Copyright Board Canada

Commission du droit d'auteur Canada

CANADA

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Regime Public Performance of Music
Copyright Act, Section 67.2

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Statement of Royalties to be collected for the performance or communication by telecommunication, in Canada, of musical or dramatico-musical works in 1994, 1995, 1996 and 1997

Reasons for decision

I. GENERAL INTRODUCTION

Pursuant to section 67 of the *Copyright Act* (the *Act*), the Society of Composers, Authors and Music Publishers 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 1996, in Canada, of musical or dramatico-musical works. Similar filings were made for the years 1994 and 1995.

The statement was published in the *Canada Gazette* on September 30, 1995. At the same time, the Board notified prospective users and their representatives of their right to file objections to the proposed tariff no later than October 28, 1995.[1] Statements filed for 1994 and 1995 had been published in a similar fashion.

The following gives reasons for:

Undisputed Tariffs: Tariffs 1.A (for 1995 to 1997), 3.A (for 1995 and 1996), 2.B, 2.C, 5.A, 7 to 10, 11.B, 12, 13, 15, 18, 20 and 21 (for 1996);

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[1] On October 14, 1995, an *erratum* relating to Tariff 9 (Sports Events) was published. Users had until November 11, next to object to this tariff.

Disputed Tariffs: Tariffs 3.B (for 1995), 4, 5.B and 14 (for 1995 and 1996) and 16 (for 1994 to 1996). Hearings were held before the Board on these tariffs.

Tariff 17.B proposed by SOCAN for 1995 and 1996 has been withdrawn for 1995.

The following tariffs will be disposed of later: Tariffs 1.B (for 1996), 2.A (for 1994 to 1996), 3.B, 11.A, 17.A, 17.B, 19 and 22 (for 1996), as well as a tariff for the CTV Television Network (for 1993 to 1998).

II. UNDISPUTED TARIFFS

Tariff 1.A (Commercial Radio) for 1995, 1996 and 1997

In its proposed Tariff 1.A which was published on September 24, 1994, SOCAN asked that the tariff be set for the years 1995 to 1997. No objection was filed to the proposed tariff. However, in a letter received on October 21, 1994, the Canadian Association of Broadcasters (CAB) expressed misgiving about the Board certifying a three-year tariff, given the rapid structural and technological changes being experienced by the radio industry, as well as expected changes to the *Act*. CAB also requested an opportunity to comment on the wording of the tariff. Under the circumstances, the Board decided to delay the certification of the tariff so as to allow CAB and SOCAN to come to an agreement on the wording of the tariff.

On January 31, 1996, CAB informed the Board that while it had not reached an agreement with SOCAN on the wording of the tariff, it would not object to the certification of the tariff as filed.

Radio Ville-Marie had objected to proposed Tariff 1 for the year 1996. On August 20, 1996, it withdrew its objection to Tariff 1.A but maintained it with respect to Tariff 1.B (Non-Commercial Radio).

Therefore, the Board certifies, for the years 1995 to 1997, Tariff 1.A as filed.

Tariff 2.B (TVOntario);

Tariff 2.C (*Radio-Québec*);

Tariff 5.A (Exhibitions and Fairs);

Tariff 7 (Skating Rinks);

Tariff 8 (Receptions, Conventions, Assemblies and Fashion Shows);

Tariff 10 (Parks, Streets and Other Public Areas);

Tariff 11.B (Comedy Shows and Magic Shows);

Tariff 12 (Theme Parks, Ontario Place Corporation and Similar Operations; Canada's Wonderland and Similar Operations);

Tariff 13 (Public Conveyances);

Tariff 20 (Karaoke Bars and Similar Premises); and

Tariff 21 (Recreational Facilities Operated by a Municipality, School, College or University).

These proposed tariffs for 1996 are identical to those certified for 1995 in all but two respects. The amount payable under Tariff 2.B (TVOntario) increases from $272,800 in 1995 to $300,080 in 1996, while Tariff 13.B (Passenger ships) now provides for a reduction in the royalties payable for each full month in which no operations occur.

No objections were filed to these tariffs, which are certified for 1996 so as to reflect the statements filed by SOCAN.

Tariff 9 (Sports Events); and

Tariff 18 (Recorded Music for Dancing)

These proposed tariffs for 1996 reflect agreements reached by SOCAN with various users or associations representing users under these tariffs. They are certified as filed.

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

No objections were filed to this tariff. The Canadian Restaurants and Foodservices Association had nevertheless raised a number of questions concerning the application of subsection 69(2) of the *Act*, which provides that no royalties are payable for public performances effected by using a radio receiving set. In practice, SOCAN does not collect royalties for public performances effected with a television set because the sound is provided through FM waves, which are radio waves.

While the Board notes this interpretation, it cannot reflect it in the tariff. The definition of "performance" contained in the *Act* distinguishes between radio and television receiving sets: the Board must account for that distinction. Therefore, the tariff is certified as filed in all but one respect. A mention will be added to Tariff 15.A (Background Music) to the effect that pursuant to subsection 69(2) of the *Act*, no royalties are collectable from the owner or user of a radio receiving set in respect of public performances effected by means of that radio receiving set in any place other than a theatre that is ordinarily and regularly used for entertainments to which an admission charge is made.

