Copyright Board
Canada

Commission du droit d'auteur
Canada

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Regime Public Performance of Music
Copyright Act, Section 67.2

Members Mr. Justice Donald Medhurst
Michel Hétu, Q.C.
Dr. Judith Alexander
Mr. Michel Latraverse
Additional reasons delivered by Member Latraverse concerning Tariff 2.A.1

Statement of Royalties to be collected for the performance in Canada of dramatico-musical or musical works in 1990, 1991, 1992 and 1993

Reasons for decision

FOR THE YEARS 1990 TO 1993:

2.A.1 Commercial Television

FOR THE YEARS 1992 AND 1993:

10 Public Parks, Streets or Squares

FOR THE YEAR 1993:

1.A Commercial Radio

2.B Ontario Educational Communications Authority

2.C *Société de radio-télévision du Québec*

3 Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns and Similar Establishments

5.A Exhibitions and Fairs

12 Ontario Place Corporation, Canada's Wonderland and Other Similar Operations

13.A Aircraft

14 Performance of an Individual Work

15 Background Music in Establishments not covered by Tariff No. 16

16 Music Suppliers

18 Recorded Music for Dancing

20 Karaoke Bars and Similar Premises

I. INTRODUCTION

Pursuant to section 67 of the *Copyright Act* (hereinafter, the "*Act*"), the Society of Composers, Authors and Publishers of Music of Canada (SOCAN) filed with the Board a statement of proposed royalties for the public performance, or the communication to the public by telecommunication in 1993, in Canada, of musical or dramatico-musical works. Similar filings were made for the years 1990 to 1992.

The statement was published in the *Canada Gazette* on September 26, 1992. At the same time, the Board gave notice to users of their right to file objections to the proposed tariff no later than October 24, 1992. Statements filed for the years 1990 to 1992 had been published in a similar fashion.

The following gives reasons for Tariff 2.A.1 (for 1990 to 1993), Tariff 10 (for 1992 and 1993) as well as Tariffs 1.A, 2.B, 2.C, 3, 5.A, 12, 13.A, 14, 15, 16, 18 and 20 (for 1993). Other tariffs will be disposed of later.

On September 23, 1993, SOCAN asked that the Board amend the 1993 proposed statement as of September 1 of that year. Bill C-88 (now S.C. 1993, ch. 23) allowed SOCAN to make such a request in order to ensure that it collect royalties for the communication to the public by telecommunication of musical works. Out of an abundance of caution, the Board granted SOCAN's request. The issue of whether SOCAN could collect royalties for such communications before September 1, 1993 remains unsettled.

II. TARIFF WORDING

The Board continues to be concerned about the wording of the tariffs it certifies. SOCAN has been advised in the past that the Board often finds the wording of the public performance tariffs outdated or unnecessarily complicated, and that the tariffs probably ought to reflect the drafting principles used for the retransmission tariffs.

It is in this spirit that several modifications have been made to the tariffs certified in this decision. These changes were made after several consultations with SOCAN. The Board also asked for and received comments from the objectors to Tariffs 1.A and 2.A.1. The valuable cooperation of all these persons is acknowledged. These changes do not alter the substance of the tariffs but aim at making them more accessible to the general public.

The changes made to these tariffs are but a first step in what of necessity will be a longer term exercise. Users and SOCAN should feel free to comment on those changes, since the Board intends to subject all of the 1994 tariff to a similar examination.

TARIFF 1.A (COMMERCIAL RADIO)

III. INTRODUCTION

Commercial radio stations have paid 3.2 per cent of their gross revenues to the performing rights societies since 1978.[1] In 1987, the societies asked for an increase to 3.5 per cent, while the Canadian Association of Broadcasters (CAB) requested that the rate be lowered to 2,9 per cent; the Copyright Appeal Board declined to change the rate. An agreement keeping the rate at 3.2 per cent from 1988 to 1992 was approved by the Appeal Board in 1988 and 1989, and by this Board in 1990. In 1991, Standard Broadcasting and CFMX asked a reduced rate for stations using less protected music; the Board set a "low-use" rate of 1.4 per cent for stations using protected music for less than 20 per cent of their broadcast time. In 1992, SOCAN asked that stations be required to maintain and hold available appropriate records before they could claim the low-use rate. The Board declined on the grounds that the audit clause provided SOCAN with sufficient means to verify the validity of any such claim.

In its statement of proposed royalties for 1993, SOCAN requested three changes to the commercial radio tariff. It asked that the rates be increased to 5 and 2.2 per cent respectively. It suggested that the eligibility to the low-use tariff be determined monthly rather than yearly. Finally, it requested that stations claiming to be low-users be expressly required to establish their status.

CAB, Standard and CFMX filed objections. They ask that the general rate be lowered to 2.8 per cent and that the low-use rate be maintained at 1.4 per cent. They concur with determining the applicable rate on a monthly basis, but object to SOCAN's request that a station bear the burden of establishing its entitlement to the low-use rate. Finally, they ask that music used in interstitial programming (such as commercials, public service announcements and jingles), the so-called "production music," be expressly excluded from the calculation of the use of music.

The hearing into this tariff took place over seven days between June 15 and 23, 1993.

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[1] For a more complete history of the radio tariffs, see *Copyright Appeal Board 1987 Report* (1987), 15 CPR (3d) 129, at pp. 134-135.

IV. ANALYSIS

A. TIERING THE TARIFF

The Board agrees with the parties that the tiered tariff ought to be maintained. Mention was made during these proceedings of the possibility of setting further tiers in the tariff. Mr. Michel Arpin, Vice-President (Planning) and Corporate Secretary, Radiomutuel, confirmed that after careful examination, CAB found that a two-tiered tariff best corresponded to the needs of the Canadian market. SOCAN supported this approach. The Board concurs with Mr. Arpin's point of view.

B. CHANGING THE RATES

To support its request that the rates be raised, SOCAN puts forward several arguments. It maintains that the use of music by commercial radio stations has increased. It claims that the creation of the low-use tariff has distorted the rate. It states that the stations are able to pay more for their music. Finally, SOCAN underlined that its share of production costs had decreased over the last twenty years.

To support its claim for a lower rate, CAB first described what it sees as the parlous state of the industry. It pointed to the promotional benefits authors derive from radio air play. It argued that account should be taken of the rate paid by American radio stations. Finally, it outlined the various contributions made by radio stations to the music industry.

