secured all the rights they required from rights holders or to provide adequate reasons for not considering this evidence. Providing sample contracts did not establish that ESA members never needed a tariff. The Court concluded that the Board gave sufficient consideration to ESA's evidence, even though it did not give it the effect ESA wished for. The Court also found that the Board's reasons were too laconic and non-responsive to ESA's argument. Nevertheless, it decided not to return the matter to the Board, in part because the reasonableness of the decision was apparent on its face.

On March 24, the Supreme Court of Canada granted leave to appeal the decision.

Canadian Recording Industry Association v. Society of Composers, Authors and Music Publishers of Canada, 2010 FCA 322

The Canadian Recording Industry Association (CRIA) also applied for judicial review of Tariff 22.A. Unlike other applications that stemmed from the decision, CRIA challenged not the legal basis upon which the Board had certified the tariff but the process by which the Board arrived at its decision.

The Board accepted, with some modifications, the evidence of a SOCAN expert with respect to the profitability of record companies in the digital environment. CRIA alleged that in so doing, the Board erred in law; the Board should have accepted the evidence of its own expert. In essence, CRIA argued that the Board made a decision without an evidentiary basis, ought to have set a nominal rate and had not provided adequate reasons for its decision.

The extent to which a tribunal is bound by the rules of evidence is a subset of procedural fairness. The Board is an administrative tribunal and as such, is not bound by the rules of evidence. However, the Board is required to act on the basis of some evidence. In this regard, the Court concluded that the decision of the Board made it clear that it did consider CRIA's evidence and explained why it was found wanting. It was also clear that the Board was persuaded by SOCAN's expert. The Board was entitled to prefer the opinion evidence of an expert witness over the evidence of witnesses having personal knowledge of the matter. There was an evidentiary foundation for the conclusions which it drew so that it could not be said that it erred in law in drawing its conclusions.





CRIA's argument for a nominal rate was as follows. In an earlier decision, having found that the appropriate proxy for the right to download a musical work is the price paid to reproduce a musical work on a CD, the Board used that price to set the royalties for the use of the reproduction right for onlinemusic services. That decision recognized the full value of the rights needed to download musical works and as a result, the rate for the communication should be nominal. CRIA contended that the tariff thus determined represented the value of the bundle of rights associated with the download of a musical work. The Court concluded that CRIA misapprehended the role of a proxy in setting royalties. A proxy represents a model which can serve as a basis for the determination of an appropriate tariff with respect to a particular right. The fact that a particular proxy has been used by the Board to determine the royalty to be paid for one right does not predetermine the value of any other right for which that proxy may also be an appropriate model. The Court concluded that the Board did not err in establishing the value of the communication right independently of the reproduction right; both rights are independently compensable.

Finally, CRIA argued that the Board had failed to provide adequate reasons for its decision. The Court disagreed. Reasons must be sufficient, not perfect. The Board explained why it preferred the evidence of SOCAN over that of CRIA. It also applied its own judgment to elements of the analysis of SOCAN's expert witness, based on its view of what was realistic. This is precisely the type of institutional expertise which court have long recognized.





SOCAN Tariff 22.B to 22.G (Internet – Other Uses of Music) 1996-2006

Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2010 FCA 139

On October 24, 2008, the Board certified SOCAN Tariff Items Nos. 22.B to 22.G (Internet – Other Uses of Music) for the communication to the public by telecommunication of musical works. SOCAN sought judicial review of the decision.

SOCAN argued that the Board erred in law and exceeded its jurisdiction in refusing to certify a tariff for the use of its repertoire by the Canadian Broadcasting Corporation (CBC) in the Internet simulcast of its radio signal. SOCAN also argued that the Board had breached procedural fairness in relying upon evidence that was not part of the record, namely the agreement between SOCAN and CBC, and in failing to allow SOCAN to make submissions on the issue. Finally, SOCAN argued that the Board erred in law and exceeded its jurisdiction in refusing to certify a tariff for the “Other Sites” category.

