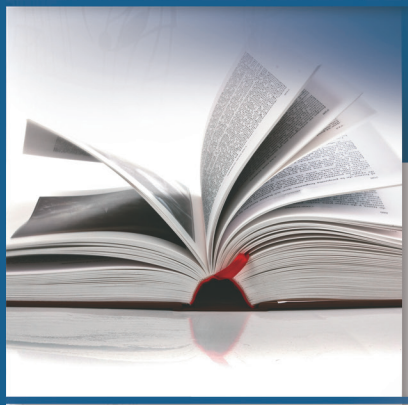

ANNUAL REPORT
2017-18

Copyright Board of Canada

Copyright Board
of Canada

CANADA

Commission du droit d'auteur
du Canada

August 3, 2018

The Honourable Navdeep Bains, P.C., M.P.
Minister of Innovation, Science and Economic Development Canada
Ottawa, Ontario
K1A 0A6

Dear Minister:

I have the honour of transmitting to you for tabling in Parliament, pursuant to section 66.9 of the *Copyright Act*, the thirtieth Annual Report of the Copyright Board of Canada for the financial year ending March 31, 2018.

Yours sincerely,

Claude Majeau
Vice-Chairman and
Chief Executive Officer

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BOARD MEMBERS AND STAFF

AS OF MARCH 31, 2018

Chairman:	The Honourable Robert A. Blair
Vice-Chairman and Chief Executive Officer:	Claude Majeau
Secretary General:	Gilles McDougall
General Counsel:	Sylvain Audet
Legal Counsel:	Valérie Demers Jean-Arpad Français Marko Zatowkaniuk
Director, Analysis and Research:	Dr. Raphael Solomon
Economic Analyst:	Dr. Rashid Nikzad
Senior Clerk:	Nadia Campanella
Assistant Clerks:	Karine Boisjoly-Létourneau Nathalie Mannarino
Registry Officer:	Tina Lusignan
Manager, Corporate Services:	Nancy Laframboise
Financial and Administrative Assistant:	Jo-Anne Boucher
Technical Support Officer:	Michel Gauthier
Administrative Assistant:	Afaf El-Bakkali

CHAIRMAN'S MESSAGE

I am pleased to present the 2017-18 Annual Report of the Copyright Board of Canada. The Report documents the Board's activities during the year in carrying out its mandate as an independent quasi-judicial economic regulator responsible for setting tariffs that are fair and equitable to both copyright owners and the users of copyright-protected works.

The Board has devoted considerable time and resources during this fiscal year working in collaboration with the Departments of Innovation, Science and Economic Development Canada and Canadian Heritage towards the formulation of procedural reforms that will enable it to carry out its mandate in a more effective and timely manner, while maintaining the principles of procedural fairness. During the year, important consultations were held to that effect, and through which comments were sought from stakeholders on a number of options regarding possible legislative and regulatory reforms. I want to thank all those involved in these collaborative efforts for their hard work and motivation.

I also wish to acknowledge the provision in the Government's Budget 2018 – as part of the Government's Intellectual Property Strategy – that will make available additional funding to support the Board's more efficient tariff-setting process. As our stakeholders have always indicated, these resources will go a long way in enabling the Board to implement procedural reforms, such as case management, and thereby to shorten the timelines for the tariffs to be certified and to reduce the amount of retroactivity that applies when the tariffs are certified.

Experience shows that stakeholders tend to prefer reform measures which suit their own purposes and oppose those which do not. At the end of the day however, what the Board hopes will emerge from the reform initiatives is a balanced playing field that will enable the Board to set royalties and tariffs that are fair and equitable to all creators and users, and in the public interest, without constraining the Board's ability to control and adapt its processes in this multifaceted environment, a necessary attribute of its independent and quasi-judicial nature.

During this fiscal year, the Board held two public hearings and issued fourteen decisions regarding proposed tariffs filed in previous years, some of which arising out of negotiated agreements following which the parties had filed a request for certification based on the terms and conditions of the agreements. Several of these decisions involved the application of relatively new and developing concepts in the field of copyright law and the corresponding economic considerations that underlie the setting of tariffs in that area. Also, when dealing with the requests for certification based on negotiated agreements, the Board is required, before approving the tariffs, to examine whether the parties are representative of the entire industry to which the tariffs will apply, and must satisfy itself that the negotiated tariffs are fair and equitable for the industry and, as well, consistent with other interrelated and already certified tariffs.

I would like to highlight the following with respect to hearings and decisions.

The first hearing concerned the SOCAN and Re:Sound Tariffs for Pay Audio Services. In May 2017, the Board heard final testimony and argument in that matter. In the second hearing, held in September 2017, the Board dealt with a SODRAC licence for the reproduction of musical works by CBC. A part of the latter hearing was devoted to the resolution of an issue remitted to the Board for redetermination by the Supreme Court of Canada in 2015. In that decision, the Court set aside the 2008-2012 SODRAC/CBC licence as it related to the valuation of some types of reproductions by CBC and directed the Board to reconsider its valuation taking into account the principles of "technological neutrality" and "balance".

Among the decisions issued during the year, some called on the Board to navigate relatively uncharted waters. In one, the Board set the royalties payable to SOCAN, CSI, and SODRAC by online music services that offer notably permanent downloads, limited downloads and webcasts of music and videos. With respect to a companion decision, the Board found that although the act of "making available" remains a communication to the public by telecommunication, it was not able to value the act of making available separately from the communication right because it was not properly seized of the issue, and in any event, the evidence adduced by the parties was lacking.

The Board also certified the tariff for royalties to be paid by elementary and secondary educational institutions outside Quebec for the reproduction of literary works. This decision was rendered as a result of a Federal Court of Appeal decision to remit the matter to the Board for reconsideration having regard to the concept of "fair dealing" in the education sector.

During the year, Collectives filed with the Board a total of fifty-one new proposed tariffs for the years 2019 and beyond, all of which were prepared for publication in the *Canada Gazette*. In addition, the Board initiated fourteen new processes dealing with a number of proposed tariffs that were previously filed with it. These new processes included the merging of a number of different proposed tariffs with the overall objective of reducing participation costs for all stakeholders involved. Among these are Online Music Services and Online Audiovisual Services – Music, for both of which hearings are scheduled to be held in 2019. For each of these new processes, the Board has had to issue various rulings and orders following requests pertaining mostly to the status of participants or the nature of the issues to be examined.

In addition to the foregoing, the Board issued four licences pursuant to the provisions of the *Copyright Act* that permit the use of published works when copyright owners cannot be located. As well, Board staff assisted a number of individuals and organizations requesting a licence to locate the copyright owner thereby facilitating the use of published works.

Before ending this message, I would like to recognize and acknowledge the contribution of J. Nelson Landry during his eight years as a part-time member of the Board. Mr. Landry's term expired in February 2018. I thank him for his dedicated and valuable input throughout those years.

Finally, I must pay tribute to the contributions made by the Board's professional and support staff to the effectiveness of the Board's operations. Without their accomplished and knowledgeable assistance the Board would not have been able to carry out its responsibilities as it did over the past year. Their expertise and work ethic make the work of the Board possible.

The Honourable Robert A. Blair

MANDATE OF THE BOARD

The Copyright Board of Canada (the "Board") was established on February 1, 1989, as the successor of the Copyright Appeal Board. The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective society. Moreover, the Board has the right to supervise agreements between users and licensing bodies, issue licences when the copyright owner cannot be located and may determine the compensation to be paid by a copyright owner to a user when there is a risk that the coming into force of a new copyright might adversely affect the latter.

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

The responsibilities of the Board 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;
  - the doing of any protected act mentioned in sections 3, 15, 18 and 21 of the *Act*, such as the reproduction of musical works, of sound recordings, of performances and of literary works; and,
  - 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;
- set levies for the private copying of recorded musical works;
- set royalties payable by a user to a collective society, when there is disagreement on the royalties or on the related terms and conditions;
- rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals, when the copyright owner cannot be located;
- examine agreements made between a collective society and a user which have been filed with the Board by either party, where the Commissioner of Competition considers that the agreement is contrary to the public interest;
- receive such agreements with collective societies that are filed with it by any party to those agreements within 15 days of their conclusion;
- determine the compensation to be paid by a copyright owner to a person to stop her from performing formerly unprotected acts in countries that later join the *Berne Convention*, the *Universal Convention* or the *Agreement establishing the World Trade Organization*; and,
- conduct such studies with respect to the exercise of its powers as requested by the Minister of Industry.

OPERATING ENVIRONMENT

Historical Overview

Copyright collective societies were introduced to Canada in 1925 when PRS England set up a subsidiary called the Canadian Performing Rights Society (CPRS). In 1931, the *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 create 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").

The *Copyright Modernization Act* (Bill C-11) received Royal Assent on June 29, 2012, and many of its provisions came into force on November 7, 2012. Though this legislation does not change the mandate of the Board or the way it operates, it provides for new rights and exceptions that will affect the Board's work.

The coming into force of new distribution and making available rights for authors, performers and makers of sound recordings, and the addition of education, parody and satire as allowable fair dealing purposes may affect existing and future tariffs or licences. New or modified exceptions dealing with non-commercial user-generated content, reproductions for private purposes, program copying for the purpose of time-shifting, backup copies, ephemeral copies by broadcasting undertakings and certain activities of educational institutions, among others, may affect some uses that are or may be subject to a Board tariff.

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 hearing has been held to date for a request to use a work whose owner cannot be located. Information is obtained either in writing or through telephone calls.

The examination process is always the same. Tariffs come into effect on January 1. On or before the preceding March 31, the collective society must file a statement of proposed royalties which the Board then publishes in the *Canada Gazette*. Users (or, in the case of private copying, any interested person) or their representatives may object to the statement within 60 days. The collective society and the objectors present oral and written arguments. After deliberation the Board certifies the tariff, publishes it in the *Canada Gazette*, and provides written reasons for its decision.

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 any time. 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 are the most prevalent: the internal coherence between the various tariffs of the Board; the practical aspects such as the ease of administration to avoid tariff structures difficult to manage in a given market environment; the relative use of the relevant repertoire; the taking into account of the Canadian environment; the stability in the setting of tariffs that minimizes undesired disruption for all participants; as well as the comparisons with "proxy" markets, including with similar prices in foreign markets.

A Consultation on Options for Reform to the Copyright Board of Canada

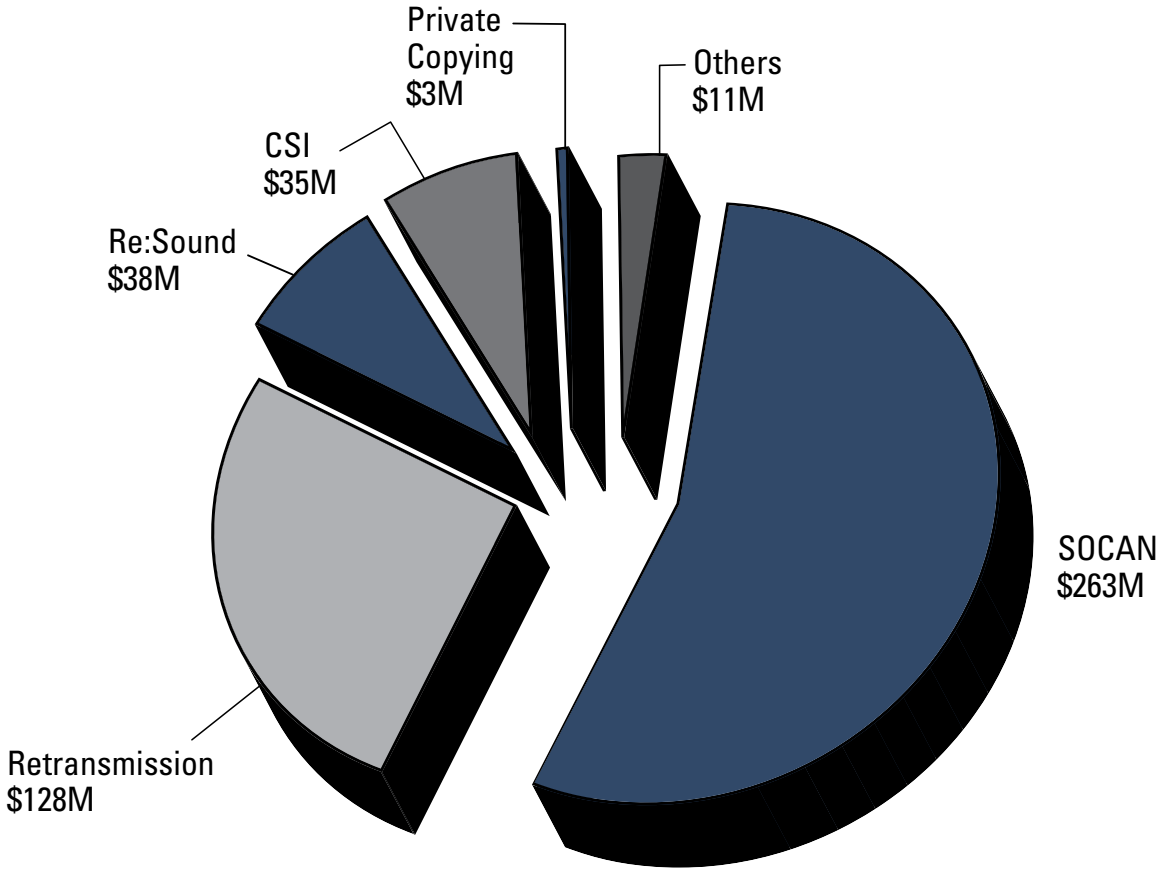
On August 9, 2017, the Departments of Innovation, Science and Economic Development Canada and Canadian Heritage, in collaboration with the Copyright Board, launched consultations to seek views on a range of potential changes to the legislative and regulatory framework regarding the Copyright Board procedures and processes. Comments were also sought more generally on the tariff-setting regimes as framed in the *Act*.

The aim of the consultation was to develop a package of measures that would have the effect of reducing the time taken by the Board's processes, i.e., the time between the filing of a proposed tariff by a collective society and the date the Board renders the decision and certify the tariff. These measures however would be such as to maintain the Board's ability to adequately fulfill its mandate and render sound decisions in accordance with the principles of procedural fairness and the reasonable expectations of stakeholders and the public.