Based on the record of these proceedings, the Board is of the opinion that the rates should remain the same.

SOCAN's assertion that music use has increased relies first on a statement that the length of the "average" song has increased since 1987. The Board agrees with CAB that SOCAN's evidence in this respect is anecdotal and cannot be extrapolated to the whole industry; the witness himself declined to do so.[2]

SOCAN also claimed that the looser content requirements of the CRTC had encouraged the use of music. Its witness testified that the content of programs on AM and FM stations has converged[3] and that the elimination of the spoken word requirement in 1993 should encourage that trend[4]. Again, the Board is of the opinion that the effect of looser content regulations is not clear in the evidence. Deregulation may remove barriers to a greater use of music; on the other hand, AM stations may lower their use of music (especially in larger markets) because they are unable to compete with the quality of sound offered on FM stations.

SOCAN also claimed that, all other things being equal, the average use of music in the group paying the higher rate must have increased since the Board has set a separate rate for low users.

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[2] Transcript, pp. 712, 771-772, 800-806.
[3] Mr. Forsyth, transcript, p. 458; SOCAN-3, p. 21.
[4] Transcript, pp. 432-435; SOCAN-3, p. 20.

This statement is tautologically true. However, it is relevant only if the higher rate is meant to reflect an industry average which ought to be adjusted with each change in tariff structure. This is not the way the Board views that rate. The Board tiered the tariff to reflect a change in the behaviour of certain users. It considers the 3.2 per cent rate to be a fair price for those users who pay it, even after tiering the tariff. Any adjustments must therefore come as a result of other factors.

The Board has stated in the past that ability to pay is one of several factors that may be taken into account in setting the price of music. Understandably, SOCAN and CAB debated at some length the financial state of the industry.

Various witnesses argued the relative merits of using different indices to assess the industry's financial status. Some witnesses preferred using earnings before interest, depreciation and taxes (EBIDT) because it is not influenced by the age of fixed assets, the capital structure or accounting techniques. Others claimed a role for net earnings after tax (EAT) or earnings before interest and taxes (EBIT). EBIDT appears to be a more stable figure than EAT or EBIT; having said this, the Board considers that all these figures can provide useful information in determining a user's financial status. Furthermore, the conclusions they lead to appear to be similar on the whole.

First, it is clear that the radio industry has experienced hard times in the last several years. Profitability has deteriorated. Mr. Ronald Osborne, President and Chief Executive Officer of Maclean Hunter Limited, submitted that the profit levels are no longer sufficient to attract new investment.[5] This is in stark contrast with the situation as it appeared to the Copyright Appeal Board in 1987, when it perceived that "the industry is continuing to expand."

Second, it appears that the deterioration of the industry's profitability has halted. However, the industry has not regained the health of its golden years. It also remains to be seen whether its fortunes are improving or whether profits have merely stopped falling. Mr. Kirk, an investment analyst with Burns Fry Research, offered the opinion that the industry has bottomed out, is starting to improve, and will experience further growth over the next few years.[6] However, his answers during cross-examination brought out the difficulty of determining at this point in time whether profit in the industry is truly at a minimum, or whether this is merely an inflection point.[7] The patient's health has stabilized; this does not tell us whether or when it will recover.

Third, the deterioration in the industry's performance has occurred for reasons that have nothing to do with the rates being paid for the performance of music. Furthermore, nothing in the evidence convinced the Board that the industry is less able to pay for its music than it was five or ten years ago.

On another issue, Professor Liebowitz pointed out that the ratio of the cost of performing rights to the cost of other production inputs has dropped. He asserted that in a free market music

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[5] Transcript, p. 885.
[6] Transcript, p. 129; SOCAN-2.
[7] Transcript, pp. 243-245.

payments would grow at the same rate as other programming costs. He stated that in order for music performance rights to represent the same share of programming expenses as they did in 1972, the rate would have to be raised to 3.74 per cent.[8] SOCAN asked that the rate be increased accordingly. The Board rejects this approach for two reasons.

First, it is necessarily true that if music royalties are linked to revenues they will grow at a rate different from that of other programming costs unless these other costs also faithfully track revenues.[9] This is an inevitable result of the pricing formula put forward by the music societies some thirty years ago, and adopted by this Board and its predecessor ever since. The Board could establish a tariff based on profits, costs or any other rational variable. Of course, any alternative pricing strategy would introduce its own set of problems. Furthermore, this is not what SOCAN is proposing.

Second, in order to link music royalties and other programming expenses, one must assume that in a free market, the relative share of production inputs does not change significantly over time. That assumption is explicitly contradicted in Professor Liebowitz's own report.[10] In the period he selected, total programming expenses grew by 494 per cent, but growth rates for individual inputs ranged from 55 per cent to 1112 per cent. The market for none of these is regulated.[11]

The Board is also unconvinced by the evidence presented by CAB in support of a rate reduction.

CAB stated that radio air play promotes the sale of recordings. It argued that it is in the interest of creators to have their work played and therefore, this should be taken into account in setting the tariff. In the Board's view, this is but one case of a symbiotic relationship between different industries, with no direct bearing on the price.

CAB also argued that since Canadian stations have access to the same repertoire as American stations, they should pay a rate no higher than that in the United States.[12] Indeed, it added that the differences between the Canadian and American markets were such that Canadian stations should pay a lower rate. Rates paid in the United States and in other countries are always interesting and can be useful; they are, however, only one part of the puzzle for setting rates in Canada, where conditions may be different.[13] In the case at hand, conditions in the Canadian and American markets are significantly different, if only because most of the American regime is articulated around a consent decree. We explain later why the Board finds that this is sufficient to distinguish the Canadian and American markets in the context of the reasons for the commercial television tariff.[14]

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[8] Transcript, p. 1055.
[9] In the period used by Professor Liebowitz, programming costs grew by 494 per cent and revenues by 405 per cent.
[10] SOCAN-4, Table 2, p. 12.
[11] Interestingly, Professor Liebowitz points out (SOCAN-4, p. 11) that in the relevant period, the increase in revenue was close to the median increase in production costs, with eight inputs growing faster than revenues, and seven growing more slowly.
[12] This rate appears to be 2.8 per cent: see CAB-8.
[13] See both retransmission decisions, 1989-1, p 21 (*p. 18 in this volume*), and 1991-10, p 22 (*p. 151 in this volume*).
[14] See *infra*, at pp. 17-18 (*p. 147 in this volume*).