SOCAN contended that the standard of review applicable to the Board’s refusal to exercise its jurisdiction and to the breach of procedural fairness was correctness. To the contrary, most respondents contended that the review of these issues was governed by a standard of reasonableness. The Court chose not to address this issue: under either standard, the Board’s decision should be maintained.

With regard to CBC, SOCAN asked that the same rate apply to the Internet simulcast of CBC radio signal as for conventional radio. For its part, CBC contended that it was simply duplicating its conventional, over-the-air signal on the Internet and that no additional liability should arise from that simulcast.

The Board complained of the lack of specific analysis by SOCAN to justify the proposed CBC tariff. It then considered CBC’s contention that the right to Internet streaming should be included in existing SOCAN’s tariff applicable to CBC’s conventional radio operations. In the end, the Board concluded that for the time being, current CBC payments to SOCAN already included the right to use SOCAN music in Internet simulcasts.

The Court concluded that the Board’s decision was neither wrong nor unreasonable. In the absence of evidence on which to base an increase in SOCAN royalties, the Court failed to see how it could be said that the Board refused to certify a tariff. On the contrary, it was a decision made by the Board in the very exercise of its jurisdiction. As the Court had stated in *Federation of Canadian Municipalities v. AT&T Canada Corp.*, “jurisdiction of an administrative board is not conditional on a litigant’s satisfaction or dissatisfaction with the decision the Board rendered”.

In light of this conclusion, the Court did not address the allegations that the Board had based its decision on the agreement between CBC and SOCAN, thereby breaching SOCAN’s right to procedural fairness.





Concerning SOCAN's contention that the Board erred in law and exceeded its jurisdiction in refusing to certify a tariff for the "Other Sites" category, the Court concluded that the Board was justified to exclude that item from the certification process and that in so doing it had provided abundant, elaborate and cogent reasons for this exclusion.

First, the Board ruled that it would have been highly disruptive and unfair to blindly set a tariff which has retroactive application (from 1996 to 2006). Second, in the absence of proper and reliable evidence, it would have been irresponsible to certify a tariff that could potentially have such a broad scope of application. Third, in view of the fact that video sharing and social networking were relatively new phenomena, the amounts involved for the period would most probably have been quite modest. Fourth, in the absence of evidence, the Board could not have discharged itself of its obligation to provide adequate reasons explaining how it had arrived at the rate of the tariff. Finally, the lack of reliable evidence would have prevented the Board from establishing a fair and reasonable tariff in this instance and for the period under examination.

The Court concluded that to proceed to a determination of the kind sought by SOCAN, in the absence of that evidence, would be acting arbitrarily and unreasonably. However, to act arbitrarily and unreasonably when required by law to act fairly and reasonably is wrong at law. The resulting decision of the Board would have been both wrong and unreasonable.

At the Court hearing, SOCAN conceded that most of the Board's conclusions regarding the lack of evidence were justified. However, it argued that the Board had a duty to certify a tariff and that consequently, it should have resorted to its procedural powers under the *Act* and taken all necessary steps to obtain the information it deemed necessary for the purpose of certifying a fair and equitable tariff. In the Court's view, while the *Act* gives the Board the powers, rights and privileges of a superior court of record, these powers are not a substitute for SOCAN's obligation to file the necessary evidence in support of its proposed tariff. Moreover, it was open to SOCAN, under the procedural rules applicable to proceedings before the Board, to request the Board's assistance in gathering and complementing its evidence. Its omission to do so in a timely fashion could not be later transposed into a duty for the Board to make use of its discretionary powers under section 66.7 of the *Act*.

Finally, SOCAN submitted that the Board should have certified a tariff but fixed the rate at zero. A tariff entails onerous obligations. In view of these obligations, the broad and ill-defined category of persons to whom these obligations would apply and the lack of evidence enabling the Board to approve the proposed tariff, the Court concluded that it was neither wrong nor unreasonable for the Board to refuse to certify a zero tariff.





