

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

Statement of Royalties to be collected for the performance in Canada of dramatico-musical or musical works in 1990

Reasons for Decision

Pursuant to section 67 of the *Copyright Act* (hereinafter, the “*Act*”), the Composers, Authors and Publishers Association of Canada, Limited and the Performing Rights Organization of Canada, Limited (hereinafter, “the societies”) filed with the Board statements of proposed royalties for the right to perform or communicate by telecommunication dramatico-musical or musical works in Canada.

The Board certified and published the undisputed tariff items in the *Canada Gazette*, Part I, dated January 13, 1990. The following reasons concern the remaining items, except items 2.A and 17. The fact that these are the subject of proceedings before the Federal Court prevents the Board from certifying them.

Pursuant to subsection 67.2(1) of the *Act*, the Board has considered and hereby certifies, with the alterations hereinafter mentioned, the societies’ statements of royalties for the following tariff items:

- A. Tariff items 6, concerning motion picture theatres; 10, concerning public parks, streets or squares; and 19, concerning fitness activities;
- B. Tariff item 2.C, concerning Radio-Québec;
- C. Tariff item 4, concerning live performances at theatres or other places of entertainment;
- D. Tariff item 5, concerning exhibitions and fairs;
- E. Tariff item 8, concerning receptions, conventions, assemblies and fashion shows;
- F. Tariff item 16, concerning background music services supplied to subscribers not

licensed under tariff No. 15.

The Board held hearings on 5, 6 and 7 June, 1990 concerning tariff item 2.C. The decision on other items was reached after considering the written submission of the parties.

The Board certifies these items in their final form for the reasons that follow.

I. TARIFF ITEMS 6, CONCERNING MOTION PICTURE THEATRES; 10, CONCERNING PUBLIC PARKS, STREETS OR SQUARES; AND 19, CONCERNING FITNESS ACTIVITIES

All objections to these tariff items were withdrawn. The Board has no objections of its own to raise; accordingly, it certifies the items, as filed.

II. TARIFF ITEM 2.C, CONCERNING RADIO-QUÉBEC

The former Copyright Appeal Board carefully examined tariff item 2.C, concerning Radio-Québec, in 1987. The royalties to be paid were set at \$225,000, with the societies sharing this amount in the ratio 25.7: 74.3.¹ The parties agreed to raise this amount by 7.5 per cent (to \$242,000) in 1988 and by 6.8 per cent (to \$258,500) in 1989. The tariff as filed would have raised that amount by 10 per cent, to \$284,350 in 1990; however, the societies reduced this to \$272,710, an increase of 5.5 per cent when compared to the amount in 1989.

Radio-Québec objected to the tariff. It agrees with the societies that the 1990 tariff should be based on the 1987 decision. It argues however that given the evidence on the level of use of music, which was not made available in 1987 and is now before the Board, and given the drop in ratings, correctly applying the criteria established in 1987 produces royalties of \$130,000.

The Board agrees that it would not be appropriate for this year to deviate from the criteria used in the 1987 decision. Furthermore, since the parties also agree that the mandate of Radio-Québec, the manner in which it is fulfilled and the type of programming broadcast have remained essentially the same, the Board will not repeat what was said in 1987.

Therefore, this decision focuses solely on the following issues:

- a. whether the tariff should be adjusted to reflect the general increase in prices and if so, how this ought to be done;
- b. whether the tariff ought to account for a drop in Radio-Québec's ratings and how it might do so;
- c. Radio-Québec's evidence which, it submits, sheds a new light on the use it makes of protected music.

The parties spent a substantial amount of time debating whether or not the level of various types of revenues received by Radio-Québec had changed significantly. However, the Board does not

¹ There is no need to reassess this ratio.

intend to delve into the matter, since in the end, neither party suggested that this factor ought to be used in determining the royalties to be paid by Radio-Québec.