Tariff 15.B (Music on Hold) will not contain a similar mention since the act involved is a communication to the public by telecommunication and not a public performance, as contemplated by subsection 69(2).

III. DISPUTED TARIFFS

A. TARIFF 3.B (CABARETS, CAFES, CLUBS, ETC. - RECORDED MUSIC ACCOMPANYING LIVE ENTERTAINMENT)

i. Background

Until 1982, establishments playing recorded music as an integral part of a live entertainment paid royalties under the music societies' background music tariffs. In 1983, the Performing Rights Organization of Canada (PROCAN) started segregating that type of use; the royalties were set at two thirds of those payable for performances of music by performers in person.[2] In 1988, the Composers, Authors and Publishers Association of Canada (CAPAC) adopted a similar tariff structure. With the 1991 merger, the rates that SOCAN could collect were set overall at levels corresponding to the sum of the previous rates. The minimum royalty was set at $54, and the rate where yearly entertainment costs exceeded $100,000 became 1.42 per cent.

In 1992, SOCAN sought to increase Tariff 3.A (for performances of music by performers in person) to 3 per cent and Tariff 3.B (for recorded music played as an integral part of a live performance) to 2 per cent. The Hotel Association of Canada and the Canadian Restaurant and Foodservices Association, who had objected to the proposal, reached an agreement with SOCAN on November 16, 1992. The agreement provided that Tariff 3.A would be set at 2.5 per cent in 1992, increasing to 3 per cent in 1997, with a minimum royalty of $80, while Tariff 3.B would be set at 1.66 per cent in 1992, increasing to 2 per cent in 1997, with a minimum royalty of $60. On August 12, 1994, the Board certified for the years 1992 to 1994 a tariff that reflected the substance of the agreement.

SOCAN therefore asks that the rates be set at 2.8 and 1.87 per cent in 1995, and at 2.9 and 1.93 per cent in 1996. The Ontario Adult Entertainment Bar Association (the Association), Club Pro Adult Entertainment Inc. (Club Pro) and Mr. Joseph W. Irving (representing some owners and operators of adult entertainment parlours in Southern Ontario), objected to proposed Tariff 3.B for 1995. Mr. Irving withdrew his objection, while the Board asked Club Pro to withdraw from the file for not complying with the Board's procedural directives.

Given the obvious link between Tariffs 3.B and 3.A, the Board postponed certification of the latter until the former was disposed of.

Hearings on proposed Tariff 3.B were held on September 26, 27 and 28, 1995. Filing of arguments and evidence on this issue was concluded on February 27, 1996.

ii. Evidence and Arguments

The relevant evidence provided during these proceedings can be stated in very few words. Tariff

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[2] $27 if the yearly entertainment costs were no more than $5,000, going to $1,133 and 0.53 per cent of the excess if the entertainment costs were more than $160,000.

3.B applies mostly to establishments whose form of live entertainment is erotic dancing. Performers, both on stage and at tables, dance to music that has been selected either by the person who is performing on the stage or by a third party, usually a disc jockey.

There are three categories of dancers. Freelancers receive no money from the club operator; they are only paid by patrons for their performances at tables. Scheduled dancers receive a payment per shift[3] as well as payments from patrons for their performances at tables. Feature attractions are paid by the club;[4] some, but not all, do table dancing.

The participants agree that SOCAN has encountered serious problems in enforcing Tariff 3.B. Clubs have challenged the amounts being claimed, asking, among other things, discounts to account for the amount of music being played from gramophones.[5]

SOCAN argues that music is as important to table dancing as it is to dancing on the stage. It asks that payments from patrons for table dancing be taken into account in the tariff base because the club derives an economic benefit from that activity. It maintains that not doing so will encourage clubs to use only freelance dancers, in order to reduce the royalties they pay to the minimum of $60 a year.

The Association's arguments are outlined as follows. Firstly, discotheques and bars are the adult entertainment clubs' true competitors. Music has neither more, nor less importance for the former than for the latter. Therefore, Tariff 3.B should be abolished and adult entertainment clubs should pay under Tariff 15 or 18. Secondly, patrons' payments for table dancing should not be included in the rate base: these are private dealings from which the club derives no direct benefit. Thirdly, the resistance facing SOCAN in the collection of the tariff is evidence of the excessive nature of the tariff. Alternatively, if the tariff formula is retained, the Association asks that the rate be reduced to its 1991 level of 1.42 per cent.

iii. Analysis

Two issues raised by the Association are irrelevant to these proceedings. The first is the so-called gramophone exemption. Tariff 3.B has always set the royalties to be paid by those who did not benefit from that exemption. It never provided for a discount formula for those whose uses of music may have been partly exempt either because they did not use qualified phonograms all the time or because they charged an admission fee part of the time.[6] These considerations may have been relevant in the past. They ceased to be so on January 1, 1994, when Parliament removed the exemption. The Board's task is not to fine tune the tariff to reflect an exemption that has ceased to exist. It is to find the proper price to be paid by those users, considering their special circumstances, including the fact that as of January 1, 1994, all of the music performances they effect are protected performances for which SOCAN manages the rights.