CAB finally argued that the Board should take into account the financial and non-financial contributions made by the Canadian radio industry to artists. Stations are required to play music qualifying as Canadian content for 30 per cent of their broadcast day. Other conditions favourable to Canadian artists are set out in various licence conditions. Contributions include cash payments to organizations such as the Foundation to Assist Canadian Talent on Records (FACTOR) and its francophone equivalent, MUSICACTION. Further cash contributions (talent searches, music competitions, etc.) bring the total to ten million dollars. Finally, CAB valued contributions in kind (free air time for concert promotion and new talent launching, lending of facilities for music recording) at some fourteen million dollars.

The manner in which the radio and music industries provide mutual support has been outlined by CAB in previous proceedings before the Copyright Appeal Board. Again, such symbiosis is not unusual between market sectors. This does not mean that these contributions should be discounted, especially since a large part of these contributions benefit performers rather than composers.[15] Any contributions are already factored into the financial picture of the industry; no further account ought to be taken of them.

C. CHANGING THE PERIOD USED TO DETERMINE A STATION'S STATUS AS A LOW USER

The parties also agree to determine the low-user status monthly. This is the same period as that used to establish the royalties. The Board agrees.

D. THE BURDEN OF ESTABLISHING LOW-USER STATUS

SOCAN's request that the station claiming to be a low-user of music bear the burden of establishing its status is not a new one. It was discussed during the 1992 hearing. Objectors disagree with any wording that would create a reverse onus on a station; they add that in view of SOCAN's right of audit, it is unlikely that a station would misrepresent its true use of music to SOCAN.

This issue requires the Board to carefully balance the rights and obligations of SOCAN and of radio stations, to minimize the burden imposed on each of them. SOCAN should feel confident that the low-user rate is not being abused, but the reporting requirements should not be such that those entitled to it hesitate to pay that rate.

Fortunately, current industry practices may provide an answer to this dilemma. CRTC regulations already require that radio stations keep tapes of their last twenty-eight broadcast days. These tapes are an exact picture of a station's daily use of music, and could serve to determine whether a station is entitled to pay the low user rate. However, the period during which they are kept is too short, given that the reference period used in setting the tariff goes back at least sixty days; SOCAN cannot be expected to audit a low-use claim before it is made. Inquiries made with the parties confirmed that keeping these tapes for a period of ninety days

[15] Transcript, pp. 418-419.

would not impose an undue burden on those paying the lower rate. The only incremental costs associated with this measure would relate to tape purchase and storage costs. This approach seems to offer a good compromise between the parties' positions.

E. PRODUCTION MUSIC

The status of production music was debated before the Board during the 1991 and 1992 tariff hearings. Objectors to the 1991 tariff claimed that the performing rights to such music were "cleared" at the source, while SOCAN maintained that this could not occur since all rights were being assigned to it. The evidence regarding the source of production music was fragmentary and confusing, and none demonstrated that production music was less important than feature music to a radio station.

During these hearings, CAB claimed that excluding this material would make the tariff both clearer and easier to administer. It also appeared that SOCAN's internal distribution rules give little weight to this material. Testifying for SOCAN, Mr. Victor Perkins conceded that for the sake of administrative simplicity, no account is taken of a "play" that is shorter than one minute: this covers almost all production music, and almost only that.[16] In its reply argument, SOCAN underlined that it is notoriously difficult to monitor this music.[17]

The Board espouses the principle that authors are entitled to compensation for any use of their music. In 1991, however, the difficulties of monitoring production music were not explained to the Board, despite general dis-cussions about monitoring, pools and the problems they entailed. It is now clear that SOCAN's own distribution rules consider it impractical to attempt to account for that music. Under the circumstances, it is eminently practical to grant the objector's request.

V. CONCLUSION

On the whole, the Board finds nothing in the evidence to warrant an adjustment in the rates paid by users of music on radio to the creators of that music. Therefore, the rates payable by commercial radio stations for their use of music shall remain the same. However, the tariff will be modified in two respects. First, it will require that in order to be able to claim a licence at the lower rate, a radio station keep and make available to SOCAN complete recordings of its last ninety broadcast days. Second, it will state expressly that no account is to be taken of production music in determining whether a station qualifies for the low-use tariff.

TARIFF 2.A.1 (COMMERCIAL TELEVISION)

VI. INTRODUCTION

It was in 1951 that the Copyright Appeal Board first set the royalties that commercial television stations pay to licensing bodies for the music they broadcast. From 1951 to 1955, the parties agreed that each station pay a fixed amount. In 1956 and 1957, agreements were reached but no

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[16] Transcript, pp. 1166-1168.
[17] SOCAN's Reply, p. 6.

tariff was filed. In 1958, an agreement set a global amount to be shared amongst all stations. Following hearings, the parties asked that the 1959 tariff be set at 2.1 per cent of a station's revenues. Other agreements were arrived at between 1960 and 1977; the rate was maintained at 2.1 per cent at first, and rose incrementally from 2.2 per cent in 1963 to 2.4 per cent in 1974. In 1978, notwithstanding that for the first time, CAB objected to the tariff proposal, the rate was maintained at 2.4 per cent; the same occurred in 1979. An agreement that left the rate at that level from 1980 to 1984 was approved by the Board. CAB has opposed the proposed tariff every year since then. In 1985, the Board kept the 2.4 per cent rate, but capped the royalties at the amount paid out in 1984. The rate was brought down to 2.1 per cent in 1986, and stayed at that level from 1987 to 1989.[18]

As the industry has grown, so have the royalty payments, by almost a hundredfold, from $0.21 million in 1958 to more than $20 million in 1989.

These reasons cover the years from 1990 to 1993. It is the first time that the Copyright Board has examined Tariff 2.A.1 and set a royalty for music used by commercial television stations. The Board did not do this earlier because of legal proceedings launched against the proposed Tariff 2.A.2, for commercial television networks. An application for leave to appeal the decision of the Federal Court of Appeal on the issue is still pending before the Supreme Court of Canada. The parties nevertheless asked the Board to dispose of Tariff 2.A.1.

CAB filed objections to all the relevant tariffs. Television station operators who had also filed objections stated that they would rely on CAB's evidence. The hearing took twelve days between January 12 and February 4, 1993.