Re:Sound Tariff 7 – (Motion Picture Theatres and Drive-Ins) 2009-2011 and Tariff No. 9 – (Commercial Television) 2009-2013

Re:Sound v. Motion Picture Theatre Associations of Canada, 2011 FCA 70

On March 28, 2008, NRCC (now Re:Sound) filed two proposed tariffs for the performance in public and communication to the public by telecommunication, in Canada, of published sound recordings embodying musical works and performers' performances of such works. Tariff 7 targeted the use of sound recordings embodied in a motion picture performed by a motion picture theatre. Tariff 9 targeted the use of sound recordings in programs broadcast by television services. Objectors to the tariff argued that the collective had no legal right to claim remuneration pursuant to section 19 of the *Act*. Accordingly, they requested – and the Board accepted this request – that the following question be addressed as a preliminary issue:

Is anyone entitled to equitable remuneration pursuant to section 19 of the *Copyright Act* when a published sound recording is part of the soundtrack that accompanies a motion picture that is performed in public or a television program that is communicated to the public by telecommunication?

On September 16, 2009, the Board answered that question in the negative. Re:Sound sought judicial review of the Board's decision.

Re:Sound is entitled to collect royalties pursuant to subsection 19(1) of the *Act* when a published sound recording of a musical work is performed in public or communicated to the public by telecommunication. A "sound recording" is defined in section 2 of the *Act*; the definition "excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work".

Re:Sound contended that the Board erred in construing the exclusion clause as excluding all the individual components of a soundtrack, including any embedded pre-existing recording. What is excluded from the definition of sound recording is the soundtrack as a whole, not its individual elements. Accordingly, while no one can claim equitable remuneration for the whole soundtrack, makers and performers of separate sound recordings embedded in the soundtrack can. According to Re:Sound, the exclusion was intended as a limitation on the rights in cinematographic works and not on the copyright extended to sound recordings.

The Board was not convinced by the attempt to draw a distinction between the soundtrack and its component parts; in its opinion, such an interpretation would require adding to the words of the definition of the term "sound recording". It therefore concluded that Tariffs 7 and 9 were based on no valid legal foundation and were incapable of being certified. As a result, the Tariffs were struck from the proposed statement of royalties that had been published in the *Canada Gazette*.





As the Federal Court of Appeal explained, the meaning of this exclusion required the Board to construe the defined term “sound recording” and the undefined “soundtrack” as it relates to pre-existing sound recordings. The Court concluded that the Board had come to the correct conclusion essentially for the reasons given by it.

Re:Sound raised before the Court various preoccupations concerning the impact of the Board’s decision on the rights of performers and makers of sound recordings, notably that a sound recording incorporated within a soundtrack could be published on the Internet or otherwise disseminated or could be extracted from a DVD and thereafter published, without any recourse or remedy open to the performer or maker in either case. The Court also concluded that these preoccupations were ill founded. The Court also found comparisons with Australian and UK law of no assistance. It rejected a further argument based on the incompatibility of the Board’s interpretation with Article 10 of the *Rome Convention*, on account that the convention defines “phonograms” as any exclusively aural fixation of sounds, which excludes movies and television programs. A final argument, according to which Re:Sound was entitled to a tariff for live-to-air broadcasts, was rejected because it had not been raised in the notice of application for judicial review or brought to the attention of the Board. An application for leave to appeal was pending before the Supreme Court of Canada at the time of reporting.