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[3] In the Toronto area, that payment seems to be in the order of $60.
[4] Payments range from $1,000 to $5,000 a week.
[5] Until January 1, 1994, performances by means of a gramophone were exempt in certain circumstances, pursuant to subsection 69(2) of the *Act*.
[6] The fact that SOCAN made allowances for this in settling disputes with certain licensees is not relevant.

The second is the applicability of the ordinary rule of evidence to these proceedings. As the Board has stated several times, the ordinary rules relating to evidence and the burden of proof do not apply. SOCAN is entitled to a tariff. Users cannot expect the Board to abolish a tariff merely because, in their view, SOCAN has not "proven its case" on a balance of probabilities or, as stated by counsel to the Association, "on the basis of lack of evidence."

The prudent course in this case is to first determine how the tariff under examination compares with other similar tariffs.[7] An adult entertainment club's use of music is characterized by two things. Firstly, music is an integral part of the entertainment that the club's client is purchasing. Secondly, the club's client is not a part of that entertainment. Uses made under Tariffs 4, 11 and 12 share similar characteristics. Those made under Tariffs 15, 16, 18 or 20 do not. Music is not an integral part of what the licensee's client is purchasing in Tariffs 15 and 16, whereas the client takes part in the entertainment being supplied in Tariffs 18 and 20.

In all of Tariffs 3, 4, 11 and 12, the cost of the entertainment is an important consideration in the tariff base, if not the sole one. The rates being used vary between 1.2 and 2.9 per cent. It seems, therefore, that both the rate and the rate base of Tariff 3.B are not out of line with the general scheme of the SOCAN tariffs.

This having been said, Tariff 3.B could be improved. The application of the definition of compensation for entertainment to adult entertainment clubs clearly creates serious problems for SOCAN as well as for the users. Club owners appear to resent, more than other users, giving SOCAN access to confidential financial records for the purposes of audit. Finally, the presence of two sources of compensation for dancers creates problems. Clubs that spend a lot on entertainment should not be at a disadvantage compared to those that rely on freelancers. From SOCAN's perspective, the source of the dancers' remuneration should make no difference to the amounts it receives. The Board cannot see, given the record of these proceedings, how it could structure a definition of "entertainment expenses" that would be understood in the same way by users and SOCAN.

The record also reveals that the relations between SOCAN and the adult entertainment industry may well be more strained than with any other group of users. As a result, it becomes imperative to devise a tariff that increases the chances that club owners will comply with the tariff.

For these reasons, adult entertainment clubs should pay royalties according to a different tariff formula, with a rate base that will not be open to confusion, misinterpretation or avoidance. Establishments, other than adult entertainment clubs, that play recorded music as an integral part of live entertainment will continue to pay under the current Tariff 3.B.

That tariff formula should be based on data that is readily available, be readily understood and verified, be easy to administer, and not be easy to circumvent. It should not give an advantage to clubs who structure their purchase of entertainment differently than others. The amount of

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[7] The Board does not find the need to resort to comparable American tariffs in this case. The Canadian tariffs offer sufficient useful comparisons to settle this matter.

royalties generated should vary with the importance of the operation and with the number of days of operation. These objectives can be reached by setting a price per seat, per day. That rate can be derived using the information contained in Exhibits SOCAN-5B and 5C, about the entertainment expenses and seating capacity of eleven clubs in the Toronto area.[8]

In deriving the rate per seat, per day, the Board uses only the club's entertainment expenses. Payment made by patrons for table dancing are excluded for several reasons. In the past, SOCAN has not sought to receive royalties on these sums; instead, it has used the possibility of collecting on those payments as a "tool" for "negotiations". The selection of music is made by the stage dancer or a third party (usually a disc jockey). Table dancers have to adapt to whatever music is being supplied to them. The money that changes hands between a patron and a table dancer is the result of a transaction in which the club operator is not directly involved. A patron's table dance purchasing decisions are not influenced by the choice of music; by contrast, music is of greater importance to the entertainment that is being offered on the stage. Finally, the entertainment expenses of the clubs being used to set the tariff are sufficiently high to generate a reasonable tariff.

The sample used to derive the rate per seat, per day suffers from two limitations. Firstly, it contains only clubs located in or near Toronto; the entertainment expenses of those clubs may overstate those of operators in smaller localities.[9] Secondly, disc jockey expenses vary too much from one club to another to provide a reliable measure of music value. For these reasons, two adjustments are called for. Firstly, the entertainment expenses being used to derive the rate per seat, per day are net of disc jockey fees. Secondly, the percentage applied to the entertainment expenses to derive that rate should be reduced from the 1.87 per cent, which is being certified for Tariff 3.B, to 1.5 per cent.