The tariff proposed by SOCAN is identical to the one certified for 1989.[19]

For its part CAB suggests that the royalties paid by American stations to American licensing bodies be used as a starting point for computing the appropriate rate. The ratio of their payments to their revenues would be used as the appropriate rate for Canadian stations to pay from their revenues. This total, which is less than half the royalty currently paid, would be adjusted to account for inflation. The share paid by each station would be the same as the share of all television royalties it paid in 1990 in accordance with Tariff 2.A.1.

CAB also asks that a mechanism be devised to allow stations to reduce their royalty obligations if they air programs that do not use music whose rights are administered by SOCAN, or whose rights have otherwise been cleared.

CAB does not contest that music plays a role in television programming, but its counsel did try to demonstrate that this role is less important than that of other inputs, and that its importance had declined since 1958.

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[18] This information is contained in Exhibit SOCAN-26.

[19] At the beginning of these hearings, SOCAN requested that the base used in calculating the royalties payable by network affiliate stations be widened. The Board declined to do so: see transcript, pp 8 to 27, 245 and 246.

VII. PRELIMINARY ISSUES

Two issues were raised that ought to be dealt with at the outset. The first concerns the determination of each party's burden of proof. The second relates to the mandate of the Board. For the sake of convenience, CAB's motion requesting that the hearings be reopened in order to reassess the extent of a broadcaster's liability is disposed of at the end of the reasons for this tariff.

A. THE BURDEN OF PROOF

SOCAN and CAB each argued that the other should bear the burden of establishing the reasonableness of its own proposal as well as the unreasonableness of the other's. The confusion created by the parties on this point makes some comment on the issue necessary.

SOCAN maintains that the principles underlying the *Act* require the objector to demonstrate the unreasonableness of the proposed tariff. SOCAN states that it is entitled to have a tariff approved and that, furthermore, while the user must file an objection, nothing requires SOCAN to file an accompanying justification. It finds further support for its position in the fact that, in this case, the tariff has developed progressively under the tutelage of the Copyright Appeal Board.

On the other hand, CAB argues that SOCAN should establish the reasonableness of the proposed tariff, since the Board's role is, first and foremost, "to prevent performing rights societies ... from upsetting the balance of market power which ought to exist between copyright owners and users."[20] It also notes that the Board itself requires SOCAN to present its evidence first, and claims that this gives credence to its view that SOCAN has the burden of proof.

Both positions rely too heavily on the ordinary rules of evidence. The Board does not adjudicate disputes between private parties; it is not bound by the rules establishing the burden of proof in civil matters. These principles are at most an element that the Board, being master of its own procedure, takes into account in establishing its own rules.

The Board's constituent statute is of some, if only a little, help in the matter. The *Act* does not set out who should establish whether or not a proposed tariff is reasonable; it merely sets out a process leading to the certification of a tariff. In doing so, however, it provides several indications to the effect that each participant must take a stance before the Board. Thus, while SOCAN is entitled to some tariff, it cannot expect the Board to rubber-stamp tariffs against which no objections are filed; the Board can ask SOCAN, on its own motion, to provide the underlying rationale for a proposed tariff structure; it did so in 1991, when CAPAC and PROCAN merged. At the same time, it would not be practical to ask SOCAN to reinvent the wheel every time a proposed tariff is examined. Long-standing tariffs that have been repeatedly scrutinized can acquire a certain weight.

Therefore, where a tariff proposal is opposed the Board expects each participant to put forward

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[20] Public performance, file 1990-4, decision of July 31, 1991 [hereafter "Public Performance, 1991"], p. 16 (*p. 297 in this volume*).

its reasons for proposing or for objecting to the tariff. This is precisely what SOCAN and CAB did during these proceedings. It then falls to the Board to assess the record on its merits, taking into account the evidence filed, the arguments raised by the participants and the relevant policy considerations.

B. THE BOARD'S MANDATE

In its written argument, CAB also states that the Board's mandate is to set a rate and structure that is "a fair and reasonable approximation of the market price which would have been set had there been a freely functioning market in performing rights."[21]

The Board disagrees with this conclusion. Its mandate is to set tariffs on a "reasonable and suitable" or "rational" basis.[22] The Board regulates the balance of market power between copyright owners and users; this does not mean that the royalties must be set by recourse to a freely negotiated price in a non-competitive or even a competitive market. The Federal Court has already enunciated the principle that a "market price" is only one of several possible rational bases for setting a tariff.[23] In any event, it is very difficult to imagine a "freely functioning market" for music performance rights in Canada.

VIII. ANALYSIS

A. THE CURRENT TARIFF FORMULA

CAB puts forward several reasons for the Board to set aside the current tariff formula. The Board is unpersuaded by these.

CAB relies first on a study prepared by Coopers & Lybrand; it concludes that there is no correlation between the amount of music used in a television program and the advertising revenues it generates. On this, everyone appears to agree. CAB then argues that the current tariff formula is predicated on such a correlation. The Board does not share this view. The study focuses on individual programs, while the tariff formula is linked to a station's total programming, and the evidence confirms that music use patterns are similar for all stations.

CAB then argues that music is the only input into the production of television programs whose price is linked to revenues. Yet, the evidence is to the contrary; in more than one case, revenue is one of the factors taken into account.[24]

Finally, CAB refers to the most recent decision of the U.S. Rate Court as evidence in favour of rejecting the current tariff formula.[25] The Board gives little weight to this decision for two

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[21] Argument, par. 47.
[22] *PROCAN* v. *Canadian Broadcasting Corporation*, *supra*., at 449 (Heald J.) and 452 (Mahoney J.).
[23] *CAPAC* v. *Canadian Broadcasting Corporation*, *supra*, at 450 (Mahoney, J.).
[24] See, for example, the testimony of Mr. Morley, transcript pp. 336 *et seq.*, relating to compensation formulae set in terms of "points." See also the testimony of Mr. Crawley, transcript p. 2208.
[25] CAB argument, paragraphs 84-86.

reasons.

First, the decision rests on the proposition that the American tariff approximates a "free market" price. It then rejects the tariff formula currently in use in Canada, stating that a flat rate is more appropriate than a tariff set as a percentage of revenues.

As noted earlier, it is not necessary that the Canadian tariff approximate a "free-market" price. Even if it were, the Board would not agree with the conclusion of the U.S. Rate Court that a flat rate is more appropriate.