A. INFLATION ADJUSTMENT

The societies ask that the royalties paid in 1989 be increased by 5.5 per cent to account for inflation; this, they submit, would keep the actual value of the tariff at the level set in 1987. The societies also maintain that adjustments made between 1987 and 1989 merely reflect inflation.

To make the adjustment, the societies suggest that use be made of the consumer price index (CPI), because "... it is the most convenient benchmark for us and certainly the most widely understood ...". [Mr. Rock, testifying for the societies, p. 63 of the transcript] When questioned on this issue by the Board, Mr. Rock could not provide any other justification for using the general CPI index rather than one of its sub-indexes. Neither could he explain why it would be more appropriate to use the CPI rather than, say, the industrial products prices (IPPI). Mr. Rock also admitted that the 5.5 per cent figure was chosen because it was the one agreed to by the societies on the one hand, and TVOntario and the CBC on the other, and that it was purely coincidental that this figure corresponded to the CPI increase for the year ending in January 1990.

Radio-Québec, for its part, submitted that there was no reason to use the CPI to determine the increase in the royalties. Its counsel submitted that, if the situation has remained the same since 1987, the 1987 figure ought to be used without taking into account the adjustments for the years 1988 and 1989. Alternatively, counsel requested that the Board make use of the "manufacturer's CPI" rather than the "consumer's CPI" (in other words, the IPPI instead of the CPI). Counsel for the societies did not address this argument in his rebuttal.

The Board considers that the amount of the royalties to be paid in 1990 ought to account for price increases that have occurred since 1987. In doing so, it applied the following principles.

First, the Board considers that in general, royalties ought not to be increased automatically merely to account for inflationary pressures experienced in Canada. Inflation may affect the value users attribute to the societies' repertoires, and as such, it must be taken into account in establishing the level of royalties. However, automatic increases result in the tariffs themselves fuelling inflation. In the present circumstances, the Board considers appropriate to make the adjustment. In the future, however, the societies will be expected to provide better arguments than a mere reference to a Statistics Canada report if they wish to secure tariff increases on that basis alone.

Second, in this case, the starting point for determining the increase in the royalties ought to be in 1987, not 1989. Having decided to base itself on the 1987 decision, the Board is bound to use the 1987 figures. The agreements reached in 1988 and 1989 (which provide for increases going far beyond the increase in the CPI for the relevant years)² cannot bind the Board if it comes to the

² Between January 1987 and January 1990, the CPI (1981 = 100) increased by 14.6 per cent, from 135.2 to 154.9. The societies' proposal would result in an increase of 21.2 per cent for the same period. Even if one were to use the

conclusion that it ought to establish the level of royalties by taking into account only such changes in circumstances as have occurred since 1987.

Third, the Board considers that in making this correction, it is more appropriate to use the IPPI. When it comes to television programming, music is not a consumer good in the true sense; rather, it constitutes one of the inputs in the production of the consumer good that is programming. The societies did not offer any convincing argument to justify the CPI as a means of effecting this adjustment.

Between January 1987 and January 1990, the IPPI (1981 = 100) increased by 8.6 per cent, from 120.4 to 130.8. Reflected on this tariff item, such an increase would raise the 1990 royalties to \$244,350.

B. VARIATIONS IN RATINGS

Radio-Québec requests an 11 per cent reduction in its royalties to reflect a decline in its market share, which dropped from 4.5 per cent in the fall of 1987 to 4.0 per cent in the fall of 1989.

Radio-Québec points out that while the number of signals carried has grown, overall viewing has remained relatively stable. Any viewing of the new signals is at the expense of established broadcasters. It also submits that the person watching a television program is necessarily prevented from viewing, or listening to, any other kind of programming. This justifies the use of ratings, which are the primary criteria used in determining the cost of advertising. The formula used to set the royalties paid by private broadcasters allows royalties to decrease if a greater number of broadcasters share in an advertising pie which remains more or less constant. By contrast, the tariff that applies to Radio-Québec is structured in a way that does not account automatically for audience fluctuations; this is why it requests the Board to make a specific readjustment.