The formula, then, for deriving the rate is:

$$\frac{\$286,920 \times 0.015}{282.18 \times 365}$$

where $286,920 is the average amount of entertainment expenses made in 1994 by the eleven clubs listed in Exhibit SOCAN-5C and 282.18 is the average number of seats allowed by these establishments' liquor licence [Exhibit SOCAN-5B]. This yields a tariff of 4.2¢ per day, per seat.

One final adjustment should be made. Where a club's opening hours for a "day" overlap to two days, the club should not be charged for two days. For that reason, the word "day" shall be defined as any period between 6:00 a.m. on one day and 6:00 a.m. the following day.

Tariffs 3.A (for 1995 and 1996) and 3.B (for 1995) are certified as filed. A new Tariff 3.C, which

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[8] The royalties payable by these clubs in 1994 represent close to 10 per cent of all royalties collected by SOCAN for that year under Tariff 3.B.

[9] In 1994, SOCAN collected an average of $1,564 from its 337 licensees under Tariff 3.B [see Exhibit SOCAN-2]. This represents average entertainment expenses of approximately $87,000. The average entertainment expenses of clubs being used to derive the rate is around $287,000.

reflects the reasons above, is also certified for 1995.

B. TARIFFS 4 AND 5.B (CONCERTS)

i. Introduction

a. History of the tariff since 1994[10]

The 1994 concert tariff hearings were the seventh in twelve years. The proceedings took a rather unusual turn. SOCAN had filed for rates of 5 per cent in 1992 and 1993, and 2.2 per cent in 1994. At the hearing, SOCAN stated that even though it viewed 5 per cent as a fair rate, it wished that the tariff reflect the terms of an agreement reached with the Canadian Alliance of Music Presenters (CAMP), an *ad hoc* coalition of performing rights users coming mainly from English Canada. SOCAN provided little or no evidence in support of its position.[11] The case for CAMP "consisted entirely of a critique of the positions taken by other parties."[12]

Meanwhile, the *Société professionnelle des auteurs et des compositeurs du Québec* (SPACQ), an association of active Francophone songwriters, most of whom are also members of SOCAN, was granted leave to intervene in the proceedings. SPACQ was "the only party to have put a positive case in favour of higher tariffs".[13] It asked that the rate be certified at 5 per cent as originally requested by SOCAN.

In its decision dated August 12, 1994, the Board concluded that, although incomplete and fraught with limitations,

> "... the record as it stands supports a significant increase in the rate. Five per cent would be more in line with other rates the Board has approved. Nothing suggests that this would constitute an unreasonably high rate. Furthermore, the only two producers to testify stated clearly that they would consider a rate of five per cent fairer and that it would not affect the number of concerts they produce.
>
> The Board unfortunately cannot go beyond the rate filed by SOCAN for 1994. ...
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> Two options are theoretically open to the Board. For 1994, it could set a rate of five per cent for members of CAMP and CAPACOA, and 2.2 per cent for the rest of the industry. It could also set a rate of five per cent for 1992 and 1993, and 2.2 per cent for 1994 for all concerned. These options are clearly unacceptable.

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[10] The history of this tariff before 1994 is set out in *Statement of Royalties to be Collected for the Performance or Communication by Telecommunication in Canada of Musical and Dramatico-Musical Works in 1992, 1993 and 1994* (1994), Copyright Board Reports, 1990-1994, 385, at 402-407. [Hereafter "*Public Performance, 1994*"].
[11] *Public Performance, 1994*, at 413.
[12] *Public Performance, 1994*, at 414.
[13] *Public Performance, 1994*, at 414.

> The rate will therefore be set at 2.2 per cent for the whole period. The Board hopes, however, that SOCAN will give due consideration to filing its proposed concert tariff for 1995 at a rate higher than that in the SOCAN/CAMP agreement. The Board is of the view that unless this course is followed, the interests of SOCAN's members will not be properly served."[14]

b. The participants' positions

It is against this backdrop that SOCAN filed its proposed statements for 1995 and 1996. In all important respects, these are identical. The rate would be 5 per cent for popular music concerts, 3.1 per cent for classical music concerts, and 1.9 per cent for classical music concerts included in a series. The rate base would remain gross receipts in the case of concerts for which admission is charged, and gross costs of production in the case of free concerts. Presenters of series would face more stringent reporting requirements and payment schedules.[15] All uses would be subject to a $20 minimum.[16]

For their part, classical music orchestras would pay according to the same formula as in 1994, which is a flat fee per concert that increases with the size of the orchestra's annual budget. Increases of between 4.5 and 11 per cent would apply in each year.

For 1995, objections were filed by the Canadian Arts Presenting Association (CAPACOA), Les productions Fogel-Sabourin (Fogel/Sabourin), as well as the Société nationale des Québécois et des Québécoises de la Capitale, the Comité de la Fête nationale de la Saint-Jean and the Festival d'été international de Québec who merged into the Regroupement des producteurs de concerts gratuits du Québec (Regroupement).[17]

Further objections to the 1996 proposal were filed by the National Capital Commission (NCC),[18] Live Entertainment (Livent), the *Société des fêtes et festivals du Québec* (who joined the Regroupement mentioned above), the *Festival franco-ontarien* (FFO) and the *Société Pro Musica* (Pro Musica).[19] On December 21, 1995, SPACQ was granted intervenor status.