Second, there are important differences between the Canadian and American regimes for setting prices to be paid for the public performance of music that reduce considerably the relevance of American decisions for Canadians.

i. The American regime rests on a consent decree between the licensing bodies and the Department of Justice. The decree was the result of an examination undertaken by the Department, under the aegis of American antitrust legislation. By contrast, the Canadian regime was established by Parliament, and is an integral part of the legislation governing copyright.
ii. In the United States, the agreement between a licensing body and a user is binding; the Rate Court adjudicates only upon request, absent an agreement. In Canada, agreements have no legal status, as was made clear in the 1991 commercial radio decision.[26] The *Act* requires that the Board certify all proposed tariffs, and empowers it to raise issues of its own even in the absence of any objection.
iii. The Rate Court has interpreted the word "reasonable" in terms of a market price. In Canada, both the Board and courts of law have stated that a market price is not the only price that may be reasonable.

The Board prefers to rely on the arguments put forward by SOCAN to support the current tariff formula. These are that it is simple, easy to administer and understand, does not require continual reassessment, and automatically accounts for changes in audience, prices, revenues and the number of users. In his testimony for CAB, Mr. Estey agreed that the formula is not irrational and is "self-administering."[27]

B. THE LEVEL OF ROYALTIES

CAB also argues that in any event, the royalties paid by Canadian television stations are too high. It notes that, since 1959, the share of station revenues paid out in public performance royalties has decreased considerably in the United States, while it has remained the same in Canada. It maintains that in 1958, when the current tariff was developed, the parties and the Copyright Appeal Board intended that there be a consonance between American and Canadian rates. If that was ever the case, this Board does not intend to rely on such a correlation.

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[26] *Public Performance, 1991*, p. 20 (*p. 300 in this volume*).
[27] Transcript, pp. 923-924.

Canadian and American markets appear to have different price structures. For example, Professors Benston and Liebowitz agreed that there is probably a link between composition fees[28] and performance rights[29]: in the long run, if the latter decline (increase), the former probably increase (decline). Therefore, although no evidence was submitted on this, it is reasonable to conclude that the lower level of performing rights in the United States has already resulted in American composition fees being relatively higher than they are in Canada.

CAB did establish that important changes have occurred in the industry since 1959, when the television tariff was set at 2.1 per cent of a station's revenues. Television has developed from radio with pictures into a distinct medium. Taped programs have replaced live broadcasts. The use of existing musical works has declined, while the use of works composed for specific productions has increased. Variety shows no longer play a starring role in programming. However, CAB's own witnesses admitted that these changes occurred long before 1986, when the Copyright Appeal Board set the rate at its present level. The analyses carried out by Messrs. Perkins (for SOCAN) and Potts (for CAB) agree on one point: music use patterns have remained essentially unchanged since 1985.[30]

The Board feels that comparisons, if any, should be made between the current situation and that in 1986, not in 1959. The Board has read with care the decision of the Copyright Appeal Board in which it set the tariff formula for the year 1986. After considering the record of the current proceedings, it adopts the reasoning and conclusions of the Appeal Board. For one thing, the evidence filed during the current proceedings merely confirms the state of affairs that existed at the time of the 1986 hearings. Any changes that might have occurred since then are either not relevant to the issue, or not significant enough to justify a reduction in the rate. In the Board's view, nothing in the evolution of the industry since 1986 justifies a change in approach.[31]

The industry's financial situation, which has deteriorated since the seventies, has not changed enough since 1986 to warrant a change in the tariff.[32] Furthermore, the Board is not persuaded that this deterioration has anything to do with the level of music tariffs. For example, according to the testimony of Professor Liebowitz, the relative burden of performing rights costs, when compared to other production costs, dropped by 50 per cent between 1972 and 1990.[33]

CAB also underlined that composition fees are negotiated while performing rights are regulated. Since one accepts that there is a link between those rights, it might appear preferable to reduce the performing rights so as to allow the market to play a larger part in establishing the total

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[28] What the parties called "front-end payments."
[29] What the parties called the "back-end payments."
[30] Transcript, p. 1934.
[31] In this respect, an important distinction can be drawn with the matter at issue in *PROCAN* v. *Canadian Broadcasting Corporation* (1986), 7 CPR (3d) 433 (FCA). In that case, Heald J. stated at p. 449 that absent an independent reasonable and suitable basis for a tariff formula, the fact that it had been in place for a long time was not relevant. In the present case, the tariff formula reasonably reflects the price that ought to be set for the relevant use, irrespective of the length of time during which the tariff had been in place.
[32] See, for example, the testimony of Messrs. McCabe, Scarth and Scapilatti (for CAB) and of Mr. Kirk (for SOCAN), as well as Exhibit CAB-4.
[33] Transcript, p. 398.

compensation of rights owners.

The Board considers that it would be ill-advised to tamper with the balance that currently exists. It believes with Professor Liebowitz that such a change would create distortions during a transition period that could be very long, with no guarantee of tangible longer term benefits. It finds that the balance of power would be too unfavourable to the rights owners in the Canadian market. Furthermore, such a measure could unduly reduce the importance of the collective management of performing rights, and approach to rights management which is certainly legitimized, and probably encouraged, in the *Act*.

C. OTHER CONSIDERATIONS

Several other arguments were raised which the Board did not consider germane to the issues.

The Board does not intend to take account of the fact that the lion's share of royalties paid by television stations are distributed to American authors. This situation exists because of the programming shown by those stations, not because of the tariff set by the Board. Any attempt at modifying the tariff structure so as to favour Canadian authors would go against the "national treatment" rule. It is true that this rule is not to be found as such in the *Act*, except for retransmission rights.[34] The Board is nevertheless of the opinion that such an interpretation better reflects the provisions of the Berne Convention.

In the same vein, although SOCAN's distribution rules may suggest the value that SOCAN places on various types of music, they are not relevant, in and of themselves, in these proceedings. The internal management of the Society is a matter for it and its members.

SOCAN's status as a monopoly was raised, but the Board does not find this categorization particularly useful. SOCAN's ability to exert what is called "monopoly power" is circumscribed by the existence of the Board, which the *Act* sets up to oversee the prices that SOCAN may charge users for the public performance of music.[35]

D. CAB'S PROPOSED TARIFF FORMULA

The conclusion that the current formula remains reasonable does not end the matter. The Board must also be convinced that it is better than the approach put forward by CAB.