The Board accepts Radio-Québec's argument. The 1987 decision took Radio-Québec's ratings into account before adjusting it to account for the unique character of this user. If the decision for 1990 is to rely on the criteria enunciated in the 1987 decision, it must reflect any variation in Radio-Québec's ratings.

The Board rejects the societies' objections for the following reasons.

First, the Board rejects the suggestion that an 11 per cent decline in ratings is not significant. This percentage may be of an already relatively low rating, when compared with other broadcasters; this, however, is immaterial for Radio-Québec itself.

Second, the societies submitted that a comparison between Radio-Québec's market shares for the fall of 1989 and the spring of 1990, as well as a comparison between the reaches for various periods as documented in Radio-Québec's annual report, establish that this fluctuation is at most

CPI to reflect changes in price levels since 1987, the royalties for 1990 would be established at \$257,850 (without even taking into account any further adjustments provided for in this decision).

a temporary phenomenon which Radio-Québec has now managed to reverse. It is necessary at the outset to set aside any comparison between ratings and reach. The former is a more precise measure of a broadcaster's market share; in this case, it ought to be preferred to the latter. Furthermore, a comparison of the ratings for another time of year may very well establish that this variation is transitory. However, the Board agrees with Mr. Daigneault, who testified for Radio-Québec, when he says that any valid analysis of ratings variations must use, year after year, the same reference season. The societies did not rebut that argument. While they produced the spring 1990 ratings, they did not offer any comparison between those and the spring 1987 ratings. The Board opts therefore to make use of the best evidence before it, which it may reassess when certifying the 1991 tariffs.

Third, the Board rejects as irrelevant the submission that Radio-Québec might have suffered less than other established broadcasters from the arrival of several new signals on the market. The adjustment made by the Board is not based on a comparison between Radio-Québec and another broadcaster, but on a comparison between Radio-Québec and the whole of television viewing which has remained, for all intents and purposes, the same.

Fourth, the societies submitted that Radio-Québec has increased its market share among target audiences such as children. This argument is based on the proposition that the value of the music varies with the audience reached; the societies did not put forward any argument or evidence to support this proposition.

Finally, the societies submitted that the royalties paid by Radio-Québec are in any case modest, given its market share, when compared to those paid by Télé-Métropole. The Board reiterates that this was taken into account in 1987; the societies did not give any reason which would justify weighting this differently in 1990.

The amount of \$244,350 established in paragraph a) should then be reduced by 11 per cent of \$225,000, to \$219,600.

C. RADIO-QUÉBEC'S RELATIVE USE OF PROTECTED MUSIC

The parties agree that Radio-Québec's use of protected music has remained constant since 1987. However, Radio-Québec maintains that the 1987 decision's assessment of its level of use of the societies' repertoires is incorrect, and that an adjustment to royalties is therefore warranted. It submits that it uses less music overall, and a greater proportion of that is unprotected. Radio-Québec argues that this is established by the testimony of Mr. Boisvert as well as by exhibits O-12, O-15 and O-16.

Exhibit O-12 compiles the music used by Radio-Québec for each month in 1988 and 1989; it was generated by using cue sheets available to Radio-Québec. This exhibit relies on two fundamentally flawed premises.

Exhibit O-12 does not account for music contained in movies or in purchased programming. It is articulated around the erroneous assumption that Radio-Québec's obligation to pay royalties for the performance of music pertains only to programming which Radio-Québec has produced or co-produced, whereas this obligation pertains to all music that it broadcasts.

Furthermore, the breakdown in the compilation is based on the Canadian membership of the societies. Mr. Boisvert admitted that protected music written by foreign composers whom the societies represent by virtue of reciprocal arrangements with foreign societies may very well be included in the "others" category (music which, he implied, was not part of the societies' repertoires).