All objectors asked that the rates in the certified tariff be no higher than those set out in the SOCAN/ CAMP agreement. Some offered suggestions on the choice of a rate base, while others commented on the reporting requirements.

Only popular concerts for which admission is charged were of interest to Fogel/Sabourin, a major producer of concerts from Montreal. It asked that the rate either remain at 2.2 per cent or be kept in line with the SOCAN/CAMP agreement. It also asked that the Board set in motion a process that would allow all industry participants to collectively hammer out a new tariff

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[14] *Public Performance, 1994*, at 417-418.
[15] Note in French text only.
[16] In the case of presenting organizations, the minimum would apply only in 1996.
[17] CAMP filed an objection, which it withdrew on August 22, 1995.
[18] The NCC had been granted intervenor status for 1995.
[19] Some thirty other objections were filed. On the whole, they supported the positions put forward by the participants during the hearings.

formula, better suited to the current economic environment in the concert industry.

CAPACOA represents concert presenting organizations located mostly in small communities and serving mainly English-speaking audiences. It asked that all rates be frozen at their current levels, that artists' fees be used as the tariff base for free concerts and that the reporting requirements for presenters remain as they were in 1994.

The *Regroupement* speaks for a number of venues where free or quasi free concerts are presented. It requested a separate tariff for festivals, applicable to concerts for which no specific admission charge is made, and for which the rate base would be the fees paid to singers, musicians, chorus-singers and orchestra leaders. The NCC supported this position, but asked for a reduced rate to take into account the multi-faceted nature of such events. For its part, the FFO, an organization which holds in Ottawa a yearly festival involving free concerts as well as many other events, went one step further and asked that artists' fees be the rate base for all concerts.

Livent produces musicals and operates several theatres and other concert venues. It asked that the rate for classical music concerts be lowered to reflect the lower commercial value of protected music in those events. Pro Musica, an organization devoted to the promotion of chamber music, proposed that the tariff be based on the actual duration of protected works performed at each concert.

c. The procedures

Hearings were first scheduled for November 28, 1995. On October 6, the Board addressed a number of questions to participants. Final responses were received on November 16. On November 14, a separate schedule was issued to allow the objectors to the 1996 proposed tariff to fully participate in the upcoming proceedings. Hearings were then rescheduled and were held from February 6 to 15, 1996. The filing of written arguments and replies was completed on May 1st, 1996.

ii. Popular Music Concerts

a. Analysis

The Board's decision of August 12, 1994 clearly encouraged SOCAN to rethink its approach to popular music concerts. In this respect, it appears to have succeeded only in part.

Two obvious courses of action were open to SOCAN as a result of that decision. It could ignore the SOCAN/CAMP agreement and file for higher rates. As SPACQ correctly points out, the agreement is of no force or effect as long as a certified tariff applies to the uses targeted in the agreement.[20] Members of CAMP would have no legal recourse to enforce its terms.

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[20] It is not necessary, for the purposes of these proceedings, to determine whether such an agreement is enforceable in the absence of a tariff.

Alternatively, SOCAN could ignore the Board's decision and file at the rates set out in the agreement. The Board would have been bound to publish the proposed statements as filed. Fairness would have made it practically impossible to set rates any higher, and the rates set out in the agreement would have become part of the certified tariffs.

Ostensibly, SOCAN opted for the first course of action by filing for a tariff at 5 per cent. In fact, however, SOCAN has forged ahead with a third course of action in an attempt to sit on the fence. It asks for a rate of 5 per cent, but will allow those whom it considers to be party to the SOCAN/CAMP agreement to pay 2.3 per cent in 1995 and 2.4 per cent in 1996.[21] Those who would be allowed to pay at the reduced rates are major players in the concert industry, having paid 64 per cent of all concert royalties in 1994.

To ignore the SOCAN/CAMP agreement under those circumstances is to ignore that SOCAN intends to practice two prices in the same market. This is not merely "an unusual situation",[22] but constitutes an unfair commercial practice. The Board will not allow SOCAN to practice price discrimination. The Board cannot force SOCAN to collect more than it wants to from CAMP members; it can, however, prevent SOCAN from collecting anything more than that amount from others.

SOCAN's request for a rate of 5 per cent is therefore rejected on that basis. The tariff will be certified at 2.3 per cent for 1995 and 2.4 per cent for 1996.[23] Absent significant changes in the situation or in the evidence made available to the Board, it is to be expected that the rate for 1997 will not exceed 2.5 per cent. Given SOCAN's attitude, this is the only way the Board can ensure that all purchasers of concert performing rights will be treated equally and will be allowed to compete on the same footing in the marketplace.

In light of this conclusion, it is not necessary to review in great detail the evidence for or against an increase of the rate to 5 per cent. However, the record of these proceedings is far richer than that of 1994. The evidence presented by the participants offered a much broader view of the reality of the Canadian concert industry of today.[24]

To merely leave the file at this would be less than constructive, especially since several participants are asking that a new tariff formula, better suited to the current concert market, be

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[21] SOCAN will not allow anyone else to "opt into" the agreement. Furthermore, SOCAN is of the view that a certain number of CAMP "members" have reneged on the agreement and should pay at the full rate.