CAB proposed a tariff that includes a flat fee for each station based on a global amount, with an additional "per program" licence fee available in lieu of or in addition to the traditional blanket licence.

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[34] See s. 70.63(2).

[35] This may well be the reason for which the Director of Investigation and Research decided not to oppose the merger of CAPAC and PROCAN.

i. Using a Global Amount

As stated earlier, the Board rejects the flat fee approach. A fixed amount, applied either to each user or to the industry as a whole, has no advantage over the current formula. The amount would have to be continually reassessed. Furthermore, to set a fixed sum, which would then have to be allocated amongst all users, as CAB proposes, would raise great difficulties. It could result in disputes between users as to their shares of the liability. The format was used in 1958 and caused the inconveniences outlined by Mr. Estey in his testimony for CAB. Even in 1958, with fewer users than there are today, the association had difficulties assigning liabilities for an ever-increasing sum among competing television stations.[36]

ii. Granting a Discount for Programs that Do Not Contain Music Controlled by SOCAN

CAB proposes a regime where a station can reduce the royalties it pays to SOCAN by clearing the music on at least some of its programs at source. At first glance, this is an attractive proposal. It would seem to lead to at least a modicum of competition. Nevertheless, the Board rejects it. The Board decided earlier against reducing performing rights fees in favour of composition fees; the same arguments are relevant here. The Board also sees practical difficulties with CAB's proposal, as well as some problems with public policy.

It is not clear that CAB's formula, if implemented, would foster the clearance at source of performing rights. This has not yet been achieved in the United States, where the regime has been in place for some time. Messrs. Rich and Zwaska, testifying for CAB, said that the savings achieved to date spring first and foremost from the possibility of avoiding the licence fees of one or other of the three American collecting bodies.[37]

The Board did set a reduced tariff for commercial radio stations using little or no protected music. The reason for this is simple: radio stations exhibit considerable variability in their use of music. The record of these proceedings establishes that television stations use music more or less in the same way and in the same amounts.

The specific proposal put forward by CAB also presents peculiar difficulties. The evidence put forward on the operation of the formula was limited. The reasons given for not using the same topping up mechanisms as those used in the United States were also unconvincing.

Finally, the proposed formula rests on unsupported assumptions. CAB does not explain why stations availing themselves of the per program licence should take their discount from 100 per cent, rather than some higher figure. The per program licence is meant to be a supplement to the blanket licence, not a substitute for it. Discounting the blanket licence from 100 per cent makes the per program licence at least as attractive as the blanket licence for all users: the user necessarily gains, and the creator necessarily loses. Furthermore, it imposes on SOCAN an

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[36] Transcript, pp. 922-923.
[37] Transcript, pp. 1305-1306.

additional monitoring burden which the users have no incentive to mitigate.[38]

In the final analysis, the Board rejects this approach mainly for reasons of public policy. This approach undermines the character of the blanket licence. It could conceivably create an advantage for American composers, or for those who belong to American societies. Given the structure, size and other characteristics of the Canadian market for performing rights, clearance at source probably would not develop in Canada. Only in the United States are collecting bodies prohibited from obtaining exclusive assignments of rights. Thus, only members of these societies are truly able to enter into agreements to license their own music to Canadian television stations.[39] In the Board's opinion, such a result is not called for.

The Board realizes that keeping the present formula effectively prevents the development of a regime for clearing rights at their source. It nevertheless prefers the current approach.

IX. CAB'S MOTION TO REOPEN

MAJORITY OPINION

On July 5, 1993, CAB asked that the Board reopen the television tariff hearings. It wished to argue that in setting the price for a television broadcaster's music performance licence, the Board should not take account of those viewers who receive their local broadcast signals through a retransmitter; it even maintained that the Board was compelled in law not to do so. In an order dated July 22, 1993, the Board asked CAB to file a memorandum setting out in detail all of the arguments in support of its position. The order also stated that if the Board, upon considering CAB's memorandum, and taking as true any factual allegations contained in it, found that the outcome of these proceedings would not be affected, the Board would issue its final decision and SOCAN would not be asked to participate further in the proceedings.

The Board does not share the conclusions contained in CAB's memorandum. In the Board's view, the arguments put forward by CAB have no bearing on what constitutes a fair price to be paid by broadcasters for the public performance of music they effect when they broadcast a television signal in a local market. The Board finds support for its position in the very decisions that CAB quoted in its argument, as well as in the Parliamentary intent clearly reflected in certain provisions of the *Act*.

CAB agrees that television broadcasters effect a performance of music.[40] It also admits to the public character of that performance.[41]

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[38] In the case of the low-use tariff for radio, users accepted a monitoring formula which, in the opinion of the Board, makes the extra monitoring burden much more bearable.

[39] Theoretically, a composer could choose not to be a member of SOCAN. But this is not realistic.

[40] This is necessarily implied in *CAPAC* v. *CTV*, [1968] SCR 676, [CAPAC] at 683, where Pigeon J. speaks of "use of the copyright by performing the works through television broadcasts."

[41] A broadcaster's transmission is public by nature: see the statement of Federal Court of Appeal in *CTV Television Network* v. *Canada (Copyright Board)* (1993), 46 CPR (3d) 343 (FCA) [CTV], at 358c-d, with regard to CTV affiliates. By contrast, the transmission by CTV to its affiliates is a private transmission: *CTV*, at 357a-358d. So is

The Federal Court of Appeal stated recently that "*the transmission* of non-broadcast services by [cable operators] ... is *a* performance in public."[42] This statement, which the Board finds equally applicable to the transmission of a broadcast signal by a television station, highlights two further characteristics of a broadcaster's performance.

First, it establishes that the performance occurs at the time of the transmission. As a result, the existence of the performance is not even dependent on anyone viewing the program: "...the fact that the subscriber has to turn on the television set in no way alters the nature of the transmission."[43]

Second, it confirms that what is effected by a broadcaster is a single performance. This remains so whether or not the transmission of a local broadcast signal by a cable operator constitutes a public performance. Any performance that may be effected by the retransmitter is a separate one, in the same way that the performance effected by a television station in broadcasting a live performance is a performance separate and distinct from the one occurring in the concert hall or the theatre.[44] This does not affect to the existence of a public performance effected by the broadcaster.

Television broadcasters perform music in public and require a licence from SOCAN. The only remaining issue is the price for that licence.