Total Royalties Generated by the Board's Tariffs

The total amount of royalties generated by the tariffs the Board certifies is estimated at $478 million for the year 2016. The following chart shows the allocation of these royalties among the various collective societies. SOCAN receives the most important share of these royalties, corresponding to more than half of the total. The nine retransmission collectives together come in second, followed by Re:Sound and CSI.

Royalties Generated by the Board's Tariffs, 2016
by Collective Societies



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.

Chairman

The Honourable Robert A. Blair was appointed Chairman of the Board in May 2015 for a five-year term. The Honourable Robert A. Blair was appointed to the Court of Appeal for Ontario in November 2003, after serving for 12 years as a trial judge on the Superior Court. In both capacities, he has presided over matters involving almost all areas of the law, with a particular emphasis as a trial judge on cases on the Commercial List in Toronto and a continuing involvement with such cases at the appellate level. He received his B.A. (Hons.) from Queen's University in 1965 and his LL.B. from University of Toronto Law School in 1968. He was called to the Bar in Ontario in 1970 and received his Queen's Counsel designation in 1982.

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

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, reappointed in 2014 for a three-year term, and further extended for an additional year in 2017. He occupied the position of Secretary General of the Copyright Board from 1993 until his appointment as Vice-Chairman. 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 1984, 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.

The Board is a micro organization, consisting of 16 employees organized in five functional groups:

- Secretariat
- Economic Services Group
- Legal Services Group
- Ministerial Services Group
- Technical Support

Note: *Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2017-2018 (Part III of the Estimates) and the Performance Report for 2017-2018. These documents are or will soon be available on the Board's website (**www.cb-cda.gc.ca**).*

COLLECTIVE ADMINISTRATION OF COPYRIGHT

In Canada, the collective administration of copyright is supported by a number of collective societies. These collective societies are organizations that administer the rights of several copyright owners. They can grant permission to use their works and set the conditions for that use. Some collective societies are affiliated with foreign societies; this allows them to represent foreign copyright owners as well.

The Board regulates Canadian collective administration organizations through one of the following regulatory regimes.

Public Performance of Music

The provisions beginning with section 67 of the *Act* deal with 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 (including cable and satellite) or the Internet. Collective societies collect royalties from users based on the tariffs certified by the Board.

Two collective societies operate under this regime:

- The Society of Composers, Authors and Music Publishers of Canada (SOCAN) administers the right to perform in public or to communicate to the public by telecommunication musical works;
- Re:Sound Music Licensing Company (Re:Sound) collects royalties for the equitable remuneration of performers and makers for the performance or communication of sound recordings of musical works.

General Regime

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.

There are a number of collective societies operating under this regime, including the following:

- Access Copyright, The Canadian Copyright Licensing Agency (Access Copyright) represents writers, publishers and other creators for the reproduction rights of works published in books, magazines, journals and newspapers. It licenses uses in all provinces except Quebec;
- The *Société québécoise de gestion collective des droits de reproduction* (Copibec) represents similar rights owners as Access Copyright, but for uses in Quebec;
- Artisti is the collective society founded by the *Union des artistes* (UDA) for the remuneration of performers' rights;
- ACTRA Recording Artists' Collecting Society (ACTRA RACS), a division of ACTRA Performers' Rights Society (ACTRA PRS), collects and distributes equitable remuneration for eligible recording artists;

- CONNECT Music Licensing (formerly known as Audio-Video Licensing Agency (AVLA)) (CONNECT) administers licences in Canada for the reproduction of sound recordings, and the reproduction and broadcast of music videos on behalf of all the major record companies, many independent labels, as well as artists and producers;
- The *Société de gestion collective des droits des producteurs de phonogrammes et vidéogrammes du Québec* (SOPROQ) administers similar rights as CONNECT. Its members are mostly Francophone independent record labels;
- The Canadian Broadcasters Rights Agency (CBRA) claims royalties for programming and excerpts of programming owned by commercial radio and television stations and networks in Canada;
- The Canadian Musical Reproduction Rights Agency (CMRRA) collects royalties on behalf of Canadian and U.S. publishers for the reproduction rights of musical works in Canada;
- The Musicians' Rights Organization Canada (MROC) collects royalties on behalf of musicians and vocalists for the public performance of their recorded works;
- The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) administers royalties stemming from the reproduction of musical works. It represents members mostly from the province of Quebec; and,
- CMRRA-SODRAC Inc. (CSI), a joint venture of CMRRA and SODRAC, licenses the reproduction rights of songwriters and music publishers whose songs are active in the Canadian marketplace.

More details about other collective societies operating under this regime can be found on the Board's website at: http://www.cb-cda.gc.ca/societies-societes/index-e.html.

Retransmission of Distant Signals

Sections 71 to 76 of the *Act* provide 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.

There are currently nine collective societies receiving and distributing royalties under this regime:

- The Border Broadcasters Inc. (BBI) represents the U.S. border broadcasters;
- The Canadian Broadcasters Rights Agency Inc. (CBRA) represents commercial radio and television stations and networks in Canada;
- The Canadian Retransmission Collective (CRC) represents all PBS and TVOntario programming (producers) as well as owners of motion pictures and television drama and comedy programs produced outside the United States;
- The Canadian Retransmission Right Association (CRRA) represents the Canadian Broadcasting Corporation (CBC), the American Broadcasting Company (ABC), the National Broadcasting Company (NBC), the Columbia Broadcasting System (CBS) and *Télé-Québec;*
- The Copyright Collective of Canada (CCC) represents copyright owners (producers and distributors) of the U.S. independent motion picture and television production industry for all drama and comedy programming;

- The Direct Response Television Collective Inc. (DRTVC) claims royalties for all television programs and underlying works in the form of direct response television programming (defined as "infomercials");
- FWS Joint Sports Claimants Inc. (FWS) represents the National Hockey League, the National Basketball Association and the Canadian, National and American Football Leagues;
- The Major League Baseball Collective of Canada Inc. (MLB) claims royalties arising out of the retransmission of major league baseball games in Canada; and,
- SOCAN, representing owners of the copyright in the music that is integrated in the programming carried in retransmitted radio and television signals.

Educational Rights

Under sections 29.6, 29.7 and 29.9 of the *Act*, educational institutions can copy and perform news and news commentaries and keep and perform the copy for one year without having to pay royalties; after that, they must pay the royalties and comply with the conditions set by the Copyright Board in a tariff, pursuant to sections 71 to 76 of the *Act*.

There is currently however no collective society representing the interests of copyright owners for this regime.

Private Copying

The private copying regime, as set in sections 79 to 88 of the *Act*, 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.

The Canadian Private Copying Collective (CPCC) is the collective society for the private copying levy, collecting royalties for the benefit of eligible authors, performers and producers. The member collectives of the CPCC are CMRRA, Re:Sound, SODRAC and SOCAN.

Arbitration Proceedings

Pursuant to section 70.2 of the *Act*, when a collective society and a user are unable to agree on the terms of the licence and on application filed by either one of them, the Board can set the royalties and the related terms and conditions of a licence for the use of the repertoire of a collective society to which section 70.1 applies.

PROPOSED STATEMENTS OF ROYALTIES FILED BY THE COLLECTIVE SOCIETIES

The following collective societies filed proposed statements of royalties to be collected in 2019 and beyond:

ACCESS COPYRIGHT

- Statement of proposed royalties to be collected for the reproduction, the communication to the public by telecommunication and the making available to the public by telecommunication of works in its repertoire by employees of provincial and territorial governments for the years 2019 and 2020.

ARTISTI

- Statement of proposed royalties to be collected for the making available to the public, the communication to the public by telecommunication and the reproduction of performances fixed in a sound recording by online music services for the years 2019 to 2021.
- Statement of proposed royalties to be collected for the fixation of performances and the reproduction and distribution of performances fixed by performers in the form of phonograms for the years 2019 to 2021.

BBI, CBRA, CRC, CRRA, CCC, DRTVC, FWS, MLB and SOCAN

- Statement of proposed royalties to be collected for the retransmission of distant television signals for the years 2019 to 2023.

CBRA, CRRA, FWS and SOCAN

- Statement of proposed royalties to be collected for the retransmission of distant radio signals for the years 2019 to 2023.

CMRRA

- Statement of proposed royalties to be collected for the reproduction of musical works by commercial television stations for the year 2019 (Tariff 5).
- Statement of proposed royalties to be collected for the reproduction of musical works by the television services of the CBC for the year 2019 (Tariff 6).

CMRRA/SODRAC, Connect/SOPROQ and Artisti

- Statement of proposed royalties to be collected for the reproduction of musical works, of sound recordings and of performers' performances by commercial radio stations for the year 2019.

Re:Sound

- Statement of proposed royalties to be collected for the communication to the public by telecommunication of published sound recordings embodying musical works by pay audio services for the year 2019 (Tariff 2).
- Statement of proposed royalties to be collected for the performance in public or the communication to the public by telecommunication of published sound recordings embodying musical works by background music suppliers for the years 2019 to 2022 (Tariff 3.A).
- Statement of proposed royalties to be collected for the performance in public or the communication to the public by telecommunication of published sound recordings embodying musical works for the use of music as background music for the years 2019 to 2022 (Tariff 3.B).

- Statement of proposed royalties to be collected for the communication to the public by telecommunication of published sound recordings embodying musical works for the use of music by satellite radio services for the years 2019 to 2021 (Tariff 4).
- Statement of proposed royalties to be collected for the performance in public or the communication to the public by telecommunication of published sound recordings embodying musical works for the use of recorded music to accompany dance for the years 2019 to 2023 (Tariff 6.A).
- Statement of proposed royalties to be collected for the performance in public or the communication to the public by telecommunication of published sound recordings embodying musical works for the use of recorded music to accompany adult entertainment for the years 2019 to 2023 (Tariff 6.C).
- Statement of proposed royalties to be collected for the communication to the public by telecommunication of published sound recordings embodying musical works in respect of non-interactive and semi-interactive streaming for the year 2019 (Tariff 8).

SOCAN

- Statements of proposed royalties to be collected for the public performance or the communication to the public by telecommunication of musical or dramatico-musical works:

For the year 2019:

  - Tariff 1.A – Commercial Radio
  - Tariff 1.C – CBC Radio
  - Tariff 2.D – CBC Television
  - Tariff 3.A – Cabarets, Cafes, Clubs, etc. – Live Music
  - Tariff 4.A.1 – Live Performances at Concert Halls, etc. – Popular Music Concerts – Per Event Licence
  - Tariff 4.A.2 – Live Performances at Concert Halls, etc. – Popular Music Concerts – Annual Licence
  - Tariff 4.B.1 – Live Performances at Concert Halls, etc. – Classical Music Concerts – Per Concert Licence
  - Tariff 4.B.2 – Live Performances at Concert Halls, etc. – Classical Music Concerts – Annual Licence for Orchestras
  - Tariff 4.B.3 – Live Performances at Concert Halls, etc. – Classical Music Concerts – Annual licence for Presenting Organizations
  - Tariff 6 – Motion Picture Theatres
  - Tariff 9 – Sports Events
  - Tariff 15.A – Background Music in Establishments not Covered by Tariff 16 – Background Music
  - Tariff 15.B – Background Music in Establishments not Covered by Tariff 16 – Telephone Music on Hold
  - Tariff 16 – Background Music Suppliers
  - Tariff 19 – Physical Exercises and Dance Instruction
  - Tariff 22.A – Internet – Online Music Services
  - Tariff 22.B – Internet – Other Uses of Music – Commercial Radio, Satellite Radio and Pay Audio
  - Tariff 22.C – Internet – Other Uses of Music – Other Audio Websites
  - Tariff 22.D.1 – Internet – Other Uses of Music – Audiovisual Content
  - Tariff 22.D.2 – Internet – Other Uses of Music – User-Generated Content

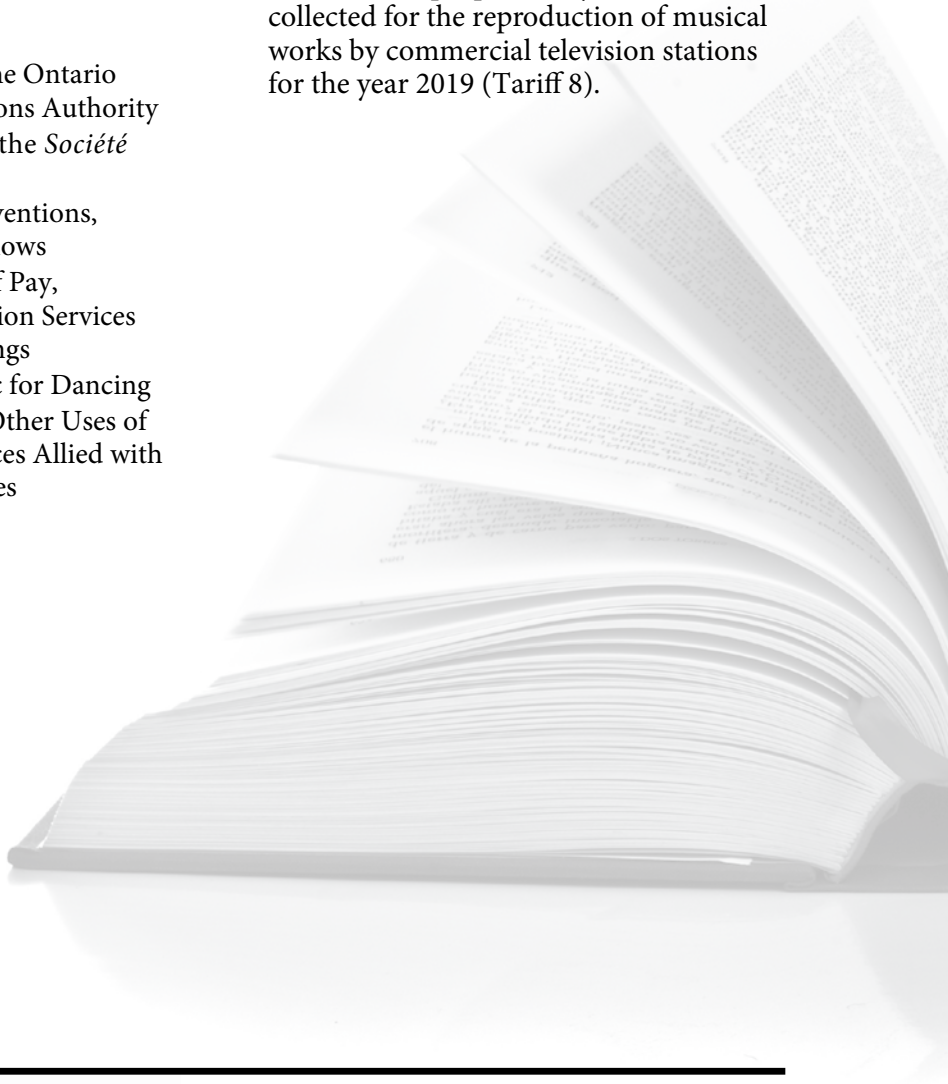
- Tariff 22.E – Internet – Other Uses of Music – CBC
- Tariff 22.G – Internet – Other Uses of Music – Game Sites
- Tariff 24 – Ringtones and Ringbacks
- Tariff 25 – Use of Music by Satellite Radio Services
- Tariff 26 – Pay Audio Services