[22] Mr. Rock, tr., at p. 1150.

[23] The Board cannot, as suggested by FFO, adopt a tariff for a longer period than that for which SOCAN has filed proposals.

[24] In 1994, all six witnesses who had a direct stake in the popular concert market (two authors, two concert producers and two singer-songwriters) were from the province of Québec and testified on behalf of SPACQ. This year, twelve witnesses had a direct stake in that market: one author, one singer-songwriter, five concert producers, one freelance events programmer, two band agents (one of whom is on the board of directors of the Canadian chapter of the International Managers Forum, an important band managers' association), one representative of RIDEAU, an association of presenting organizations of concert tours in Quebec and other Francophone markets, and a representative of the Ontario Council of Folk Festivals. These witnesses came from different parts of Canada, dealt with different aspects of the market and offered a variety of perspectives not made available to the Board to date.

developed. Several witnesses outlined a number of seemingly endemic problems with the current tariff structure, which could raise serious doubts as to its long-term appropriateness. Reviewing some of these apparent problems and reflecting upon them appears to be necessary.

b. Perceived problems with the current tariff

An increase in the rate of the tariff, as currently structured, could have negative effects on producers, performers and authors

An increase in the rate of the tariff without a change in structure could result in less concerts being produced, if the industry is in the precarious situation that was described to the Board. That would adversely affect the livelihood of producers, but also of many members of SOCAN. During the proceedings, it was argued that touring is the norm for developing acts and the cornerstone for getting a recording deal (and the attending sales and airplay), as well as providing more than 90 per cent of their income. If this is so, it is easy enough to imagine the impact a decrease in the number of concerts resulting from an increase in the rate would have on those artists. The gain for non performing songwriters would also be offset to some extent.

Even if an increase did not reduce the activity in the concert industry, its effects under the current tariff structure would be mixed at best. Revenues of non performing authors would increase; however, that increase would be insignificant for the large majority. Producers' revenues would decrease, and the situations for performers who co-produce their concerts would be either unchanged or would deteriorate.[25]

The current tariff may undervalue the contribution of some composers

SOCAN and SPACQ have long deplored the fact that authors and composers, who provide the "prime ingredient" for live concerts, get a disproportionately smaller share of concert revenues than performers.[26] Comparisons are made between the rate of the tariff on the one hand, and European rates and royalties paid for grand rights in Canada and elsewhere on the other.

Many of the objectors involved in the production or presentation of popular music concerts also appear willing to agree with SOCAN where authors who do not perform their own materials are concerned. They recognize the disparity in the amounts that flow to those who perform as opposed to those who compose. They also appear to recognize that in an environment where touring revenues are becoming more and more important, non performing songwriters will not reap sufficient benefits from that revenue flow unless their share is increased.

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[25] Apparently, successful groups sometimes receive as much as 90 per cent of net receipts. This means that 90 cents of every dollar in royalties paid to SOCAN is money that they either do not receive (if they perform someone else's material) or receive only in part and much later, if they are singer-songwriters.

[26] Artists fees appear to represent 73 per cent of gross receipts for 28 RIDEAU members surveyed in 1995, and somewhere between 40 and 50 per cent of gross receipts for commercial presenters such as Donald K. Donald, MCA, CPI and Fogel/Sabourin.

The current tariff may be structurally inadequate for singer-songwriters

Apparently, most concerts feature performers who use their own materials;[27] many of these performers find serious flaws with the current regime. They resist having to pay to use works which they see as their own. They also dislike several aspects of SOCAN's distribution rules: delays, perceived discrepancies between the royalties generated and the amounts distributed, equal treatment of opening acts and headliners, etc.

Of course, more sophisticated distribution rules could resolve many of these perceived difficulties. However, the Board cannot change SOCAN's distribution rules. This does not mean that the Board should ignore the problems altogether when looking for a tariff structure that will accommodate as many industry participants as possible.

Singer-songwriters supply two inputs in a concert: their performance and their works. The Board sets the remuneration for the use of one of those inputs: the works being performed. The Board may find it appropriate, under certain circumstances, to take into account the remuneration of the performance in setting the price for the use of the works, or even to let the singer-songwriter seek compensation for the use of the works directly from the same person who pays for the performance.[28] Put another way, the person who hires a singer-songwriter may well have a legitimate argument in favour of being allowed to purchase the performance and to rent the works in a single transaction. The fact that SOCAN owns the rights is not, of itself, an impediment to such considerations.

Exploring possible solutions

The current structure is simple and easy to apply. However, simplicity can sometimes " ... become an obstacle to a fair and equitable tariff structure." [29] Complex markets may require more sophisticated tariff structures.

Producers find the current tariff structure unfair. Singer-songwriters find it inadequate. Non performing authors are not adequately compensated by it. The tariff, as currently structured, may not meet the needs of the various players in today's concert industry in Canada in so many respects that it ought to be changed drastically.