The Board may set that price according to any reasonable criteria. At this stage, economic considerations become paramount. The nature of the audience and the possible use of the performance to effect further performances become two of several questions that may be taken into account in determining the price to be paid for the performance.[45]

In the case at hand, the Board is of the opinion that the economic value of music to the broadcaster is properly measured as a proportion of its income. There are at least two reasons for reaching this conclusion.

First, the Board considers that the number of viewers is more important than the technology used in reaching them. Courts have already stated that the *Act* ought to be applied in a "technology-neutral" fashion.[46] In a local market, the cable subscriber's choice of viewing a signal "off-air" or on cable has no direct effect on the broadcaster's revenues. Therefore, it is reasonable to account for all the potential audience in setting the financial burden to be borne by the broadcaster.

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the transmission by a non-broadcast service to a retransmitter.

[42] *Canadian Cable Television Association* v. *Canada (Copyright Board)* (1993), 46 CPR (3d) 359, (FCA) [CCTA] at 371c. [our emphasis]

[43] *CCTA*, at 371g.

[44] *CCTA*, at 371g. This also disposes of CAB's argument that viewers' choices dictate whether the broadcaster or the retransmitter performs the music contained in a broadcast signal. The very fact that a cable subscriber may be choosing which of two performances to view presupposes that both performances have taken place.

[45] According to the Supreme Court of Canada, the Board, in setting the appropriate royalties, may even take into account revenues derived from activities that are clearly not covered under the *Act*: see *CAPAC*, at 683.

[46] See *CAPAC*, at 682-3; *CCTA*, at 368h.

Second, taking into account all of a television broadcaster's revenues merely reflects practices in other rights markets,[47] as well as the broadcasters' own pricing policies, neither of which take account of whether the local market audience is reached directly or through the intermediary of a cable operator. The price paid for programming is a function of the total potential audience in the market. Advertising rate sheets and revenues also are a function of the total audience reached, whether viewing is on cable or off-air: broadcasters do not share their advertising revenues with local cable operators. This bolsters the Board's view that the value of SOCAN's repertoire to a broadcaster is not influenced by the share of that broadcaster's viewing captured through cable. Therefore, it finds it reasonable to set the price as a function of the total benefits the broadcaster derives from the use of that repertoire; it even considers that to do so avoids giving television stations a free ride.[48]

Furthermore, this approach is congruent with the retransmission regime set out in the *Act*, which constitutes "a comprehensive scheme covering the communication of works through the retransmission of signals first transmitted by over-the-air radio and television stations."[49] Statements that this regime does not "render cable's retransmission of music in local signals non-infringing," or that "retransmitters are not entitled to shelter behind" its provisions for the public performance that may be effected at the same time must be weighed against what appear to be the clear objectives of that comprehensive scheme and the unambiguous intention of Parliament.

The transmission of a local broadcast signal by a cable operator clearly constitutes a retransmission within the meaning of section 28.01 of the *Act*. The scheme allows cable operators, under certain conditions, to retransmit local signals, music and all, without charge. To do what CAB suggests would prevent that retransmission from occurring at the conditions set out in the scheme.

In the absence of a compensation scheme for the retransmission of local signals, CAB cannot argue either that there are double payments for the same audience.

The *CCTA* and *CTV* decisions do raise several difficulties in the interpretation of the *Act*. Both decisions are currently the subject of pending applications for leave to appeal to the Supreme Court of Canada. If leave is granted, the Court's decision may well require nuancing the Board's conclusions. Having said this, the parties had asked the Board to proceed with the examination of Tariff 2.A.1 even before the decision of the Federal Court of Appeal in *CTV* had been rendered. In the absence of any request from the parties to further delay the disposition of an issue that now goes back more than four years, the Board is of the opinion that the balance of inconveniences is in favour of releasing its decision without any further delay.

Given the approach followed by the Board in reaching its decision, it becomes unnecessary to

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[47] The Board may take into account market practices in setting the price for music performance licenses: *PROCAN* v. *Canadian Broadcasting Corporation* (1986), 7 CPR (3d) 433 (FCA), at 450 (per Mahoney J.).

[48] The Board's decisions on royalties payable by TVOntario, the CBC and Radio-Québec, to which CAB refers at page 13 of its argument, all set prices based on viewing, whether or not that viewing depended on cable.

[49] *Re Royalties for Retransmission Rights of Distant Radio and Television Signals* (1990), 32 CPR (3d) 97 (Copyright Board), at 139a.

dispose of the other issues raised by CAB in its memorandum.

X. ADDITIONAL REASONS DELIVERED BY MEMBER LATRAVERSE

I share my colleagues' point of view on Tariff 2.A.1, and the underlying rationale for their decision.

However, I cannot subscribe to some of the reasons they rely upon to dismiss the arguments put forward by CAB to reopen the matter.

I would reject its attempt to reopen the matter for the following reasons.

First, the request is made too late. Counsel for CAB filed the motion to reopen on July 5, 1993. The hearings had ended on February 4, 1993, and written replies to the parties' arguments had been on file with the Board since April 14, 1993.

In support of his request, counsel for CAB relies mainly on the reasons set out in two decisions for the Federal Court of Appeal, *CCTA* and *CTV*, both issued on January 5, 1993. Hearings before this Board took place between January 12, and February 4, 1993. The arguments set out in counsel's argument, as well as the evidence he referred to, could just as easily have been raised in the context of these hearings or in the period immediately following them. He chose not to do so. Since the tariff we are called upon to examine is annual, CAB remains quite able to raise these issues in the context of the examination of the 1994 tariff, if it finds advisable to do so.

Our role is to set short term tariffs, as in this case a yearly tariff; this tariff also must be set within a reasonable time. CAB did not discharge its burden of convincing the Board that it ought to postpone a decision on this tariff.

Secondly, subsection 28.01(2) of the *Act* provides that no payment is due for the retransmission of local signals, which does not constitute an infringement of copyright. The only comment offered by CAB on this is as follows:

> Given that section 28.01(2) of the *Act* excuses only the communication of musical works, and not the communication of performances of musical works, it does not apply to render cable's retransmission of music in local signals non-infringing.[50]

There is nothing else in CAB's memorandum to support its statement in this regard. This appears to me to be insufficient.

I do not subscribe to all the conclusions set out by my colleagues for the following reasons.