For the years 2019 and 2020:

- Tariff 1.B – Non-Commercial Radio Other than the CBC
- Tariff 2.A – Commercial Television Stations
- Tariff 2.B – Television of the Ontario Educational Communications Authority
- Tariff 2.C – Television of the *Société de télédiffusion du Québec*
- Tariff 8 – Receptions, Conventions, Assemblies and Fashion Shows
- Tariff 17 – Transmission of Pay, Specialty and other Television Services by Distribution Undertakings
- Tariff 18 – Recorded Music for Dancing
- Tariff 22.D.3 – Internet – Other Uses of Music – Audiovisual Services Allied with Broadcast and BDU Services

SODRAC

- Statement of proposed royalties to be collected for the reproduction of musical works embedded in music videos for transmission by a service for the year 2019 (Tariff 6).
- Statement of proposed royalties to be collected for the reproduction of musical works embedded in audiovisual works for transmission by a service for the year 2019 (Tariff 7).
- Statement of proposed royalties to be collected for the reproduction of musical works by commercial television stations for the year 2019 (Tariff 8).



REQUESTS FOR ARBITRATION

The Board did not receive any request for arbitration in the year 2017-18.

However, on March 31, 2017, SODRAC requested that the Board fix the terms of the CBC/SRC licence with respect to the reproduction of musical works for the period April 1, 2017 to March 31, 2018. SODRAC also asked that the consideration of this request be merged to the ongoing consideration of the licence for the period 2012-2017, which the Board did on April 27, 2017.

Finally, on March 28, 2018, SODRAC advised the Board that a partial agreement had been reached between the parties in respect of certain aspects of the SODRAC v. CBC licences file, and that this agreement resulted in the Board being no longer seized of the following:

- The issue of synchronization royalties for copies of existing and commissioned works done by CBC for the production of a CBC program for the purpose of its exploitation, for the period ending December 31, 2017;
- The issue of synchronization royalties for copies of existing works done by CBC for the production of a CBC program for the purpose of its exploitation, for the period starting January 1, 2018; and,
- The issue of royalties for interactive kiosks.

HEARINGS

The Board held two hearings during the fiscal year 2017-18.

The first hearing, held in May 2017, was in respect of SOCAN and Re:Sound's Tariffs for Pay Audio Services for the years 2007 to 2016. In addition to the two collective societies, *Stingray Digital Group Inc.* and a group representing the Broadcasting Distributors Undertakings (Bell Canada, Rogers Communication Inc., Shaw Communications Inc., Cogeco Cable Inc., Videotron G.P., Telus Communications Company) participated in the hearing.

The second hearing, held in September 2017, was in respect of a SODRAC licence for the reproductions of musical works by CBC. For this hearing, the Board consolidated two cases: the redetermination, following a Supreme Court of Canada decision, of a SODRAC-CBC licence for the years 2008-2012 and the examination of the same licence for the years 2012-2018.

DECISIONS

During the fiscal year 2017-18, the following decisions were rendered:

May 5, 2017 – SOCAN Various Tariffs, 2007-2017

SOCAN filed various proposed tariffs for the public performance or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works for the years 2007 to 2017.

Some of the tariffs were not opposed and were certified as filed, or with changes. Some other tariffs were opposed and were certified, reflecting in some cases agreements reached between the parties.

The following proposed tariffs were unchanged from the last time they were certified, and were certified as proposed:

- Tariff 5.B (Exhibitions and Fairs), 2009-2017
- Tariff 14 (Performance of an Individual Work), 2013-2017
- Tariff 23 (Hotel and Motel In-Room Services), 2013-2017
- Tariff 6 (Motion Picture Theatres), 2014-2016

All of the following tariffs were certified for the years 2013 to 2017. For the years 2013 and 2014, these tariffs were unchanged from the last time they were certified. For the years 2015 to 2017, they were adjusted for inflation.

- Tariff 5.A (Exhibitions and Fairs)
- Tariff 7 (Skating Rinks)
- Tariff 8 (Receptions, Conventions, Assemblies and Fashion Shows)
- Tariff 10.A (Parks, Parades, Streets and Other Public Areas – Strolling Musicians and Buskers; Recorded Music)
- Tariff 10.B (Parks, Parades, Streets and Other Public Areas – Marching Bands; Floats with Music)
- Tariff 11.A (Circuses, Ice Shows, Fireworks Displays, Sound and Light Shows and Similar Events)
- Tariff 11.B (Comedy Shows and Magic Shows)
- Tariff 12.A (Theme Parks, Ontario Place Corporation and Similar Operations)
- Tariff 12.B (Paramount Canada's Wonderland and Similar Operations)
- Tariff 13.B (Public Conveyances – Passenger Ships)
- Tariff 13.C (Public Conveyances – Railroad Trains, Buses and Other Public Conveyances, Excluding Aircraft and Passenger Ships)

SOCAN used the formula the Board used in a 2004 decision to calculate inflation. SOCAN calculated a 7.3 per cent increase for all tariffs except Tariff 12.B. For this Tariff, the adjustment was 10.11 per cent to reflect the fact that the last inflation adjustment for this specific tariff was done for the year 2002, as opposed to 2004 for the others.

In a more recent decision, the Board used a different formula to calculate inflation. The Board accepted SOCAN's inflation adjustment of 7.3 per cent but noted that under the new formula it would have been 18.2 per cent.

As there was no objection, the Board increased SOCAN's annual royalty rate for TVO from $300,080 to $360,096 for the years 2014 to 2017, to account for TVO's websites and other technological platforms. The Board also increased SOCAN's annual royalty rate for *Télé-Québec* from $180,000 to $216,000 for the years 2-13 to 2017, for the same reason.

For the years 2015 to 2017, SOCAN proposed substantially increased rates to its Tariff 4.B.2 – Classical Music Concerts – Annual Licence for Orchestras. No one objected. However, in an email to the Board on April 6, 2017, SOCAN proposed new, lower rates for these years to better reflect the gradual increases that the Board had certified for 2013-2014. The Board agreed and certified the rates accordingly.

Over the years, various community-radio associations opposed SOCAN Tariff 1.B (Non-Commercial Radio Other than the Canadian Broadcasting Corporation) to the extent that it was unclear on its potential applicability to the Internet activities of their member stations. Following an agreement between the objectors and SOCAN covering non-commercial AM, FM or Internet-only radio stations for the period 2007 to 2017, the objections were withdrawn and the Board certified the tariff as per the agreement between the parties.

For 2009 to 2012, SOCAN proposed no changes to Tariffs 2.A (Commercial Television Stations) and 17 (Pay and Specialty Television Services). For 2013, SOCAN proposed an increase from 1.9 per cent to 2.1 per cent. Various broadcasters and the Canadian Association of Broadcasters objected to these tariffs. The Board scheduled a hearing for March 2014.

Prior to the hearing, the parties filed a settlement. As part of the agreement, the parties asked that the two tariffs be certified for the period 2009 to 2013 as last certified for 2008; the Board did so.

For 2013-2014, SOCAN proposed an annual royalty rate for Tariff 2.D (Television – Canadian Broadcasting Corporation) of $6,922,586, the same rate as certified for 2012. CBC objected to the tariff for the year 2014 but withdrew its objection. The Board certified that rate.

For 2015-2017, SOCAN proposed Tariffs 4.A.1 (Popular Music Concerts – Per Event Licence), 4.A.2 (Popular Music Concerts – Annual Licence), 4.B.1 (Classical Music Concerts – Per Concert Licence) and 4.B.3 (Classical Music Concerts – Annual Licence for Presenting Organisations) as last certified, adding only a definition for "performers" for 2017. The Toronto Organizing Committee for the 2015 Pan American and Parapan American Games and Restaurants Canada objected to these tariffs but later withdrew their objections. The Board certified the tariffs as proposed.

For 2013, SOCAN proposed Tariff 9 (Sports Events) at a rate of 0.105 per cent, an increase from the rate of 0.1 per cent certified for 2011-2012. For 2014-2017, SOCAN proposed 0.1 per cent once again. The NHL and the Blue Jays objected to the tariff for 2013. SOCAN agreed with the NHL and the Blue Jays to a rate of 0.1 per cent for 2013. Subsequently, the Toronto Organizing Committee for the 2015 Pan American and Parapan American Games objected to Tariff 9 for 2014-2015; the Committee later withdrew its objections and the Board certified Tariff 9 for 2013-2017 as previously certified.

SOCAN Tariff 3 (Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns and Similar Establishments), Tariff 18 (Recorded Music for Dancing), and Tariff 20 (Karaoke Bars and Similar Establishments) were last certified for 2011-2012. SOCAN proposed that these tariffs remain the same as last certified for 2013-2014 and that an inflationary adjustment be applied for 2015-2017.

Restaurants Canada and the Hotel Association of Canada opposed the tariffs. The Objectors argued that it would be unfair to adjust the rates for inflation, since their revenue has declined significantly. The Board agreed with SOCAN, who argued that because Tariff 3 rate is a percentage rate, decreasing revenues have allowed users to reduce the compensation paid to entertainers, this automatically reduced royalties paid to SOCAN. The Board noted that fixed-rate tariffs (such as the minimum rate for tariff 3 and the Tariffs 18 and 20 rates) need to be adjusted for inflation from time to time to prevent their becoming insignificant.

May 19, 2017 – SOCAN Tariff 1.C – Radio – CBC, 2012-2014; SOCAN Tariff 22.E – Internet – CBC, 2007-2013

The Board examined two tariffs that were proposed by SOCAN and that targeted the Canadian Broadcasting Corporation (CBC). Tariff 1.C pertained to the use of SOCAN's repertoire on CBC radio for the years 2012 to 2014 and Tariff 22.E pertained to the use of SOCAN's repertoire on CBC Internet sites for the years 2006 to 2014. CBC objected to Tariff 22.E for all years and to Tariff 1.C for 2012.

On November 28, 2012, SOCAN filed with the Board an agreement with CBC for Tariff 22.E. On June 4, 2013, SOCAN noted that Tariff 1.C was now unopposed, because SOCAN had agreed that the 2011 rate apply to the years 2012-2014.

For Tariff 1.C, parties agreed on a monthly payment of $144,406.60.

For Tariff 22.E, there are two payment formulas, one relating to the tou.tv service and one relating to all other Internet services except cbc.music.ca and espace.mu. For tou.tv, the formula is A x B, where A is 1.9 per cent of tou.tv's Internet-related revenues; and B is the ratio of audio page impressions to all page impressions relating to tou.tv, if that ratio is available, and 0.75 if not.

For all other Internet services, the formula is A x B, where A is 10 per cent of the total amount payable by CBC to SOCAN under Tariffs 1.C and 2.D (Television – CBC) or by agreement between the parties; and B is the ratio of audio page impressions to all page impressions relating to online programming, if that ratio is available, and 0.15 if not.

The Board noted that Tariffs 1.C and 22.E both being single-user tariffs, many of the considerations articulated about agreements in *Re:Sound 5* are irrelevant.

The Board made a small wording change to Tariff 22.E. It also noted that, given the evolution in technology, page impressions may no longer be relevant.

May 19, 2017 – SOCAN Tariff 13.A – Public Conveyances – Aircrafts, 2011-2017

Through the years 2010 to 2014, SOCAN filed its proposed Tariff 13.A relating to public performance or communication to the public by telecommunication of musical works in an aircraft for the years 2011 to 2017.

For the years 2011 to 2014, SOCAN proposed to add a new category dealing with audiovisual presentations. In addition, the proposed rates were nearly double the existing ones, with fees further doubled for interactive offerings. The 2015-2017 tariff proposals changed the quarterly fee based on number of seats to an annual fee per seat. They also replaced the category "in-flight music" with "music as part of in-flight programming."

The National Airlines Council of Canada (NACC) objected to the tariff for 2013 and 2014 and intervened in the tariff for 2015-2017. NACC is a trade association representing Air Transat A.T. Inc., Jazz Aviation LP, Air Canada and WestJet Airlines Ltd.

The Board established a schedule of proceedings, which was to have led to a hearing beginning on September 27, 2016. After exchanging interrogatories and initial answers, SOCAN indicated that a settlement was soon forthcoming; the parties then jointly filed the Settlement Tariffs for 2011-2020.

In their joint request for certification, parties indicated the following. First, the settlement tariff rates for 2011-2014 are lower than the proposed tariff rates; as such, there is no prejudice in the Board certifying them. Second, the agreed changes to the proposed tariff for 2015-2017 dealt mostly with the reporting requirements. There was also a discount for licensees if an airplane is out of service for required maintenance.

The Settlement Tariff for 2011-2014 is identical to the tariff the Board certified for 2009-2010. For the 2015-2017 Settlement Tariff, further analysis was required because the two tariffs are not easily comparable.

The Board used the framework established in its May 25, 2012 decision on Re:Sound Tariff 5 (Use of Music to Accompany Live Events (Parts A to G), 2008-2012) for certifying tariffs pursuant to agreements. Under that framework, it should consider (a) the extent to which the parties to the agreements can represent the interests of all prospective users, and (b) whether relevant comments or arguments made by former parties and non-parties have been addressed.