A new tariff structure should attempt to meet the needs of performing and non performing authors, of producers and of presenters alike.

It may be possible to do so by using a graduated scale. Where all of the performed works belong to someone else than the performer, the rate could be set higher than it currently is (5 per cent,

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[27] According to the record of these proceedings, this is the case for between 85 and 90 per cent of concerts in English Canada, and between 70 and 75 per cent of concerts in French Canada.

[28] This is what is done, for example, in the case of users who purchase their background music from a wholesaler: see *infra*, this decision on Tariff 16.

[29] *Statement of Royalties to be Collected for the Performance in Canada of Musical and Dramatico-Musical Works in 1991* (1991), Copyright Board Reports, 1990-1994, 283, at 293.

for example).[30] The rate would decline as the performer uses his or her own materials. A minimum rate (say, one per cent) would be set to account for SOCAN's administrative overheads, to provide room for spontaneous performances and to allow for incidental music. Such a structure could be refined further to deal with opening acts, especially those who do not perform their own works.

Several witnesses were asked to comment on the merits of a tariff that would provide one rate for concerts given by singer-songwriters and another for concerts given by performers who use other people's compositions. Some found the proposal interesting, but wondered whether that might not discourage producers from signing performers who do not write their own material. Others feared that it might inhibit spontaneity and affect the structure of the deal with the promoter. Others again wondered how to prevent potential abuses of the system by transferring the singer-songwriter's rights to a third party.

SOCAN expressed the view that such a formula may introduce an economic disincentive to perform the works of others, may lead to discount arrangements with performers, and may create incentives for inaccurate reporting. These misgivings will have to be addressed during discussions among industry participants and at any subsequent hearing into the issue before such an approach is indeed contemplated by the Board. Reporting requirements may need to be tightened, so that producers would have to record the performance for verification purposes. Also, an assessment would have to be made of the extent to which the information SOCAN already collects for distribution purposes could be used for assessment purposes.[31]

Several participants suggested that the various players in the concert industry, including SOCAN, should try to arrive at a new, better tariff structure, one that would focus on the needs of composers and users and not on those of the institutions or organizations of which they are members. Several suggestions were made during the hearing, some of which are examined, in a preliminary fashion, in this decision. The Board hopes that these few thoughts will help participants in starting a reassessment process which will prove fruitful.[32]

iii. Free Concerts

Until recently, free concerts paid the minimum amount of royalties. In its decision of August 12, 1994, the Board, relying on the record of the proceedings, adopted production costs as the rate base for those concerts.

SPACQ and SOCAN argue in favour of keeping the current rate base. According to SOCAN, the reported difficulties with the tariff are being exaggerated, and are due mainly to the novelty of

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[30] The rate should not, however, be so high as to produce adverse effects, such as those outlined tentatively by some of the witnesses. See, e.g. Tr., at pp. 422-3, 783.

[31] It may be necessary to take other factors into account. Thus, performers who use their own works may loose the benefit of the 20 per cent "top up" for which the SOCAN distribution rules provide in the case of smaller events. In the same vein, some account may need to be taken of the potential loss in revenue for publishers.

[32] The Participants may, among other things, attempt to agree on what they consider to be the relevant factors, even if they cannot agree on their relative weight or on a starting rate.

the formula; participants should be given time to iron them out. SOCAN adds that most licensees have paid without problems.[33] SPACQ rejects as deficient the artists' fees as a rate base. At a minimum, it considers that the rate base should include all the costs pertaining to the staged performance: sound, lighting, technicians, artists fees, etc.[34]

The Board agrees with the objectors that using costs of production as a rate base may have been unfair. It now appears that using that base may result in higher payments than for concerts for which admission is charged, since ticket sales often represent only a portion of the production costs for those concerts.[35] Outdoor concerts, which require expenses that are not readily associated with the delivery of a performance, and events incurring additional expenses for the purposes of broadcasting may have suffered even more.

The formula has also been difficult to apply and has resulted in case by case interpretations. This created uncertainty and subjectivity.

In the absence of gate receipts, the best measure of the value of music at free concerts would appear to be the artists' fees. That amount is readily verifiable, fluctuates with the market, and can, in most cases, be determined in advance, resulting in a lighter paper burden.

Therefore, the rate base for the tariff will be all fees paid to those performing on stage (singers, musicians, dancers, conductors).

The definition of free concert also needs to be clarified. As is the case with Tariff 5.B, free concerts should be those for which no separate charge is made for attending. Therefore, where a fee is charged to access the grounds, but no separate charge is made to attend the concert, the event will be treated as a free concert.

In cases where the artist is not remunerated, the minimum fee will apply.