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

Sirius Canada Inc. v. CMMRA/SODRAC Inc., 2010 FCA 348

On April 8, 2009, the Board certified the *Satellite Radio Services Tariff* (SOCAN: 2005-2009; NRCC: 2007-2010; CSI: 2006-2009) pertaining to the communication to the public by telecommunication and reproduction of musical works by satellite radio services. Sirius Canada Inc. (Sirius) and CSI sought judicial review of the decision of the Board. The Tariff is set out in a way that takes into account different types of satellite radio receivers. Sirius’s application pertained to two models of satellite radio receivers: one with an extended buffer, that automatically stores 44 to 60 minutes of programming, and another that comes with a block recording feature; when engaged, the block recording receiver stores several hours of broadcast content for later replay. Sirius argued that the Board erred when it concluded that satellite radio services, by supplying a subscriber with those types of receivers, authorized the subscriber to reproduce copyrighted works. The Court disagreed.



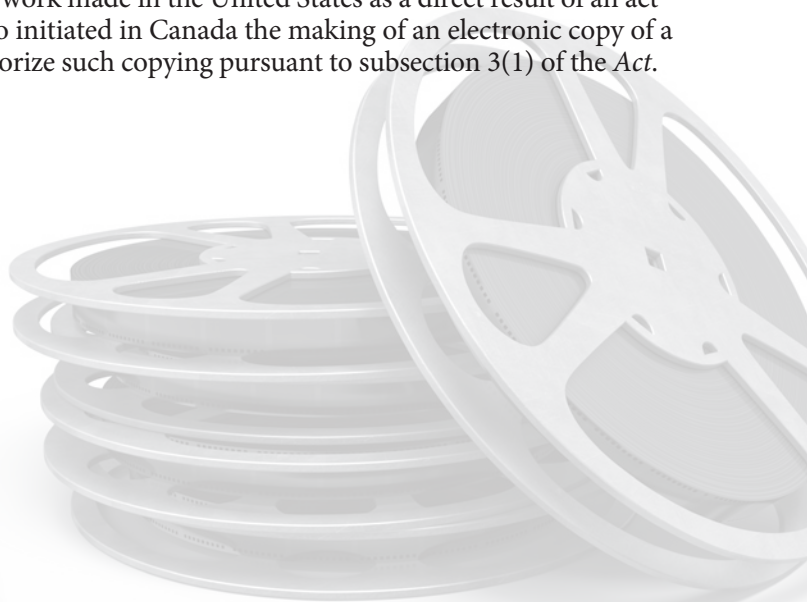


In reaching its conclusion, the Board relied upon the *CCH* decision. In that decision, one of the issues was whether the Law Society of Upper Canada had authorized its patrons to copy the works of the Great Library by providing self-service photocopiers. Authorization is a question of fact that depends on the circumstances of each case. A person did not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. However, this presumption may be rebutted if it is shown that a certain relationship, or degree of control, existed between the alleged authorizer and the persons who committed copyright infringement. In *CCH*, the Law Society lacked the necessary degree of control over the Library's patrons. In the decision under review however, satellite radio services supply some of their subscribers with receivers that automatically cause the content to be copied.

In the Court's view, because the copying is automatic, the only control that can be exercised over the copying rests with the services. The automatic copying element was not present in the *CCH* case, where patrons could choose what to copy and not copy. The presumption against the authorization of an infringing act was rebutted by the degree of control exercised by the satellite radio services over their broadcast content and the features included in the radio receivers supplied to their subscribers.

CSI's challenged the Board's decision on two fronts. The first related to the determination of the location of the copying of a work and whether an infringing authorization can occur in relation to a copy made outside Canada. The second related to the copies of broadcast content made in the 4- to 10-second buffer memory found in all satellite radio receivers.

CSI alleged that the Board erred in law when it concluded that (a) it had no jurisdiction to impose a royalty tariff in respect of a copy of a work made in the United States as a direct result of an act taken in Canada, and (b) a person who initiated in Canada the making of an electronic copy of a work in the United States did not authorize such copying pursuant to subsection 3(1) of the *Act*.





The Board concluded that, when an electronic copy of a work is transmitted to and stored on the United States main server solely as a result of the act of a person in Canada, the copying occurs in the United States and therefore the Board has no jurisdiction to impose a royalty tariff in respect of that copying. CSI argued that where the copying is initiated in Canada, the act of copying occurs in Canada because there is no person outside Canada who can be held responsible for it.