NACC represents large passenger aircraft companies, holding certificates authorizing passenger seating capacity of 70 passengers or more. The Board thus considered planes smaller than the 70-passenger threshold. It found that the Settlement Tariffs imply the same or lower royalties as previously certified for a 50-passenger plane. In addition, the proposed tariffs were either higher or the same as the Settlement Tariffs, which implies no procedural fairness issues. In this case, there were no comments or arguments made by former parties and non-parties. The Board concluded that the interests of those not represented by NACC are not adversely affected by the Settlement Tariffs. It therefore certified this Tariff as per the Settlement Tariffs, of which the rates are indicated in the following table:

Rates Certified

<table>
<tr><th colspan="2">2011-2014</th><th>2015-2017</th></tr>
<tr><td colspan="2">1. Music while on ground</td><td>1. Music while on ground</td></tr>
<tr><td>Passengers</td><td>Fee per Calendar Quarter</td><td rowspan="5">$2.32 per seat, for each aircraft in service during the year, prorated to the number of days in which the aircraft is in service during the year.</td></tr>
<tr><td>0 to 100</td><td>$40.50</td></tr>
<tr><td>101 to 160</td><td>$51.30</td></tr>
<tr><td>161 to 250</td><td>$60.00</td></tr>
<tr><td>251 or more</td><td>$82.50</td></tr>
<tr><td colspan="2">2. In-flight Music</td><td>2. Music as part of in-flight programming</td></tr>
<tr><td>Passengers</td><td>Fee per Calendar Quarter</td><td rowspan="5">$5.49 per seat for each aircraft in service during the year, prorated to the number of days in which the aircraft is in service during the year.</td></tr>
<tr><td>0 to 100</td><td>$162.00</td></tr>
<tr><td>101 to 160</td><td>$205.20</td></tr>
<tr><td>161 to 250</td><td>$240.00</td></tr>
<tr><td>251 or more</td><td>$330.00</td></tr>
</table>

May 24, 2017 – Application to fix royalties for a licence and its related terms and conditions for SODRAC v. CBC, 2017-2018 – Interim Decision

On March 31, 2017, SODRAC requested the Board to establish the terms of a licence, which would allow CBC to reproduce works from SODRAC's repertoire in the course of its activities, for the period of April 1, 2017 to March 31, 2018. SODRAC also requested that the interim licence issued by the Board in its decision of June 27, 2016, be extended until the Board's final determination of this matter. On consent, the Board granted the request.

June 2, 2017 – SOCAN Tariff 19 – Physical Exercises and Dance Instruction, 2013-2017

SOCAN proposed tariffs for the public performance or the communication to the public by telecommunication of musical works in conjunction with physical exercises and dance instruction for the years 2013 to 2017. GoodLife objected to the tariff for both 2014 and 2015-2017. It also intervened for 2013.

When ready to proceed, the Board asked GoodLife to provide its detailed reasons for objecting to the tariff. GoodLife then withdrew its objections for all years.

For the years 2013 and 2014, SOCAN proposed that the rates remain the same as that certified by the Board for 2011-2012, namely $2.14, multiplied by the average number of participants per week in the room, subject to a minimum annual fee of $64. For the years 2015-2017, SOCAN proposed to increase the rates by 16.8 per cent to account for inflation. The new rates proposed were $2.50 and $74.72. SOCAN did not use the inflation-adjustment rule as most recently used by the Board, but the Board nevertheless certified the rates as proposed by SOCAN for the years 2013-2017.

June 2, 2017 – Satellite Radio Services Tariffs – Re:Sound, 2011-2018; SOCAN, 2010-2018

In March of 2009 to 2015, SOCAN filed its proposed tariffs for the communication to the public by telecommunication of musical works by satellite radio services for the years 2010 to 2018. In March of 2010 to 2014, Re:Sound filed its proposed tariffs for the communication to the public by telecommunication, by satellite radio services, of published sound recordings embodying musical works and performers' performances of such works for the years 2011 to 2018. In March 2009, 2010 and 2012, CSI filed its proposed tariffs for the reproduction of musical works, in Canada, by satellite radio services for the years 2010 to 2013.

SiriusXM and its predecessor corporations, Sirius and CSR, objected to these tariffs for various years. The Hotel Association of Canada (HAC) objected to some of these tariffs, as did Restaurants Canada. The Board merged consideration of the proposed tariffs filed by SOCAN, Re:Sound, and CSI, and ordered a hearing for 2013.

Prior to the start of the hearing, the parties jointly wrote to the Board indicating that settlement negotiations were ongoing. They requested that the Board postpone the hearing *sine die*. The Board did so.

CSI and SiriusXM then jointly wrote to the Board, indicating that they had settled and agreed to withdraw CSI's tariffs. Some time later, SOCAN, Re:Sound and SiriusXM jointly wrote to the Board, requesting that the Board certify the Settlement Tariffs for SOCAN for the years 2010 to 2018 and for Re:Sound for the years 2011 to 2018. SiriusXM Canada withdrew its objections to the Proposed Tariffs, conditional on the Board certifying a tariff consistent with the terms and conditions of the Settlement Tariff.

Re:Sound and SiriusXM also advised of their future intention to request an increase to Re:Sound's rates under the Settlement Tariff once the *World Intellectual Property Organization Performances & Phonograms Treaty* (WPPT) came into force. This request was filed a few months afterwards.

The Board sent a copy of the Settlement Tariff to all parties, as well as questions for HAC and for Re:Sound and SiriusXM jointly. HAC, Re:Sound, and SiriusXM responded to the questions. Re:Sound and SiriusXM also jointly replied to the answer by HAC.

Subsequent to the questions and answers, Re:Sound and SiriusXM requested that the Board defer certification pending the completion of certain discussions. SOCAN did not oppose this request. Re:Sound and SiriusXM filed with the Board updates on their discussions on eight occasions, until they resolved the matter.

In its decision of May 25, 2012 in respect of Re:Sound Tariff 5.A to 5.G, the Board set out a two-part framework for certifying tariffs pursuant to agreements. It should consider (a) the extent to which the parties to the agreements can represent the interests of all prospective users and (b) whether relevant comments or arguments made by former parties and non-parties have been addressed. The Board applied the framework in this case.

SiriusXM is the only user under the satellite radio tariffs. The Board found that HAC and Restaurants Canada are not prospective users. The agreement thus represented the interests of all prospective users.

The SOCAN portion of the Settlement Tariff is similar to the SOCAN tariff certified by the Board for 2005-2009. The Re:Sound portion of the Settlement Tariff from January 1, 2011 to August 12, 2014 is also unchanged from the

previously certified tariff. However, for the period from August 13, 2014 to December 31, 2018, the royalty rate has increased to reflect Re:Sound's repertoire share of 83 per cent, compared to SOCAN. The Board accepted the proposed repertoire adjustment, without ruling on its accuracy.

Accordingly, save for minor wording changes, the Board certified tariffs for Re:Sound and SOCAN identical to the Settlement Tariff filed jointly with SiriusXM. The rates certified for SOCAN are 4.26% of revenues, with a minimum fee of 43¢ per subscriber. The rates certified for Re:Sound are 1.18% of revenues with a minimum fee of 12¢ per subscriber, and 3.63% of revenues with a minimum fee of 36¢ per subscriber after August 12, 2014.

July 21, 2017 – Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment, 2013-2018

On March 30, 2012 and 2015, Re:Sound filed its proposed Tariff 6.C for the Use of Recorded Music to Accompany Adult Entertainment for the years 2013-2015 and 2016-2018, respectively. The Federation of Calgary Communities (FCC) objected to the tariff for the years 2016-2018. FCC indicated that all of Re:Sound's tariffs are too onerous for volunteer groups. They recommended that all tariffs have a flat rate for community-based groups. After Re:Sound requested certification of the tariff for both 2013-2015 and 2016-2018, FCC withdrew its objection; the tariffs were then unopposed.

Re:Sound submitted that the rates should be based on SOCAN Tariff 3.C in respect of adult entertainment clubs, rather than SOCAN Tariff 18 in respect of recorded music for dancing, adjusted for inflation since 2004, and subject to a 50 per cent repertoire adjustment. The rates would be 2.6¢-2.7¢ for 2013-2015, and 2.7¢-2.8¢ for 2016-2018, per day, multiplied by the establishment's capacity. These rates are lower than the proposed rates for the two periods, which were 21¢ and 6.6¢ per day, multiplied by the establishment's capacity.

Tariff 6.C includes the right of communication to the public by telecommunication of published sound recordings. The Board expressed the preliminary view that the establishments do not communicate to the public by telecommunication. Re:Sound agreed but expressed concern that any narrowing of the scope of the tariff might create gaps in coverage. The Board included both activities in the certified tariff, but noted that its analysis was based on a consideration of performance in public.

Re:Sound supplied no calculations to answer the question of whether establishments will pay more under Tariff 6.C than they paid under the previous tariff, which was Re:Sound Tariff 6.A for the use of recorded music to accompany dance (2008-2012). Based on the Board's calculations, this difference varies according to the capacity of the venue, the number of days of operation per week, and the number of months of operation per year. Because of this uncertainty in respect of the difference between the two tariffs, these calculations were not used by the Board for determining the fairness of this tariff.

The Board followed Re:Sound's suggestion and benchmarked Tariff 6.C to SOCAN Tariff 3.C, which is the same use, namely the use of recorded music in an adult entertainment club. The Board also accepted Re:Sound's submissions that harmonizing the rates and structure of the Re:Sound and SOCAN tariffs applicable to adult

entertainment venues will simplify the administration of the tariff for both Re:Sound and establishments and allow for greater efficiencies such as joint licensing initiatives between Re:Sound and SOCAN.

The rate payable under SOCAN Tariff 3.C for 2011-2012 was 4.4¢ per day, multiplied by the establishment's capacity. The rate remained at 4.4¢ for 2013-2014 and increased to 4.7¢ for 2015-2017. This was a partial adjustment for inflation. When it certified Re:Sound Tariff 6.A, the Board fully adjusted SOCAN Tariff 18 for inflation since 2004, before using it as a benchmark for setting Re:Sound's royalties. The Board used the same methodology here, leading to a theoretical SOCAN rate of 5.5¢ per person per day. The Board used the actual inflation rates to adjust the rate for the years 2013 to 2016 and did not adjust for 2017 and 2018. The Board declined to include an inflation adjustment clause in the tariffs.

The Board followed its decision in Re:Sound Tariff 6.A (2011) and used a 50 per cent repertoire adjustment. The certified rates were 2.6¢ for the years 2013 and 2014 and 2.7¢ for the years 2015 to 2018, per day, multiplied by the establishment's capacity.

The Board made a few adjustments to tariff wording to harmonize it with that of other tariffs. First, it provided that any sharing of confidential information with service providers shall be only to the extent required by the service providers for the service they are contracted to provide. In addition, such a service provider was required to sign a confidentiality agreement prior to getting access to such information. Second, it made the interest clause symmetric: no interest is payable with respect to overpayments or underpayments. Third, it calculated interest factors to apply to retroactive amounts symmetrically.

August 25, 2017 – Online Music Services Tariff (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)

On August 25, 2017, the Board rendered a decision certifying *Online Music Services Tariffs (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)*.

This decision dealt with several types of services, namely, permanent downloads, limited downloads, and webcasts (non-interactive, semi-interactive, interactive and hybrid) of audio tracks. It also dealt with permanent downloads, and semi-interactive and interactive webcasts, of music videos. Furthermore, it addressed situations where mixed bundles containing both audio tracks and music videos are sold to customers.

Royalties are payable to SOCAN for the semi-interactive, interactive, and hybrid webcasts of audio tracks and the semi-interactive and interactive webcasts of music videos. Royalties are payable to CSI for permanent and limited downloads, as well as webcasts (non-interactive, semi-interactive, interactive and hybrid) of audio tracks. Royalties are payable to SODRAC for the permanent downloads of music videos.

Legal Issues

Several legal issues were raised during this proceeding and determined by the Board. Among those issues were the royalty rate for making available of musical works, the effect of the Supreme Court of Canada decision in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 [*ESA*] on limited downloads, the copyright implications of cloud-based storage and the scope of SOCAN's Proposed Tariffs.

The Board was not able to value the act of making available separately from the communication right for two reasons: it was not properly seized of the issue and, in any event, the evidence adduced by the parties was lacking.

The Board interpreted the *ESA* Supreme Court decision as applicable equally to permanent downloads and to limited downloads, with the result that such activities only involve the reproduction right.

On the issue of the cloud-based storing and retrieving of protected works, the Board found that based on the evidence and the application of subsections 31.1(4)–(6) of the *Copyright Act,* no royalties should be set in this proceeding.

Given that there was ambiguity in the proposed language of SOCAN's tariff, and given that existing and proposed SOCAN tariffs would cover non-interactive webcasts, and that it is important to avoid the certification of tariffs with overlapping application, the Board concluded that excluding non-interactive webcasts from the scope of this tariff was appropriate.

Economic issues

The decision also dealt with a number of issues of an economic nature, including determining the proper rate base for the various royalties and appropriate minimum fees.

In comparison to previous tariffs for online music services, the present tariff has a larger rate base for webcasting services that now also includes advertising revenues specifically related to each webcasting activity. The rate base in previous applicable tariffs consisted only of subscription revenues.

On the issue of minimum fees, the Board adopted a formula whereby most minimum fees would be set at two-thirds of the amount paid by an average user. This formula ensures that the average user does not pay the minimum fee, that small users do and that, under reasonable conditions, about one-third of users pay the minimum fee.

This decision involved several different rates for different uses that persons who provide online music services must pay to SOCAN, CSI, and SODRAC. The following tables show the details of the rates certified for audio tracks and music videos respectively.