For their part, the societies maintain that Radio-Québec has not established that it uses less protected music than other broadcasters; they suggest that the figures provided by Radio-Québec are unreliable. Evidence submitted by the societies established that between 7 and 13 October, 1989, Radio-Québec broadcasted more than fifteen hours of protected music. Exhibit O-12 documents the use of only six hours of music, protected and unprotected, for the whole of the month of October.

Exhibits O-15 and O-16 compare the relative importance of music for Télé-Métropole and Radio-Québec. Mr. Boisvert admitted that exhibit O-15 accounts for only the music in the part of a program that is produced by Radio-Québec, and does not take into account any music which might be contained in other parts of that program. For this reason, the Board agrees with counsel for the societies that exhibit O-15 shares the flawed premises of exhibit O-12.

The argument put forward by Radio-Québec is not unattractive, but the very nature of the evidence submitted in support of it does not allow the Board to proceed very far with it.

The value of the tariff item applicable to Radio-Québec for the year 1990 is calculated as follows:

| | |
|--|---------------|
| | \$ |
| 1987 Tariff / Tarif 1987 | 225,000 |
| | |
| PLUS | |
| Price increase adjustment: 8.6 per cent / Ajustement pour refléter la hausse des prix : 8,6 pour cent | <u>19,350</u> |
| | 244,350 |
| MINUS / MOINS | |
| Ratings adjustment: 11 per cent of \$225,000 / Réduction pour refléter la baisse d'écoute de 11 pour cent (de 225 000 \$) | <u>24,750</u> |
| | |
| TOTAL AMOUNT OF ROYALTIES / DROITS TOTAUX À PAYER | 219,600 |
| | |
| PROCAN share: 25.7 per cent / Part de la SDE : 25,7 pour cent | 56,440 |
| CAPAC share: 74.3 per cent / Part de la CAPAC : 74,3 pour cent | 163,160 |

The tariffs are amended accordingly.

III. TARIFF ITEM 4, CONCERNING LIVE PERFORMANCES AT THEATRES OR OTHER PLACES OF ENTERTAINMENT

The Board received objections to items 4.A and 4.B from Mr. Tim Huebert, and to item 4.A from the West Kootenay Regional Arts Council and the Kaslo Concert Society. The thrust of these

objections goes to the allegedly disproportionate burden imposed by the tariff structure on concerts where no entrance fees are collected, or where that amount is small. The societies replied that a minimum fee is required to ensure that the compensation received exceeds transaction costs.

The Board lowers the minimum fee per concert or event from \$33 per society (\$66 if the fee is paid to both societies) to \$10 for each society (or \$20 in total). The Board considers that the minimum is onerous for events where receipts are either low or non-existent. In order to incur more than a \$33 (\$66) minimum royalty, a popular music concert would have to generate more than \$3,300 in receipts, and a classical music concert, \$13,200. Lowering the minimum to \$10 (\$20) brings these figures down to \$1,000 and \$4,000, respectively.

Minimum fees offer an attractive way of dealing with transaction costs. However, the minimum amount payable by various types of users varies considerably. In tariff item 5.A.(a), the minimum fee is \$6 per day, with no minimum number of days; in tariff item 19, the minimum fee for an annual licence is \$60. In view of this, the Board cannot accept that the transaction costs argument, in itself, would make a minimum fee of \$10 unreasonably low.

The Board is concerned with minimum payments in general, and their size, variation and incidence in particular. It believes that such factors as the nature of the revenues derived from these minimum payments and their effect on compliance with the tariffs ought to be examined. The reduction of the minimum fee applicable to tariff item 4 is a temporary remedial measure.

Therefore, item 4 in both tariffs is amended by substituting “\$10” for “\$33” wherever it is found.