The Court concluded that CSI's argument was ill-founded as it assumes that the making of the copy in these circumstances cannot be subject to the copyright law of the United States. CSI also argued that the copying occurred in both Canada and the United States, so that the location of the copying for purposes of the *Copyright Act* should be determined on the basis of the "real and substantial connection" test applied in *Society of Composers, Authors and Music Publishers of Canada, v. Canadian Assn. of Internet Providers*. The Court rejected this argument. The decision invoked by CSI required a determination of the location of a communication initiated in one country and received in another. Given that a communication cannot be complete without both a sender and receiver, it was necessary to adopt a principled basis for choosing whether the communication would be situated at the location of the sender or the location of the receiver. Here, the copy only exists in one location; the real and substantial test is thus not required.

Alternatively, CSI argued that a person who initiates, in Canada, the making of an electronic copy of a work in the United States has authorized the copying. The Board concluded that the act of authorizing in Canada is not actionable under the *Copyright Act* where the primary infringement occurs outside Canada. The Court agreed. The authorization of a particular act infringes copyright only if the authorized act is itself an act of infringement. Therefore, when the Board concluded correctly that it had no jurisdiction to impose a royalty tariff in relation to the copying of a work located in the United States, it was compelled to conclude that it had no jurisdiction to impose a royalty tariff in relation to the authorization of that copying, even if the authorization took place in Canada.

CSI argued that the Board also erred in law in determining that the 4- to 10-second buffer memory stored momentarily in the temporary memory of all satellite radio receivers supplied by the services was not a copy of a substantial part of a work. CSI argued that the Board misdirected itself by reasoning that a copy of a work or a substantial part of a work would exist only if a complete reproduction of the work exists at one point in time.

While the Board clearly considered it relevant that the 4- to 10-second buffer did not cause a copy of the entire work to exist at any point in time, the Court did not read the reasons of the Board as indicating that this was determinative. Rather, the Board's conclusion was influenced not only by the fact that a copy of no more than 4- to 10-seconds of content could exist in the buffer at any one time, but also by the fact that there would at no time be a choice as to what goes into the buffer and when it comes out. The Board's conclusion that the buffered content was not a copy of an entire work or a copy of a substantial part of a work was reasonably open to the Board on the record and was not based on an error of law.

An application for leave to appeal was pending before the Supreme Court of Canada at the time of reporting.





Access Copyright Tariff (Reprography – Educational Institutions) 2005-2009

Alberta (Education) v. Access Copyright, 2010 FCA 198

On June 26, 2009, the Board certified a tariff for the reprographic reproduction of works in the repertoire of Access Copyright by primary and secondary educational institutions outside Quebec.

Every ministry of education outside Quebec and every Ontario school boards sought judicial review of the Board's decision. They argued that the Board erred in law when it concluded that a certain category of copies did not constitute fair dealing under the *Act*. They also argued that the Board erred when it concluded that an exception pertaining to copies made for use in examinations did not apply.

During the course of the proceedings before the Board, both parties agreed to participate in the conduct of a survey to measure the volume of photocopies made by educational institutions. Each time someone made a photocopy during the survey period, an observer filled out a logging sticker, indicating, among other things, the purpose for which the copy was made. For the purposes of assessing fair dealing, logged copies that the institutions argued were fair were divided into four categories. The institutions argued that "multiple copies made for the use of the person making the copies and single or multiple copies made for third parties without their request for the purpose of private study and/or research and/or criticism and/or review", constituted fair dealing under sections 29 and 29.1 of the *Act* and should not be subject to the tariff. Access Copyright contended the opposite.

In reaching its conclusion, the Board relied on the decision of the Supreme Court in *CCH*. That decision sets out a two-step test to assess fair dealing. First, one must determine if the copies were made for an allowable purpose under the *Act*; second, one must assess whether the dealing was fair. With regard to the first step, the Board accepted as a fact that a copy was made for an allowable purpose if the logging sticker so indicated. With regard to the second test, the Board considered the six factors outlined in *CCH*.