Audio tracks

Activity	SOCAN Royalties	CSI Royalties
Permanent Downloads	–	8.91 per cent of revenues Minimum fee: 3.6¢ per track if in a bundle of 13 tracks or more; 6.6¢ per track otherwise
Limited Downloads	–	8.91 per cent of revenues Minimum fee: $100 per year
Non-interactive Webcasts	–	1.49 per cent of revenues Minimum fee: $100 per year
Semi-interactive or Interactive Webcasts	5.3 per cent of revenues Minimum fee: $100 per year	1.49 per cent of revenues Minimum fee: $100 per year
Hybrid Webcasts	3.48 per cent of revenues Minimum fee: $100 per year	3.13 per cent of revenues Minimum fee: $100 per year

Music videos

Activity	SOCAN Royalties	SODRAC Royalties
Permanent Downloads	–	5.64 per cent of revenues Minimum fee: 6.6¢ per music video containing only one musical work; 2.6¢ per musical work in a music video containing two or more musical works
Semi-interactive or Interactive Webcasts	2.99 per cent of revenues Minimum fee: $100 per year	–

August 25, 2017 – Scope of section 2.4(1.1) of the *Copyright Act* – Making Available

Background

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed proposed tariffs for the communication to the public by telecommunication of works in its repertoire in connection with the operation of an online music service for the years 2011 to 2013. The examination of these proposed tariffs was merged into a single proceeding.

On July 12, 2012, the Supreme Court of Canada issued its *ESA* decision. It concluded that the transmission over the Internet of a musical work that results in a download of

that work is not a communication by telecommunication. The effect of this decision on SOCAN was that it could not collect royalties for such downloads.

On November 7, 2012, the *Copyright Act* was amended. This amendment including the addition of subsection 2.4(1.1), which provides that "[f]or the purposes of this Act, communication of a work or other subject matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public."

Concluding that it was not possible to certify SOCAN's proposed Tariff 22.A (Online Music Services) without considering this new provision, the Board commenced a separate proceeding to address the legal issue of the effect of s. 2.4(1.1) on SOCAN's ability to collect royalties for the transmission of permanent copies of musical works.

Parties and Arguments

The following parties chose to participate and make submissions:

- Alliance of Canadian Cinema, Television and Radio Artists (ACTRA PRS)
- Apple Canada Inc. and Apple Inc.
- Artisti
- Bell Canada
- Canadian Association of Broadcasters
- Canadian Broadcasting Corporation / *Société Radio-Canada*
- Canadian Copyright Licensing Agency o/a Access Copyright
- Canadian Media Production Association
- Canadian Musical Reproduction Rights Agency Ltd. (CMRRA) and the Society for Reproduction Rights of Authors, Composers and Publishers (SODRAC) (jointly CSI)
- Canadian Retransmission Collective
- Cineplex Entertainment LP
- Entertainment Software Association
- Google
- Microsoft Corporation
- Music Canada (formerly CRIA)
- Musicians' Rights Organization Canada (MROC)
- National Campus and Community Radio Association / *L'Alliance des radios communautaires* (NCRA/ARC)
- Pandora Media Inc.
- Prof. Ariel Katz
- Province of British Columbia
- Quebec Collective Society for the Rights of Makers of Sound and Video Recordings (SOPROQ)
- Quebecor Media Inc.
- Re:Sound Music Licensing Company (Re:Sound)
- Retail Council of Canada
- Rogers Communications
- Shaw Communications
- Sirius XM Canada Inc.
- *Société des auteurs et compositeurs dramatiques* (SACD) and the *Société civile des auteurs multimédia* (SCAM) (jointly SACD-SCAM)
- *Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada* (SODRAC)
- *Société québécoise de gestion collective des droits de reproduction* (Copibec)

- Society of Composers, Authors and Music Publishers of Canada (SOCAN)
- Telus
- Videotron G.P.
- Yahoo! Canada

SOCAN argued that, as a result of the new subsection 2.4(1.1) of the *Act*, Internet music services are liable to SOCAN when they post musical works on their Internet servers in a way that allows customers to have access to them from a place and at a time chosen by each customer, irrespective of whether the musical works are subsequently transmitted to end-users by way of downloads, streams, or not at all.

Some responding parties supported SOCAN's position, while others put forward either slightly or significantly different interpretations of s. 2.4(1.1). One of the significant arguments put forward by responding parties was that subsection 2.4(1.1) merely clarifies that the right to communicate a work to the public by telecommunication includes the making available of that work. As such, the act of making available for the purpose of streaming falls under paragraph 3(1)(*f*) of the *Act*, but making available for the purpose of downloading does not.

Board's decision

The Board considered the history of s. 2.4(1.1), statements made by the Government during the development and introduction of the amendments, and analyzed the text and context of the provision. It also addressed considerations of technological neutrality.

Based on this, the Board concluded that subsection 2.4(1.1) of the *Act* deems the act of placing a work or other subject-matter on a server of a telecommunication network in a way that a request from a member of the public triggers the transmission of that work or subject-matter, including in the form of a stream or download, whether or not such a request ever takes place, to be a communication to the public by telecommunication.

The Board also considered international treaties, and the expert evidence that was submitted on these, and concluded that a more limited interpretation of subsection 2.4(1.1) of the *Act*, which would make this provision applicable only when a work is made available for streaming, would not comply with Canada's international obligations, as existing rights under the *Copyright Act* would not be sufficient to cover all acts contemplated by the treaties.

Finally, addressing arguments that acts subsequent to the act of making available could change its legal nature, the Board concluded that the act of making a work available to the public remains a communication to the public by telecommunication regardless of whether the subsequent transmission is a download or a stream. It remains distinct from any subsequent act of transmission; the two acts do not merge and become a single, larger act.

September 1, 2017 – Re:Sound Tariffs 5.A to 5.G, 2013-2015 and 5.H to 5.K, 2008-2015 – Use of Music to Accompany Live Events

On March 30, 2007, Re:Sound filed its proposed Tariff 5 for the use of music to accompany live events for the years 2008 to 2012. As a result of negotiations between the parties, the Proposed Tariff was eventually restructured into parts A to G, as follows:

A. Recorded music accompanying live entertainment in cabarets, cafes, clubs, restaurants, roadhouses, taverns and similar establishments;
B. Receptions, conventions, assemblies and fashion shows;
C. Karaoke bars and similar establishments;
D. Festivals, exhibitions and fairs;
E. Circuses, ice shows, fireworks displays, sound and light shows and similar events;
F. Parades; and
G. Parks, streets and other public areas.

Following agreements between Re:Sound and some groups of objectors, the Board certified on May 25, 2012, Re:Sound Tariff 5 (Parts A to G) for the years 2008 to 2012.

Re:Sound anticipated that the negotiations would result in the following new categories of events, also for 2008-2012:

H. Sports events;
I. Comedy and magic shows;
J. Concerts; and
K. Theatrical and dance performances.

On March 30, 2012, Re:Sound filed its Proposed Tariffs 5.A to 5.J for 2013-2015. A number of objectors opposed these tariffs. Discussions with the parties led to the addition of the new component, Tariff 5.K. Consequently, the Board was then seized of Tariffs 5.H to 5.K for 2008-2012 and Tariffs 5.A to 5.K for 2013-2015.

In December 2013 and 2015, Re:Sound filed with the Board two requests for certification of a set of modified tariffs (the "Settlement Tariffs"). Except for Tariff 5.D (2015), the Settlement Tariffs 5.A to 5.G essentially maintained the status quo as certified for 2008 to 2012. Settlement Tariffs 5.H to 5.K were inaugural tariffs which were mostly benchmarked against SOCAN certified tariffs.

After the first request for certification, the Board asked a number of questions to the parties. Only Re:Sound, the Sports Objectors, the Canadian Arts Presenting Association (CAPACOA), and the Canadian Association of Fairs and Exhibitions (CAFE) provided responses. Only Re:Sound filed a reply.

CAPACOA and CAFE responded as follows. First, they were concerned with the inconsistencies between tariffs, caused by the multiplication of parts of Tariff 5. Second, they expressed concerns about tariff 5.J being based on capacity, rather than actual admissions. Finally, they expressed concerns that Tariffs 5.E, 5.I and 5.J have relatively high minimum fees per event.

Re:Sound replied as follows. First, it is open to consider consolidation of tariffs starting in 2016. Second, a tariff based on capacity is much simpler to administer. Finally, its minimum fees are necessary to cover tariff administration costs.

Some Objectors withdrew from the proceeding between the first and second requests for certification. After the second request, the following entities remained as objectors: Sony Centre for the Performing Arts; The Corporation of Roy Thompson Hall and Massey Hall; the National Arts Centre; *la Place des Arts*; and The Royal Conservatory of Music (in respect of Koerner Hall in Toronto). These Objectors however were deemed to have withdrawn their objections to Tariffs 5.A to 5.K for 2008-2015 after failing to provide written submissions in due course.

The Board agreed with Re:Sound that as a general rule, a tariff based on capacity is easier to administer than a tariff based on admissions. It also agreed with Re:Sound that minimum fees are necessary. An annual licence would be ideal to reduce the burden of such minimum fees, but there are no data available to set such a licence.

The Settlement Tariffs refer to both "performance in public" and "communication to the public by telecommunication." The Board did not believe that any communication to the public by telecommunication of sound recordings actually take place during the live events targeted by the tariffs. While the Board declined to modify the tariffs accordingly, it also declined to make any statement as to the relative value or importance of each of the rights.

In certifying tariffs based on agreements, the Board used a test first set out in the May 25, 2012 decision on Re:Sound Tariffs 5.A to 5.G. It considered (a) the extent to which the parties to the agreements can represent the interests of all prospective users and (b) whether relevant comments or arguments made by former parties and non-parties have been addressed.

The analysis for certifying each of the Settlement Tariffs follows.

Tariffs 5.A-5.C, 5.E-5.G (2013-2015); Tariff 5.D (2013-2014)

Re:Sound and the relevant Objectors requested that the following tariffs – Tariffs 5.A-5.C, 5.E-5.G (2013-2015); Tariff 5.D (2013-2014) – be certified as they were for the years 2008-2012, subject to minor wording amendments and, for Tariffs 5.B, 5.C, 5.D, 5.F, and 5.G, with the addition of an inflation clause similar to that certified in Re:Sound Tariff 3 for the use and supply of background music for the years 2003-2009.

The Board continued to believe that failing to take into account the decreased purchasing power that comes with inflation leads to certifying tariffs whose fairness and equity themselves erode over time. However, given that Tariffs 5.B, 5.C, 5.D, 5.F, and 5.G were agreed upon in December 2015, the clause was moot. Accordingly, except the inflation clause, the Board certified the provisions of Settlement Tariffs 5.A to 5.G (except Tariff 5.D for 2015).

Tariff 5.D (2015)

For 2015, Tariff 5.D has revised structure and rates. The relevant parties indicated that the proposed changes to Tariff 5.D for 2015 reflect the input of the Canadian fairs, festivals and exhibitions industry. CAFE and CAPACOA consulted extensively with their members and requested changes to the Tariff to make it simpler to administer and more equitable.

The Settlement Tariff for 2015 applies a daily fee structure to all sizes of fairs, based on average daily attendance (as opposed to total attendance), so that fairs are treated equally regardless of their size or duration. Additional rate tiers have been added to accommodate a wider variety of sizes of fairs.

The 2015 settlement rates were calculated by multiplying $0.0024 per attendee by the mid-point of each rate bracket, where $0.0024 is the average fee per attendee payable under the tariff for 2008-2012.

The Board was concerned that in some situations, festivals would pay more under the Settlement Tariff than under the certified tariff and even the Proposed Tariff. Because setting rates potentially higher than those included in the Proposed Tariff originally published in the *Canada Gazette* may entail procedural fairness issues, the Board invited the parties to answer questions on the procedural and substantive fairness of potential fee increases. CAFE and CAPACOA were also specifically asked to describe their governance structure to explain the extent to which they represented small users of Tariff 5.D in the negotiations with Re:Sound.

The relevant parties explained that the Settlement Tariff is fair since it is based on a structure that is more equitable and simpler to administer than the other options. The Settlement Tariff brings enhanced predictability in terms of expenses. It also allows all festivals, exhibitions and fairs regardless of size and duration to be treated equally. The Board verified these assumptions by testing the Settlement Tariff with attendance figures provided by 10 festival members of CAPACOA, and found that no festival with a daily attendance below 10,000 would pay more under the Settlement Tariff.

CAPACOA indicated that its members included 15 individual festivals, and three festival associations. All were consulted on the Settlement Tariff. It also indicated that the festival community represented by CAPACOA is mainly comprised of small and mid-size festivals. They however consulted with Festivals and Major Events (FAME) as well as with the *Regroupement des événements majeurs internationaux.*

CAFE indicated that it represents fairs and exhibitions across Canada. Its membership varies from small, one-day fairs with attendance of less than 1,000 people, to some of the highest attendee numbers across Canada (e.g., Canadian National Exhibition, Calgary Stampede). CAFE's board had representatives from fairs and exhibitions in seven provinces, including four small fairs, six medium fairs and two large fairs, as well as a member representing the provincial association.

The Board concluded that the 2015 Settlement Tariff for 5.D is fair for the following reasons. First, any payment increase would be offset by tariff efficiencies. Second, the tariff scales the actual number of attendees. Finally, CAPACOA and CAFE are very representative of the interests of members and non-members. The Board certified Tariff 5.D for 2015 in accordance with the Settlement Tariff.

Tariffs 5.H-5.I (2008-2015)

The relevant parties submitted that Tariff 5.H (Sports Events) reflects its SOCAN counterpart, Tariff 9 (Sports Events), and Tariff 5.I (Comedy and Magic Shows) reflects SOCAN Tariff 11.B (Comedy Shows and Magic Shows). The agreed-upon adjustments are 40 per cent of the comparable SOCAN rates.

There are two exceptions to the relationship between Tariff 5.H and SOCAN Tariff 9. After 2011, even though the SOCAN rate was left unchanged, the rate for Tariff 5.H continues to increase incrementally each year, as did the SOCAN rate prior to 2011. This was agreed upon by the parties. Also, the Tariff 5.H rate for free sports events is $5, the same as under SOCAN Tariff 9.

The Board then applied the "Re:Sound 5" test, finding that the Sports Objectors represent the vast proportion of users of Tariff 5.H and are also significant users of Tariffs 5.E, 5.I and 5.J. CAPACOA and the Professional Association of Canadian Theatre (PACT), former Objectors to Tariff 5.I, represent most users of that tariff. In addition, there is a nominal fee for free sporting events, such as those that may be hosted by the Federation of Calgary Communities. Finally, there have been no comments or arguments made by former parties and non-parties. The Board certified Tariffs 5.H and 5.I pursuant to the Settlement Tariffs.