IV. TARIFF ITEM 5, CONCERNING EXHIBITIONS AND FAIRS

The Canadian Association of Exhibitions filed an objection to this tariff item, and sought a clarification of the concept of attendance. More specifically, it submitted that the status of staff and organizers was uncertain, and that persons admitted without charge should not be included in the attendance for the purposes of the tariff.

The societies for their part, maintained that all persons present at a fair ought to be counted when determining the royalties payable under this item. They also underlined that to exempt those fairs that do not charge an entrance fee would result in having to collect fees from exhibitors and participants at the fair who make use of the societies’ repertoires; this, in the societies’ submission, would render the collection of fees all the more difficult.

The Board wishes to clarify the tariff by excluding persons working on the exhibition grounds from those who are counted for the purposes of this item. The Board is not persuaded by the societies’ argument that since all persons are exposed to the musical performance, all those present on the grounds should be counted for the purposes of the tariff. Music is part of the visitors’ experience in coming to an exhibition. Staff and exhibitors are performing jobs, with or without music.

By the same token, music is part of a visitor’s experience whether or not that visitor pays an entrance fee. Furthermore, the Board believes that the number of visitors who enter the grounds

without charge can be estimated. These visitors will continue to be part of a fair's attendance for the purposes of the tariff.

Therefore, item 5 in both tariffs is amended by adding, after the word "attendance" in the first line of paragraphs A.a) and A.b), the following:

“(excluding exhibitors and staff).”

V. TARIFF ITEM 8, CONCERNING RECEPTIONS, CONVENTIONS, ASSEMBLIES AND FASHION SHOWS

The Board received an objection to this tariff item from Mr. Tim Huebert. In essence, he submitted that the nature of family celebrations, as well as the status of the performer should be taken into account in determining the royalties; he requested that “amateur and semi-professional” performers be allowed to pay a low royalty that would cover all the performances they might give in a year. The societies reiterated their rationale for minimum royalties. They also insisted that the importance of music to an event, and not the nature of the event or the status of the performer, ought to determine the rights to be paid.

Royalties ought to be paid for the use of music, whatever the status of the performer. The objector did not offer sufficient reason to justify setting different rates for “amateur or semi-professional” performers; he did not either explain how such a regime might be articulated. Furthermore, the Board does not possess sufficient information to allow it to set up a regime that would draw distinctions between the royalties to be paid according to the nature of the various events covered in item No. 8.

Any reservations the Board might have about this item concern the level of the rates, and are similar to those expressed earlier with regard to minimum rates. However, since the Board has received no evidence in this regard, it does not have sufficient reason to review those rates at this time.

Consequently, the Board certifies item 8 in both tariffs, as filed.

VI. TARIFF ITEM 16, CONCERNING BACKGROUND MUSIC SERVICES SUPPLIED TO SUBSCRIBERS NOT LICENSED UNDER TARIFF NO. 15

The Board received an objection to this tariff item from Executive Communications Ltd. It objected to the differences in rate structures between the two societies, and protested that a tariff that favours larger music suppliers is discriminatory since it allows them to undercut smaller entities by providing the same service at lower cost.

The societies replied that these objections were essentially irrelevant to the determination of the rate and that the whole of tariff item 16 ought to be viewed as a discount scheme (when compared to item 15) made possible by the savings the societies achieve by issuing a single licence for many users.

The objection raised by Executive Communications Ltd. is the same as that it raised in 1988. No

new evidence was led, or argument provided, to justify departing from the views expressed at that time by the Copyright Appeal Board, views which this Board shares.

Therefore, the Board certifies item 16 in both tariffs, as filed.

This concludes the examination of the societies' proposed statements of royalties for 1990, with the exception of tariff items 2.A (Commercial Television) and 17 (Transmitters of Non-Broadcast Services) which remain open because of the legal proceedings instituted in their respect.

A handwritten signature in black ink, appearing to read 'Philippe Rabot', written in a cursive style.

Philippe Rabot
Secretary General