The Court indicated that the issue of fair dealing is a purely factual question subject to the standard of review of reasonableness. Accordingly, the application could only be allowed if the Board's reasons were not transparent or intelligible, or did not fall within a range of acceptable outcomes.

Since there was no controversy with respect to the Board's finding that the copies had been made for an allowable purpose under the *Act*, the only question before the Court was whether the copies were made fairly. The Court's attention was directed almost exclusively to the analysis of the first factor, the purpose of the dealing. The Board distinguished the purpose inquiry at the first step from that of the second step and determined that whether the predominant purpose is or is not an allowable purpose is one of the factors that must be taken into account in deciding whether the dealing is fair. The Board took a detailed look at the copies. It found that with respect to copies made on a teacher's initiative for her students, the real or predominant purpose was instruction or "non-private" study. This tended to make the dealing in the relevant copies unfair.





The applicants argued that the Board had interpreted the *Act* overly restrictively with respect to the purpose of the dealing. According to them, the adjective “private” is intended to exclude from fair dealing the commercial use of copyright protected material that has no educational value. The Court disagreed. If Parliament had wished to exclude only commercial exploitation it could have used words such as “non-commercial” or “not for profit”. “Private” means “by oneself”. A large and liberal interpretation, as required in *CCH*, means that the provisions are given a generous scope. It does not mean that the text of a statute should be given a meaning it cannot ordinarily bear.

The Board was entitled, in making its finding, to look beyond the fact that the logging sticker might have stated that the copies were made for research or private study. Indeed, *CCH* does require that an objective assessment of the user’s real motive in using the copyrighted work be made. The Board was not precluded from finding a different objective purpose at step two from the purpose it accepted as fact at step one. In doing so, the Board came to the conclusion that the applicants’ dealing was unfair. The essence of the Board’s decision was that when a teacher photocopies copyrighted material for her class, that use cannot be private study. This is a legitimate conclusion that was open to the Board based on the evidence before it. The Board’s reasons were also comprehensible and transparent, and therefore reasonable.

Section 29.4 of the *Act* provides that it is not an infringement of copyright for an educational institution to reproduce, on the premises of the institution, a work as required for a test or examination. The provision also states that the exemption from copyright infringement does not apply if the work is “commercially available” in “a medium that is appropriate for the purpose” referred to in the provision.

In reaching its conclusion, the Board analyzed the notion of “commercially available”. It concluded that the works were commercially available and, accordingly, it found that the exception provided for at section 29.4 did not apply to certain copies. The applicants argued that, while the copied works were commercially available, the Board failed to consider whether they were available in “a medium that is appropriate for the purpose.” They asserted that the copied works were not available in an appropriate medium.

The Court agreed with the parties that the standard of review of the Board’s decision on section 29.4 was correctness. It concluded that the Board failed to address an issue that was essential to the disposition of the matter before it. The issue required that the words “in a medium appropriate for the purpose” be defined and applied to the facts of this case. The Court allowed the application on this ground and remitted the decision to the Board to determine the meaning of the expression and to assess whether the relevant copies came within the meaning of these words.

On May 5, 2011, the Supreme Court of Canada granted leave to appeal from the decision.

Agreements Filed with the Board



Pursuant to the *Act*, collective societies and users of copyrights can agree on the royalties and related terms of licenses 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 license.

In 2010-11, 380 agreements were filed with the Board pursuant to section 70.5 of the *Act*.

Access Copyright which licenses reproduction rights such as digitization and photocopy, on behalf of writers, publishers and other creators, filed 298 agreements granting educational institutions, language schools, non-profit associations, copy shops and others a license to photocopy works in its repertoire.

The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) filed 79 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 2010-11 were concluded with various educational institutions, municipalities, non-profit associations and other users.

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