Tariff 5.J (2008-2015)

Tariff 5.J is an inaugural tariff for which there is no SOCAN counterpart as it targets the public performance of published sound recordings at live music concerts, during the entrance and exit of audiences and during breaks in live performances at live music concerts. The rates are based on the Re:Sound Tariff 3 in respect of background music, with a minimum fee of $15 per event.

Re:Sound submitted that a tariff based on capacity is easier to administer than a tariff based on admissions. It does not require users to track and report attendance to every event or require Re:Sound to monitor and audit such reports. Capacity is far easier for both Re:Sound and users to verify and it can be determined in advance, providing users with certainty as to their royalty obligations prior to holding an event. The Board accepted these arguments.

The Board then applied the "Re:Sound 5" test, finding that the Arts Objectors and CAFE represent a wide variety of events potentially subject to Tariff 5.J. Since there were no comments made by former parties and non-parties, the Board certified Tariff 5.J pursuant to the Settlement Tariffs.

Tariff 5.K (2008-2015)

There is no relevant SOCAN benchmark for Re:Sound Tariff 5.K, given the significant differences between the use of live and recorded music at events. The rates and structure of Re:Sound Tariff 5.K are based instead on the input of the Canadian performing arts industry represented by CAPACOA and CAFE. The rates were arrived at by analyzing Re:Sound's other attendance-based tariffs such as Tariff 3 and making adjustments for the higher value of foreground versus background music.

After considering comments from non-parties and former parties, the Board's view was that CAPACOA and CAFE represent a wide variety of events. However, because Tariff 5.K purports to apply not only to theatrical, dance, acrobatic arts, integrated arts, and contemporary circus arts events but also to any other live event not otherwise specifically covered by Tariffs 5.A to 5.J, the agreement could not represent the interests of all prospective users.

As a general rule, the Board will refuse to certify a tariff that could potentially have such a broad scope without proper evidence, none of which was adduced in terms of "other" unidentified live events. Hence, the Board certified Tariff 5.K pursuant to the Settlement Tariffs with a modified scope: theatrical, dance, acrobatic arts, integrated arts, contemporary circus arts or other similar live performances.

The Board did not set interest factors applying on retroactive payments for the following reasons. The Settlement Tariffs filed with the Board were silent on the use of interest factors to apply on retroactive payments. Furthermore, the Board had no knowledge of what rates the parties would have come to, had they known that interest factors would be included. Finally, it is even possible that the parties would not have come to an agreement, had interest factors been on the bargaining table.

September 1, 2017 – Re:Sound Tariff 3.A – Background Music Suppliers, 2010-2013; Re:Sound Tariff 3.B – Background Music, 2010-2015

General

On March 31, 2009, 2010, 2011 and on March 30, 2012, Re:Sound filed its proposed tariffs for the public performance and the communication to the public by telecommunication in Canada of published sound recordings embodying musical works and performers' performances of such works in respect of the use and supply of background music for the years 2010 to 2016.

The Hotel Association of Canada (HAC), Restaurants Canada , the Retail Council of Canada (RCC), DMX Music Canada Inc. (DMX), Bell Canada (Bell), Stingray Digital Group (Stingray), Totem Medias Inc. (Totem), and, jointly, Rogers Communications Inc., Shaw Communications Inc., Bell Canada, Quebecor Media Inc., and Cogeco Cable (the Broadcasting Distribution Undertakings, or "BDUs") objected to one of the tariffs for at least one year. DMX, Bell, Stingray, Totem, and the BDUs are the "Supplier Objectors." HAC, Restaurants Canada, and RCC are the "Establishment Objectors."

The Canadian Broadcasting Corporation, the *Association des restaurateurs du Québec*, the Canadian Federation of Independent Business, PJJ Productions, the Sony Centre for the Performing Arts, the Corporation of Roy Thompson Hall and Massey Hall, the National Arts Centre, the *Place des Arts*, the Royal Conservatory of Music (in respect of Koerner Hall in Toronto), the Professional Association of Canadian Theatres, and the Canadian Arts Presenting Association also objected to one or more of the Proposed Tariffs, but eventually withdrew their objections. The Fitness Industry Council and GoodLife Fitness Centres both requested intervenor status, and later withdrew. Life Time Fitness Inc. and County Magazine & Breakaway, who also objected, did not confirm their participation and were consequently deemed to have withdrawn.

Despite a motion by RCC, the Board ruled that Re:Sound's tariffs would not be consolidated with SOCAN Tariffs 15 (Background music in establishments not covered by Tariff 16) and 16 (Background music suppliers). In that ruling, the Board also ordered the filing of periodic status reports relating to negotiations between Re:Sound and the Objectors.

In 2013, Re:Sound settled with the Supplier Objectors. One year later, Re:Sound filed Settlement Tariff 3.A, and requested additional time to negotiate with the Establishment Objectors.

In 2015, Re:Sound and the Establishment Objectors agreed on all issues in Settlement Tariff 3.B save two: minimum fees and sharing of information with SOCAN. When the parties filed Settlement Tariff 3.B, they also filed submissions on the two outstanding issues.

For 2010-2016, Re:Sound initially proposed a rate of 16.36 per cent of the supplier's gross revenues from the supply of the recorded music per quarter, and subject to a minimum quarterly fee of $20.61 per establishment. Such a tariff would be a marked increase from the rate of 3.2 per cent established by the Board in its decision of October 21, 2006 in respect of Re:Sound Tariff 3 – Use and Supply of Background Music, 2003-2009 (*Re:Sound 3 (2003-2009)*). However, as described below, parties have agreed on much lower rates. Parties have also asked the Board to split the tariff in two parts. Tariff 3.A would target the supply of background music, and reflect the structure of SOCAN Tariff 16, while Tariff 3.B would target establishments that use background music, and reflect the structure of SOCAN Tariff 15.

The Board considered the extent to which the parties to the agreements represented the interests of all prospective users, and whether relevant comments or arguments made by former parties had been taken into account. The Supplier Objectors represented the vast majority of Canadian providers of background music. The Establishment Objectors represented a large number of users of background music. All other objectors have withdrawn. The parties to the Settlement Tariffs adequately represented the interests of the prospective users.

Tariff 3.A – Background Music Suppliers

Settlement Tariff 3.A referred to royalties being paid "for the authorization of a subscriber to perform in public." In May 2017, the Board wrote to the parties stating that, as such, the tariff appeared to set a royalty for an activity for which the *Copyright Act* sets out neither an exclusive right nor a right to equitable remuneration.

After some time, the BDUs proposed an alternative text, including the words: "a background music supplier who pays on behalf of subscribers." The Board accepted the alternative wording, since it no longer referred to an act of authorization, but rather permitted a person to voluntarily make an additional payment under the tariff.

In this case, one payment (and associated reporting obligations) completely take the place of another payment (and associated reporting obligations). The parties probably agreed to such an arrangement because of efficiencies. Instead of having to collect royalties from numerous establishments, and process associated reports, Re:Sound only has to collect a higher payment from background music suppliers from which it already would be collecting royalties. It may be cheaper for establishments to have the background music supplier pay in lieu of it, and, to the extent this additional cost for the supplier is passed through to the subscriber, simply pay that one cost instead.

Settlement Tariff 3.A set the royalty rate for equitable remuneration for communication by telecommunication at 0.97 per cent of revenues, which is notionally equivalent to the royalty rate for the right to communicate by telecommunication set in the Board's decision of June 30, 2012 in respect of SOCAN Tariff 16 for the years 2010 and 2011 (*SOCAN 16 (2010-2011)*) (i.e., 2.25 per cent), adjusted for repertoire by multiplying by 43.06 per cent.

The parties agreed that the rate for the equitable remuneration for public performance would be equal to the rate certified in *Re:Sound 3 (2003-2009)* for the equitable remuneration for both the communication to the public and the public performance, that is 3.2 per cent of revenues from subscribers.

The Board concluded that the use of *SOCAN 16 (2010-2011)* as a proxy was reasonable, and the context of an agreement led it to adopt the rates set out in Settlement Tariff 3.A in the certified tariff.

While *Re:Sound 3 (2003-2009)* did not set minimum royalties, Settlement Tariff 3.A included minimum fees. The quarterly minimum fees agreed upon by the parties in Settlement Tariff 3.A were $0.64 per subscriber per establishment for the equitable remuneration for the communication to the public by telecommunication, and $2.15 per subscriber per establishment as payment in lieu of the subscribing establishment's payment for the equitable remuneration for the performance in public. The Board included these minimum fees in the certified tariff.

Settlement Tariff 3.A included a provision whereby the royalty rates for small cable transmitters are halved. This was consistent with *SOCAN 16 (2010-2011)*. The Board included this provision in the certified tariff.

Several other Re:Sound tariffs certified by the Board provide that Re:Sound may share information with SOCAN "in connection with the collection of royalties or the enforcement of a tariff." In Settlement Tariff 3.A, sharing of Re:Sound's information with SOCAN did not contain the restriction that it be "in connection with the collection of royalties or the enforcement of a tariff." The Board added that restriction to Tariff 3.A.

The parties agreed that suppliers who fail to report on time and do not rectify their default within 30 days of receiving a default notice from Re:Sound, shall be subject to interest on their payment until the reporting is received. Since the issue of imposing penalties for late reporting is a compliance and enforcement issue rather than a tariff certification issue, the Board did not set penalties for late reporting in the tariff.

Tariff 3.B – Entities Playing Background Music

For 2011-2016, Re:Sound proposed the following rates:

- 0.294¢ multiplied by the number of admissions or attendees or tickets sold per day or event or,
- 0.92¢ multiplied by the number of square metres and by the number of days on which background music was played or,
- in all other cases, $98.84 per year.

The Proposed Tariffs also provided for a minimum annual fee of $98.84. When background music is used with a telephone on hold, Re:Sound proposed a separate royalty of $98.84 per year for the first trunk line and $27 for each additional trunk line.

In the Settlement Tariff 3.B, the parties agreed on the following rates:

- 0.0864¢ (2010-2012), 0.0895¢ (2013-2014) and 0.0931¢ (2015) multiplied by the number of admissions (or attendees or tickets sold) per day or event during which recorded music was played, or
- 0.1620¢ (2010-2012), 0.1678¢ (2013-2014) and 0.1745¢ (2015) multiplied by the capacity and by the number of days during which background music was played, or
- 0.2701¢ (2010-2012), 0.2798¢ (2013-2014), and 0.2910¢ (2015) multiplied by the number of square metres of the area to which the public has access, and by the number of days during which background music was played, or

– in all other cases, $46.27 (2010-2012), $47.94 (2013-2014), and $49.85 (2015).

The rates agreed by the parties are higher than the rates certified in *Re:Sound 3 (2003-2009)*, but much lower than the initial rates proposed by Re:Sound. Settlement Tariff 3.B provided for separate rates when background music is used with a telephone on hold. Finally, the parties asked the Board to determine the issues of minimum fees and of the sharing of information with SOCAN.

Re:Sound explains that the rates for 2010 to 2015 have been increased on account of inflation, following the methodology used by the Board in its decision in respect of CBC Radio for 2006-2011. The Board accepted the parties' calculations for 2010 to 2015.

Section 5 of the Settlement Tariff allowed for future inflationary adjustments using the same formula without the need for a hearing. The Board could not certify the parties' inflation proposal as it pertains to a period outside of the period under consideration in this instance and for which the Board is not properly seized. Section 5 was not included.

As described above, in *Re:Sound 3 (2003-2009)*, the Board did not certify any minimum royalties. In its Proposed Tariffs for 2010 to 2016, Re:Sound proposed a minimum annual fee of $98.84.

As part of settlement negotiations, Re:Sound proposed minimum fees of $46.27 (2010-2012), $47.94 (2013-2014), and $49.85 (2015), based on the minimum fee in SOCAN Tariff 15.A for 2008-2011, increased for inflation since 2004 and subject to a repertoire adjustment of 43.06 per cent. The Establishment Objectors proposed fees of $23.14 (2010-2012), $23.97 (2013-2014), and $24.93 (2015), half of the fees proposed by Re:Sound.

Given that the data that Re:Sound must collect and analyze in order to verify the royalties owing is relatively modest, the Board set minimum royalties at $25 per year for all years.

For music while on hold, the parties agreed on the following rates. For 2010 to 2012, the rate is of $46.27 for the first trunk line and $1.02 for each additional line. For 2013 and 2014, the rate is of $47.94 for the first trunk line and $1.06 for each additional line. For 2015, the rate is of $49.85 for the first trunk line and $1.11 for each additional line. These rates are based on SOCAN Tariff 15.B adjusted for repertoire and inflation. The Board accepted these rates.

Re:Sound requested that the tariff permit it to share information with SOCAN "in connection with the collection of royalties or the enforcement of a tariff," arguing that information reported under Tariff 3.B is not sensitive information and is also information similar to what licensees have to report to SOCAN under Tariffs 15.A and 15.B.

The Establishment Objectors did not believe that the sharing of information would increase efficiencies and would result in additional savings to their members. They did not want to accept the sharing arrangement without proof of efficiencies.

The Board expressed the view that such limited sharing of information can lead to efficiencies in collective administration and that the prejudice to the Objectors is low. Consequently, the Board decided that Tariff 3.B will provide that Re:Sound may share with SOCAN information collected pursuant to the tariff, in connection with the collection of royalties and the enforcement of a tariff.

December 1, 2017 – Private Copying, 2018 and 2019

On March 29, 2017, CPCC filed a proposed tariff of levies to be collected in 2018 and 2019 on the sale of blank audio recording media, in Canada, in respect of the reproduction for private use of musical works embodied in sound recordings, of performers' performances of such works or of sound recordings in which such works and performances are embodied ("private copying"). The proposed tariff sets the levy at 29¢ for each CD. Only Mr. Sean Maguire objected to the tariff. The parties agreed to a "paper-only" proceeding, consisting of the filing of cases and responses to the Board's questions.