While there may be no doubt that the transmission of a television signal by a broadcaster constitutes a public performance, the decision of the Federal Court of Appeal in *CCTA* leads one to conclude that the transmission of a signal by a cable operator also constitutes a public

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[50] CAB Memorandum, p. 9.

performance.

My colleagues conclude that these constitute two separate performances. The first one, by the broadcasters, results in full liability for the payment of royalties, irrespective of the manner of reception. The second, by the cable operators, would result in no liability, thanks to the exemption provided for in subsection 28.01(2) of the *Act*.

My reading of the *CCTA* decision leads me to believe that these constitute a single performance, delivered to the audience through two different channels. As Létourneau J., notes:

> However, if one wants to lay with the subscriber the ultimate responsibility for the materialization of the public performance and therefore the infringement of the copyrights, there is no doubt that, upon a plain and constructive meaning of the word "authorization," the appellant authorizes such materialization by its customers.[51]

If this were the case, could one reasonably impose on the broadcaster 100 per cent of the cost of the liability owed to authors, because cable operators enjoy a statutory franchise?

I find no legal text or support to justify such a transfer of liability.

TARIFF 2.B (ONTARIO EDUCATIONAL COMMUNICATION AUTHORITY)

AND

TARIFF 2.C (*SOCIÉTÉ DE RADIO-TÉLÉVISION DU QUÉBEC*)

SOCAN filed its statement of proposed royalties for 1993 before the Board issued its decision on the TVOntario tariff for 1992. SOCAN's proposal would have set at $364,696.50 the price TVOntario pays for its use of music; Radio-Québec would have been required to pay $240,988.45. TVOntario and Radio-Québec filed oppositions to these tariffs. On February 18, 1993, the Board set at $272,800 TVOntario's royalty for 1992, while Radio-Québec's royalty was set at $234,080.

SOCAN later filed with the Board agreements between it, TVOntario and Radio-Québec. These agreements request that the Board set the same royalties in 1993 as in 1992.

These agreements reflect the formula used in 1992 to account for price fluctuations; the Board intends to use the same formula this year. Since the increase in the Consumer Price Index from June, 1991 to June, 1992 was less than two per cent, all the amounts used in the 1993 tariff will remain at their 1992 levels. Therefore, the Board certifies Tariffs 2.B and 2.C for 1993 so as to reflect the substance of the relevant agreements.

TARIFF 3 (CABARETS, CAFES, CLUBS, COCKTAIL BARS, DINING ROOMS, LOUNGES, RESTAURANTS, ROADHOUSES, TAVERNS AND SIMILAR

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[51] *CCTA*, at 371h.

ESTABLISHMENTS);

TARIFF 12 (ONTARIO PLACE CORPORATION, CANADA'S WONDERLAND AND OTHER SIMILAR OPERATIONS);

TARIFF 18 (RECORDED MUSIC FOR DANCING);

AND

TARIFF 20 (KARAOKE BARS AND SIMILAR PREMISES)

All these tariffs were the subject of agreements between SOCAN and the objectors for the years 1992 and 1993. Agreements were reached with the Canadian Restaurant and Foodservices Association on Tariffs 3, 18 and 20; with the Hotel Association of Canada on Tariffs 3 and 18; with Ontario Place Association and the Canadian Alliance of Music Presenters on Tariff 12.A; and with Canada's Wonderland on Tariff 12.B. The last two agreements are also intended to apply to the years 1994 and 1995.

The Board asked SOCAN a number of questions concerning differences between Tariff 12.A and 12.B. The explanations supplied by SOCAN were, on the whole, acceptable.

As a result, the Board certifies Tariffs 3, 12, 18 and 20 for 1993 so as to reflect the substance of the agreements.

TARIFF 5.A (EXHIBITIONS AND FAIRS); TARIFF 13.A (AIRCRAFT);

AND

TARIFF 16 (MUSIC SUPPLIERS)

These proposed tariffs were identical to those certified for 1992. They reflect agreements reached between the persons concerned. No objections were filed. The Board certifies Tariffs 5.A, 13.A and 16 1993 so as to reflect the substance of the agreements.

TARIFF 10 (PUBLIC PARKS, STREETS OR SQUARES)

SOCAN's statements of proposed royalties for 1992 and 1993 asked for increases in the amounts set in this tariff. SOCAN also asked that concerts in parks be subject to Tariff 4 rather than to a separate tariff. The Ontario Recreational Facilities Association (ORFA) filed an objection, which it withdrew on November 9, 1993.

The Board agrees with SOCAN that concerts that used to be covered by this tariff ought to be subject to the general concert tariff. Furthermore, given the price adjustment formula which the Board used in 1992 and is using for all amounts contained in the 1993 tariff, the figures in the certified Tariff 10 for 1992 will be 4.3 per cent higher than those for 1991, and the certified Tariff 10 for 1993 will be identical to that of 1992.

TARIFF 14 (PERFORMANCE OF AN INDIVIDUAL WORK)

SOCAN's statement of proposed royalties for 1993 contained a significant increase for this tariff. However, no objections were filed.

Following a series of inquiries and observations from the Board, SOCAN indicated, in a letter dated October 1, 1993, that it would be content with this tariff remaining the same in 1993 as in 1992. The Board certifies this tariff accordingly.

TARIFF 15.A (BACKGROUND MUSIC)

Given the price adjustment formula which the Board is using for all amounts contained in the 1993 tariff, the certified Tariff 15.A for 1993 will be identical to that of 1992.

TARIFF 15.B (MUSIC ON HOLD)

SOCAN's statements of proposed royalties for 1992 and 1993 asked for the addition of a tariff for the performance of recorded music over a telephone on hold. The royalty payable in 1992 would have been $91.85 for one trunk line plus $2 for each additional trunk line. In 1993, these amounts would have raised to $93.04 and $2.03. No objections were filed to this tariff for 1992 or for 1993.

The Board addressed several inquiries to SOCAN. It was particularly preoccupied with clarifying the notion of "trunk line" around which the tariff is structured. As a result of these exchanges, SOCAN included a definition of this expression in its statement of proposed royalties for 1994. The Board finds that definition satisfactory and makes use of it in this decision.

On November 3, 1993, SOCAN confirmed that it would be impractical to certify a tariff for 1992 at this late date. As for 1993, the Board sets the base rate at the same level as for the minimum royalty payable under Tariff 15.A, and at $2 the royalty payable for each addi-tional trunk line.

Claude Majeau
Secretary General