CPCC raised two points. First, CDs continue to qualify as a medium ordinarily used by individual consumers to copy music. Second, the value of the private copying levy should remain at 29¢ per blank CD. Mr. Maguire also raised two points. First, the Board should revisit its definition of "ordinarily used." Second, he argued that if the overall cost of administering the private copying regime exceeds the revenues generated thereby, the tariff makes no practical sense.

Ms. Laurie Gelbloom, General Counsel of CPCC, discussed CPCC's management and staff, its financial position, the distribution of royalties, and enforcement of the tariff. She also presented data from an annual survey of retail prices of blank CDs sold singly, in spindles of 50 CDs, and in spindles of 100 CDs.

Mr. Benoît Gauthier filed a report, to answer the question of whether or not CDs continue to qualify as a medium that is ordinarily used by individual consumers to copy music.

Mr. Gauthier forecasted that 200.1 million tracks will be copied onto blank CDs in 2018 and that 183.9 million tracks will be copied onto blank CDs in 2019. He forecasts that, of all tracks copied onto all media and devices, 7 per cent will be copied onto CDs in 2018 and 6.2 per cent in 2019. Mr. Gauthier forecasted that 7.15 million blank CDs will be purchased by individuals in 2018 and 5.7 million in 2019. Finally, he forecasted that 33 per cent of blank CDs will be used to copy music in both 2018 and 2019.

Mr. Gauthier then examined these numbers in the context of previous Board decisions. More specifically, he compared 200 million tracks to 26 million in 1999, 7 per cent of copies being onto CDs to 5 per cent in 1999 and 2.25 million CDs purchased by individuals for the purpose of copying music in 2018 and 1.79 million CDs in 2019 with 1.05 million CDs in 1998. Accordingly, his forecasts suggest that blank CDs will continue to be ordinarily used by consumers to copy music in 2018 and 2019.

Dr. Marcel Boyer filed a report on the value of the levy, focusing on the economics of product life-cycles. According to the report, the Board has been predicting the demise of the market for the blank CDs since the Private Copying decision for 2011. However, this has not occurred: the market appears to have stabilized in 2015-2016. Furthermore, the Board has assumed that the price of a product drops at the end of its life-cycle. According to M. Boyer, this is not necessarily the case. A seller may raise prices so as to target the diehard group of customers whose demand is relatively less elastic. Dr. Boyer concluded that there is neither life-cycle evidence nor theory that suggests the Board should deviate from the 29¢ levy it has set since 2010.

The Board asked about CPCC's annual survey of retail prices. The response gave consistent data to allow intertemporal comparisons and also contained several measures of data accuracy and precision.

The Board also asked about the Music Monitor Survey. The response showed that copying/purchasing is strongest around the end of the year and weakest in the summer. CPCC added that there are no plans to conduct the Music Monitor Survey again because of the costs involved.

The Board also asked CPCC about life-cycle theory. The response drew an analogy between brand loyalty and format loyalty displayed by purchasers of blank CDs. It also noted that creative destruction shortens the life-cycle of technological products like blank CDs, but that remaining buyers are stubborn in their loyalty to the CD technology.

CPCC also replied to Mr. Maguire. First, while Mr. Maguire claims the survey data are too old to be reliable, these data met the standard set by the Supreme Court in *Mattel*. Second, CPCC noted that it would not have filed tariffs for 2018 and 2019 if it had not thought that its revenues would exceed its costs. Finally, CPCC explained why the Board should not take costs to society into account: the private-copying regime has a public purpose, CPCC is not a profit-maximizing corporation, and doing so exceeds the Board's jurisdiction.

Mr. Maguire conceded that if the Board maintains its standard for ordinarily used, CDs qualify. However, he argued that the Board's standard is a low threshold. Alluding to the burden of proof, Mr. Maguire argued that CPCC must state which data are new to these proceedings. Based on the reduction in survey frequency, he argued that the Board may not even have enough current data to show that blank CDs are "ordinarily used." Mr. Maguire filed data showing that CPCC's expense ratio is rising. Mr. Maguire muses that it may no longer make practical sense to operate the private copying regime. Finally, Mr. Maguire questioned whether the Board's threshold for "ordinarily used" is too low.

In essence, the Board's approach to the concept of "ordinarily used" has always been data-driven. Data for each proceeding are compared to data for other media for which the Board has certified or declined to certify a private copying tariff in the past. The comparison is done for a set of relevant variables. The Board found that its approach to "ordinarily used" from *Private Copying 1999-2000* remains appropriate. This approach emphasizes consistency rather than frequency and focuses on uses by individual consumers.

The Board distinguished between absolute and relative measures of the amount of private copying. The number of tracks copied privately onto CDs and the number of blank CDs bought by individuals for the purpose of copying music are absolute measures. By contrast, the fraction of tracks copied privately is a relative measure and the fraction of CDs used for copying music are relative measures.

The advantage of absolute measures is that they do not depend on data from non-leviable media. Looking at the use of other media and devices to determine whether or not CDs qualify introduces an inconsistency: if the use of non-leviable media increases substantially, a relative measure might suggest that CDs no longer qualify.

In the early 2000s, leviable media constituted almost everything onto which private copies were made; today, the reverse is true. Also, the wording of the *Act* suggests that the Board should only consider absolute measures of "ordinarily used." It did so.

The Board examined two absolute measures of private copying: the number of tracks copied onto blank CDs and the number of blank CDs purchased by individuals for the purpose of copying music. Based on CPCC's forecasts, and the Board's analysis, CDs qualify as a medium ordinarily used for the purpose of copying music.

The Board suggested several improvements to CPCC's forecast methodology. First, it would start all forecasts in 2009-2010. Second, it would use a regression model – either a straight or a curvy line. Model diagnostics suggest that the number of tracks copied should have a curvy line and the number of blank CDs bought should have a straight line. With these improvements, the Board came to the same conclusion: CDs would qualify as a medium ordinarily used for the purpose of copying music.

The Board addressed CPCC's *Mattel* claim. First it noted that assessing the reliability and validity of a survey requires the examination of certain facts, which may not be the same every time the evidence is introduced in a new proceeding. Second, it explained that as data age, they become less relevant.

The Board considered Mr. Maguire's practical-sense argument. In effect, he was arguing for private, microeconomic efficiency and for public, macroeconomic efficiency. The Board found that questions of private efficiency are CPCC's alone, not the Board's. The Board rejected the consideration of public efficiency, agreeing with CPCC that the public purpose overrides concerns of macroeconomic efficiency.

In the Board's view, its own costs should not be part of the consideration whether or not to certify a tariff since this would lead to an aberrant result. Otherwise, unopposed tariffs should always be certified since their costs are low. But the same logic would lead to the conclusion that the costliest tariffs (i.e., large tariffs with many objectors, that are sometimes sent back to the Board for redetermination from judicial reviews or appeals) should not be certified.

Since 2010, the Board set the rate at 29¢ four separate times, explaining that the current levy is a reality in the marketplace. Evidence of passthrough would suggest that the levy is part of the market. Average retail prices have ranged from a low of 29.3¢ (2014) to a high of 52.8¢ (2017). After 2014, the price has been stable at around 51¢. The data suggest at least some pass-through. They are also consistent with the theories advanced by Dr. Boyer about life-cycle pricing.

The Board thus certified a tariff of 29¢ per blank CD and retained the existing apportionment among collective societies: 58.2 per cent to authors, 23.8 per cent to performers and 18 per cent to makers.

January 12, 2018 – Re:Sound Tariff 6.B – Use of Recorded Music to Accompany Fitness Activities, 2013-2017

On March 30, 2012 and March 28, 2013, Re:Sound filed its proposed Tariff 6.B for 2013 and 2014-2017, respectively, for the performance in public or the communication to the public by telecommunication, of published sound recordings embodying musical works and performer's performances of such works for all uses in all areas of fitness and skating venues, and to accompany a fitness activity including fitness classes (which include skating lessons) and dance classes.

The Objectors were GoodLife Fitness Centres Inc. (GoodLife), the Fitness Industry Council of Canada (FIC), Life Time Fitness Inc., Canadian Dance Teachers' Association – Alberta Branch, Zoom Media Inc., and Mood Media Corporation. The Federation of Calgary Communities and Gymnastics Saskatchewan filed letters of comment.

In July 2015, Re:Sound, GoodLife, FIC, Zoom Media Inc., and Mood Media Corporation jointly requested that the Board certify Tariff 6.B for the years 2013-2017 as set out in a Settlement Tariff. As a result, only the Canadian Dance Teachers' Association – Alberta Branch, and Life Time Fitness Inc. remained as objectors.

Unlike the proposed tariff, the Settlement Tariff provided that where recorded music is provided by a background music supplier, the supplier's royalties and reporting requirements are determined pursuant to Re:Sound Tariff 3.A in respect of background music suppliers. The Board asked Re:Sound to explain why non-represented members of the background-music industry would not be adversely affected by the Settlement Tariff. It also ordered the remaining objectors to comment on the Settlement Tariff or else they would be deemed to have withdrawn their objections; no such comments were received.

The Board also requested Re:Sound to provide particulars on the negotiations, the negotiating parties and the negotiated terms. It did so and GoodLife replied. After reviewing the parties' submissions, the Board asked additional questions. Re:Sound responded that the parties were working on an amended Settlement Tariff language. The parties subsequently filed the Revised Settlement Tariff.

The Revised Settlement Tariff applies to three situations: (i) music is played as background music by a fitness venue; (ii) music is played as part of a dance and fitness class; and (iii) music is played by a skating venue.

The tariff distinguishes between music provided by background music suppliers, and other music. In the former case, the background music supplier (or the fitness venue if there is such an arrangement) pays under Re:Sound Tariff 3.A (2010-2013), based on the amounts paid to the background music service and the number of establishments covered. In the latter case, the Revised Settlement Tariff provides for a simplified tariff structure, with a flat annual payment based on the number of members of the fitness venue regrouped in three categories: less than 1,000 members; between 1,000 and 5,000 members; and more than 5,000 members. This structure differs from the past certified tariff, which was based on either the number of attendees, the capacity of the venue or the size of the venue.

The parties submitted that the old structure requires detailed reporting by fitness venues, and is very difficult for Re:Sound to monitor and verify. Membership data are much easier for a fitness venue to track and report and for Re:Sound to verify. The new structure allows a fitness venue to estimate its royalty obligations in advance.

For dance and fitness classes, the Revised Settlement Tariff proposed the same structure and rates as those in the past Tariff, subject to incremental, annual rate increases. The parties submitted that the per-class fee structure reflects the use and value of music. The rates for skating venues are the same as under the past Tariff, with an increase in the minimum fee from $38.18 to $49.05.

The parties submitted that the Revised Settlement Tariff provides for a structure and rates which have been carefully considered and agreed upon by the parties that will be subject to it. The Board noted that the rates in the Revised Settlement Tariff are lower than the initial rates in the Proposed Tariffs. Also, the Board found that FIC and GoodLife represent the majority of fitness venues in Canada; together they account for over 5,000 fitness venues with over four million members. In addition, Zoom Media Inc. and Mood Media Corporation represent background music suppliers for fitness venues. Thus, the Revised Settlement Tariff represents the interests of all prospective users.

The Board must also consider the comments made by non-parties: The Federation of Calgary Communities and Gymnastics Saskatchewan. These organizations worried about the Proposed Tariffs' increase or about the fact that the royalty payments under Tariff 6.B would be in addition to payments made under any applicable SOCAN tariff. The Board found that rates potentially applicable to community centres and other not-for-profit organizations remain reasonable. It also found that because Re:Sound Tariff 6.B is payable in addition to any applicable SOCAN tariff should not be a ground for denying Re:Sound's right to a tariff.

The Board certified the Revised Settlement Tariff, with modifications to wording to make the tariff consistent with Re:Sound Tariff 3.A and for clarity.

January 19, 2018 – Access Copyright – Elementary and Secondary Schools, 2010-2015 – Reconsideration

On February 19, 2016, the Board issued its decision pertaining to the reproduction in Canada (excluding Quebec) of works in Access Copyright's repertoire by elementary and secondary educational institutions and persons acting under their authority for the years 2010 to 2015. Access sought judicial review of that decision.

On January 27, 2017, the Federal Court of Appeal agreed with Access that the Board failed to consider that expert evidence had been filed to estimate the degree of the underestimation of the number of copied works comprised in Access' repertoire. The Court concluded that this was a reviewable error and sent the matter back to the Board for reconsideration.

The Issue of Repertoire

Since Access can only claim royalties in relation to works that are in its repertoire and since Access and the Objectors did not agree on how this should be determined, the issue of which works were in Access' repertoire was live during the proceedings.

On June 3, 2013, during the process leading to the hearing on that matter, the Objectors wrote to the Board, stating that in order to both adequately answer claims of Access Copyright with respect to repertoire and to make their own case, they needed to conduct their own analysis on these data. They added however that they did not have access to the database and that only Access could do the analysis.

Access replied that the Objectors could perform their own repertoire analysis, and could use as one of their sources of data for such an analysis the dataset, in conjunction with the codebook provided to them by Access. At this point, there was no suggestion by Access that there were significant coding errors, and that the data could not be relied upon.

The codebook provided information on two binary variables: *ac_pub_affiliate* and *ac_rro_bilateral*.

After the hearing which took place in April and May 2014, and in order to better understand the evidence that was being discussed during the hearing, the Board put certain technical questions to the parties, including the following:

> Please confirm that the correct interpretation of *ac_pub_affiliate = 1* (as used in Exhibit Objectors-10 at para 101) is that the work's publisher has signed an affiliate agreement with Access Copyright. Please confirm that the publisher is the owner of copyright of the work in every such instance.

In its response, Access stated that the code *ac_pub_affiliate* = 1 indicates that the publisher of the work has signed an affiliation agreement with Access Copyright. Access added however that for many works coded as either *ac_pub_affiliate = 0* or left blank, the publisher has in fact signed an affiliate agreement with Access. As a result, using the *ac_pub_affiliate* to measure the volume of copying of works owned by Access' affiliates greatly underestimates the volume of compensable copying. It is thus necessary to conduct a more detailed analysis of the data to delineate between books, magazines and newspapers that are claimed by virtue of affiliation and those that are claimed under the agency relationship.

This was the first mention by Access of significant coding errors in the dataset. According to the evidence, the coding errors underestimated the copying volume of certain works. However, the evidence did not describe the review that occurred to identify the coding errors nor explained how such errors may have occurred.

After the Objectors provided their own response to the Board's questions of June 6, 2014, Access provided a reply thereto in which it submitted a new report. This report described a new study, which examined a random sample of copying transactions that had both *ac_pub_affiliate* and *ac_rro_bilateral* set to 0.

In its 2016 decision, the Board wrote that Access has provided no evidence of the degree of underestimation. On judicial review, the Federal Court of Appeal concluded that the Board, through oversight, overlooked the expert report.

Reconsideration Proceeding

Pursuant to the Court decision, the Board provided the Objectors with the opportunity to respond to the new report, allowing them to request data from Access related to the issue of coding errors. Access was required to take reasonable steps to provide such data. In the case of any dispute, either party was invited to apply to the Board to resolve the dispute.

The Objectors requested Access Copyright to provide all documents that prove Access Copyright's repertoire claims for the years 2010-2015. They argued that due to the errors in Access Copyright's repertoire analysis, the Objectors want to double-check the status of works in all transactions involving affiliated works. To do this, the Objectors needed repertoire information from Access Copyright.

Access replied to the Objectors' request, submitting that the Objectors were attempting to enlarge the scope of the reconsideration beyond what the Federal Court ordered (i.e., the expert report and its data).

The Board noted that the expert report had a fundamental limitation: it could only identify errors in one direction. That is, by reevaluating only those transactions where the data indicated that the copying was from a work whose owner of copyright was neither a direct affiliate of Access (*ac_pub_affiliate* = 0), nor an affiliate of an Reproduction Rights Organization (RRO) with which Access had a bilateral agreement (*ac_rro_bilateral* = 0), this analysis could only result in an increase to Access' repertoire. The Board found that this asymmetry makes the analysis unreliable as an indicator of the amount of underestimation. Any attempt to measure net underestimation would require sampling from the entire population of transactions, including those that were initially coded as being in repertoire.

The Board concluded that there is insufficient contextual information to suggest that the reanalysis is a reliable indicator of net underestimation. The Board did not believe the reanalysis would be more accurate than the initial analysis.

Access explained that it did not believe it necessary to precisely code and identify its affiliates in the data but did not explain why certain kinds of errors were more likely than others. Without knowing how the initial error occurred, it appears very likely that similar errors would have occurred in cases where transactions were coded as being in repertoire.

In the expert report, Access noted the difficulty of establishing the identity of a work for many transactions. The Board did not treat such (blank) transactions as not in Access' repertoire, but rather inserted them pro-rata into the other types of repertoire.

The Board was convinced that coding errors did occur but not biased in one direction or another. Therefore, the Board did not give the reanalysis in the expert report any weight for the net underestimation.

The Board found that despite the presence of errors in the dataset, the initial data remain the best available source from which to estimate the total volume of copying from works in Access' repertoire. The royalty rates certified in 2016 were thus unchanged.

UNLOCATABLE COPYRIGHT OWNERS

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

During the fiscal year 2017-18, 33 applications were filed with the Board. The following 4 licences were issued:

- Sophie Dubois, Montreal, Quebec, for the reproduction of an illustration, incorporation in a book and the distribution of the book;
- Juke-Box, Cap-Chat, Quebec, for the reproduction, distribution and public performance of a musical work;
- Tightrope Books, Toronto, Ontario, for the reproduction and distribution of a book; and
- Wendy Mitchinson, Bright, Ontario, for the reproduction, communication to the public by telecommunication and distribution of three advertisements.

Federal Court of Appeal

Five applications for judicial review were filed with the Federal Court of Appeal in 2017-18:

- *Cineplex Entertainment LP v. Society of Composers, Authors and Music Publishers of Canada et al.* (File: A-266-17) on September 25, 2017, in respect of *Scope of section 2.4(1.1) of the* Copyright Act *– Making Available* (Decision of the Board, August 25, 2017); [Discontinued on March 8, 2018]
- *Entertainment Software Association (ESA) and Entertainment Software Association of Canada (ESAC) v. Society of Composers, Authors and Music Publishers of Canada et al.* (File: A-267-17) on September 25, 2017, in respect of *Scope of section 2.4(1.1) of the* Copyright Act *– Making Available* (Decision of the Board, August 25, 2017);
- *Apple Inc. and Apple Canada Inc. v. Society of Composers, Authors and Music Publishers of Canada et al.* (File: A-270-17) on September 25, 2017, in respect of *Scope of section 2.4(1.1) of the* Copyright Act *– Making Available* (Decision of the Board, August 25, 2017);
- *Society of Composers, Authors and Music Publishers of Canada v. Apple Canada Inc. et al.* (File: A-268-17) on September 25, 2017, in respect of SOCAN tariff portion of *Online Music Services Tariffs – CSI, 2011-2013; SOCAN, 2011-2013; SODRAC, 2010-2013* (Decision of the Board, August 25, 2017); and
- *CMRRA-SODRAC Inc. v. Apple Canada Inc. et al.* (File: A-265-17) on September 25, 2017, in respect of the CSI tariff portion of *Online Music Services Tariffs – CSI, 2011-2013; SOCAN, 2011-2013; SODRAC, 2010-2013* (Decision of the Board, August 25, 2017).

On January 15, 2018, the FCA merged file A-270-17 with A-266-17 and A-267-17. Files A-268-17 and A-265-17 were also merged.

On May 24, 2016, the following applications for judicial review were filed with the Federal Court of Appeal:

- *CAB v. SOCAN et al.* (File: A-159-16), in respect of the *Commercial Radio Tariff (SOCAN: 2011-2013; Re:Sound: 2012-2014; CSI: 2012-2013; Connect/SOPROQ: 2012-2017; Artisti: 2012-2014)* (Decision of the Board, April 22, 2016); and
- *CSI et al. v. CAB* (File: A-166-16), in respect of the *Commercial Radio Tariff (SOCAN: 2011-2013; Re:Sound: 2012-2014; CSI: 2012-2013; Connect/SOPROQ: 2012-2017; Artisti: 2012-2014)* (Decision of the Board, April 22, 2016)

These two applications were later merged by the Federal Court of Appeal. However, on November 21, 2017, the two applications were discontinued.

Two decisions rendered by the Federal Court of Appeal in 2017-18 were in respect of Board's decisions:

June 28, 2017 – *Re:Sound v. Canadian Broadcasters Association of Canada*, 2017 FCA 138, in respect of Re:Sound Tariff 8 for non-interactive and semi-interactive webcasting for the years 2009 to 2012

The Board's Decision

On May 16, 2014, the Board certified Re:Sound Tariff 8 setting royalties for the use of published sound recordings embodying musical works and performers' performances of such works in non-interactive and semi-interactive webcasting for the years 2009-2012.

Use of SOCAN ratio

During the proceedings, Re:Sound had urged the Board not to set its equitable remuneration in relation to a pre-existing SOCAN tariff for the same use (namely Tariff 22.F for audio websites), with a one-to-one ratio, but rather on the basis of several agreements that it submitted represented market rates for webcasting sound recordings. The Board analyzed the agreements and found that they would be an inappropriate basis for the tariff since applying the rates contained in these agreements in the Canadian context would lead to exceedingly large royalties. In the end, it applied the one-to-one ratio from the previously certified SOCAN tariff.

On judicial review, the Federal Court of Appeal held that an administrative decision that, absent new and different circumstances, applies its previous jurisprudence in the same way on similar facts, should be taken as an indicia of reasonableness.

The Court examined the Board's jurisprudence on the market rates issue, and concluded that it has been consistent on this issue, which supports the reasonableness of its decision.

Meaning of Equitable Remuneration

Re:Sound had also argued that the term "equitable remuneration" in the *Copyright Act* ascribe a different kind of remuneration from the royalties to which copyright owners like SOCAN's members are entitled. The Court dismissed this argument, concluding that this was based on a misinterpretation of the *Act*.

Requirements of International Treaties

The Court also rejected Re:Sound's argument that international treaties required the Board to determine the quantum of equitable remuneration on a market basis.

CBC v. SODRAC

Between the date of the Board's decision and the hearing of this judicial review, the Supreme Court of Canada released *Canadian Broadcasting Corporation v. SODRAC 2003 Inc.*, 2015 SCC 57. [*SODRAC*] In it, the Supreme Court affirmed the importance of the overarching principle of balance of both copyright owners and users' interests when interpreting and applying the *Act*, including when the Board is valuing rights. On judicial review, Re:Sound argued that this principle of balance required the Board to consider costs incurred by producers and performers as a factor when setting the tariff.

The Court held that the Board's analysis, focusing on the value of the sound recording rather than input costs, was fully consistent with this balance, and concluded that a work's value may not have any relation to the economic costs of inputs.

Lastly, the Board did not have the benefit of the *SODRAC* decision at the time it made its decision. Given the lack of evidence on this before it, it was reasonable for the Board not to perform the precise technological neutrality analysis mandated by the Supreme Court, and to refuse to assign a value to these technological differences.

March 22, 2018 – *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58, in respect of Access Copyright Tariff for provincial and territorial governments for the years 2005 to 2014

On May 22, 2015, the Board certified a tariff for the reproduction of literary works in Access' repertoire by provincial and territorial governments. The royalty rates were based, in part, on the results of a study of the volume and nature of published works reproduced by provincial and territorial government employees. Access Copyright applied for judicial review of that decision.

At issue before the Court were:

i. The Board's decision not to include in the tariff a requirement to delete copies after the end of the tariff period, and the resulting exclusion of digital copying from the tariff;
ii. The manner in which the Board assessed the extent to which copying captured by the study met the requirement of being a "substantial portion" of the original works, as required under s. 3 of the *Copyright Act*; and
iii. Whether the Board breached any obligations of procedural fairness.

Deletion requirement and Digital Copies

In its decision, the Board stated it would not include a deletion provision in the tariff, and went on to conclude that the absence of the deletion provision meant that Access could not license digital copies for the purposes of the tariff, and therefore excluded digital copying from the tariff. Access argued that the Board had an obligation to certify a tariff with digital copying.

On the issue of the presence of a deletion requirement, the Court characterized the Board's action as "decid[ing] not to include it in its tariff," rather than "remov[ing] the Deletion Provision."

The Court also held that the Board had discretion under section 70.15 regarding what matters should form part of a tariff and what matters should not, and that it was well within its proper discretion, and reasonable, not to include the making of digital copies in the tariff.

Evaluation of Substantial Portion

Section 3 of the *Copyright Act* requires copying to be of a substantial portion of the original work for that act to be controlled by copyright. Access argued that the manner in which the Board assessed this substantial portion was erroneous. In particular, it argued that the Board should have performed a qualitative comparison of the portions copied to the original work, as was done in *Cinar Corporation v. Robinson*, 2013 SCC 73 [*Robinson*], and should not have used a "bright-line" rule that one to two copied pages of a published work that did not exceed 2.5% of the overall work constituted a reasonable approximation for non-substantiality.

The Court distinguished from *Robinson,* on the basis that it was an action for copyright infringement, and involved non-literal copying. The present matter was a tariff proceeding, and involved literal copying. As such, there was no need to engage in a qualitative comparison of each copy to the original work.

Furthermore, the Court found that, given the lack of qualitative evidence, and the number of comparisons the Board would have had to do, it may not have been possible to evaluate the requirement of "substantial portion" in another way. As such, the Court concluded that the Board's approach was reasonable.

Procedural Fairness

Access argued that the Board breached obligations of procedural fairness by not permitting it to make submissions on certain issues. However, the Court concluded that Access had ample opportunity to make submissions on those issues. It also noted that "the Board is entitled to insist that its decisions be timely and efficient and if it were to invite specific submissions on every conceivable point of dispute, its proceedings would be impermissibly bogged down."

Furthermore, the Board's exercise of discretion in not permitting Access to file new evidence relating to the deletion requirement was reasonable.

The Court concluded that the Board did not breach any obligations of procedural fairness.

Federal Court

July 12, 2017 – *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669

The Canadian Copyright Licensing Agency ("Access"), filed proposed tariffs for the reproduction of literary works by Post-Secondary educational institutions for the years 2011–2013.

On October 13, 2010, Access applied for an interim tariff, and on December 23, 2010, the Board issued an interim tariff for those years. The language of the interim tariff was based on a model licence that had been agreed by Access and the Association of Universities and Community Colleges (as it was then named), which represented the interests of York University. The interim tariff was not the subject of a judicial review.

Subsequently, Access commenced an action to enforce the interim tariff against York University.

York argued that i) there is no obligation to pay the interim tariff on the grounds that deciding whether to benefit therefrom is voluntary and ii) that some of the reproductions in issue fall under fair dealing.

Status of Interim Tariff

One of the grounds on which York argued that the interim tariff is not an approved tariff was because it had not been published in the *Canada Gazette*. However, the Court concluded that while the Board had an obligation to publish the interim tariff in the *Canada Gazette*, it only had to do so "as soon as practicable;" and that the Board apparently decided that publication was not practicable – a matter which is within its discretion to decide.

In conclusion, the Court held that the interim tariff is mandatory, and that York could not opt not to be subjected thereto.

Fair Dealing

The Court analysis focussed on the "fairness" portion of the two-step fair-dealing analysis established by the Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13.

In considering fair dealing, the Court adopted the Board's nomenclature which distinguishes among the first and second step of a fair-dealing evaluation by referring to the threshold question as the "purpose" of the dealing, and the first non-exhaustive factor to be considered as the "goal" of the dealing.

Finding that most of the fair dealing factors tended towards unfairness, the Court concluded that York's Fair Dealing Guidelines were not fair in their terms or application for the purpose of any of the fair dealing exceptions in the *Copyright Act*.

As such, the Court ordered that Access was entitled to payment of royalties provided by the interim tariff.

AGREEMENTS FILED WITH THE BOARD

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

In 2017-18, 120 agreements were filed with the Board pursuant to section 70.5 of the *Act*.

Access Copyright filed 25 agreements granting educational institutions, language schools, non-profit associations, copy shops and other users a licence to photocopy works in its repertoire.

Copibec filed 92 agreements concluded, in particular, with various crown corporations, educational institutions and non-profit associations.

CBRA filed three agreements of which two are with American companies.