There is no need to adjust the rate to account for the change in the rate base. Artists' fees at free concerts are significantly higher than at concerts for which admission is charged. Furthermore, it now seems clear that artists' fees often represent more than the gate receipts for small, medium, and even large presenters.[36]

Since the artists' fees formula is being retained for all free concerts, there is no need to create a separate tariff for free concerts at festivals.

iv. Classical Music Concerts

In 1994, the Board split Tariff 4.B into three sub-tariffs. The per event tariff was already in

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[33] Argument, p.13 and tr., p. 972.
[34] This was referred to in French as "*frais de plateau*".
[35] This appears true especially with presenters that are members of RIDEAU or of CAPACOA: Mr. Arcand, tr. p. 928.
[36] See Exhibits Fogel/Sabourin-14 and 15.

place. The orchestra tariff reflected an agreement reached by SOCAN and the Association of Canadian Orchestras. The tariff for presenting organizations was designed to afford presenters of classical music a level of budgetary certainty similar to orchestras, without creating an incentive to reduce the use of protected music.

No one objected to the orchestra tariffs, which are certified as filed by SOCAN.

With respect to the rate for the per event and the presenters' tariff, SOCAN asks, as in the past, that it be kept in line with the rate for popular music concerts, taking into account the lower use of protected music in classical music concerts. This request is based on the assumption that popular and serious music should be valued on the same footing. The Board now agrees with Livent and Pro Musica that this assumption should be challenged, and that the link between the classical and popular music concert tariffs should be loosened. The markets appear different. The financial challenges encountered are different in each sector of the concert industry. The revenue structures also are very different. Furthermore, it may be, as was argued by ro Musica and Livent, that where serious music is involved, protected music does not, on the whole, have the same drawing power as music that is in the public domain. In the future, SOCAN should therefore make a separate case for these tariffs and not expect that they will automatically be linked to the popular music concert tariffs.

Even absent these arguments, the Board would have hesitated to increase the tariff. The increase granted in 1994 was significant; it would have been premature to consider another increase at this time, without fully understanding what the impact of the previous one has been on that market.

The rates in Tariffs 4.B.1 and 4.B.3 will therefore be maintained at their current levels. In the case of free concerts, the base will also become the artists' fees. No minimum will be set for Tariff 4.B.3. The Board still holds the view that "the prevalence of public domain music in classical music concerts is such that setting a minimum fee in that tariff would constitute a disincentive to playing protected music."[37]

Tariff 4.B.3 currently provides for a single annual payment, made in advance, if the estimated royalties do not exceed $100. Otherwise, payments are made quarterly. SOCAN asks for quarterly reports and payments, to be filed within 30 days of the end of each quarter. This, it argues, would be no more difficult that filing an early estimate and payment, plus a final report and adjustment. This would also mean that distributions could be made in a more timely fashion, especially since concert royalties have their own distribution pool.

The reporting requirements in Tariff 4.B.3 will remain the same as in 1994. The tariff is still experimental, and has not been widely used. SOCAN has not convinced the Board that what it proposes would work any better.

There is, however, a need to clarify that subscription and membership revenues are included in

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[37] *Public Performance, 1994*, at 426.

the rate base, since it would appear that most presenting organizations located in small communities operate with subscriptions or membership fees.[38]

Pro Musica's proposal for a tariff based on the actual duration of protected works performed during a concert would be too unwieldy, and may create an incentive not to play protected music. More importantly, organizations such as Pro Musica, who present concerts where only one protected work is performed, have the option of paying under Tariff 14, and do not have to pay royalties if no protected work is performed during a concert.

C. TARIFF 14 (PERFORMANCE OF AN INDIVIDUAL WORK)

SOCAN withdrew a request that would have prevented the use of Tariff 14 in the case of concerts. Consequently, the tariff is certified as formulated in 1994.

D. TARIFF 16 (MUSIC SUPPLIERS)

i. Background

A tariff for the public performance of music purchased from a supplier has existed, in one form or another, at least since the 1940's. SOCAN's predecessors each used formulas that were quite different.

In 1960, CAPAC received for "wired" music systems 2.75 per cent of the cost of the service for industrial premises and 5.5 per cent for other premises, with a minimum of $30. In 1961, a new tariff, dealing with all background music and comprising nine subcategories, was adopted. The tariff was articulated around set prices for establishments of a certain size, with increments for larger establishments. Music suppliers who undertook to remit the fees payable received a discount of between 5 and 20 per cent of the royalties.[39] Starting in 1971, a separate CAPAC tariff for music suppliers was reinstated, using the structure of the 1960 tariff.[40] The rates remained the same until 1990. Over the years, the cost of equipment provided with the music service was sometimes included, and sometimes not, in the rate base.

For its part, PROCAN and its predecessor, BMI Canada, started collecting royalties from music suppliers in 1956. Suppliers were identified as the licensees. Where the service at one location cost more than $100 per month, royalties were one per cent of that cost. Other locations cost $6 per year, or $3 if the location received the service for less than half the year.[41] These rates remained the same until 1983. The percentage rate then rose to 1.06 per cent in 1983, 1.2 per

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[38] Mr. Zukerman, tr., pp. 1935-1937.

[39] Some suppliers continued to pay royalties set at a percentage of the cost of service. Exhibit C/S-32 shows that CJAD did so between 1963 and 1970. The manner in which the name of CJAD is inserted in the document leaves the impression that this was a standard form contract which may have been used with other music suppliers.

[40] Two changes were made to the 1960 formula. Small stores paying less than $10 a month for their music service paid royalties of $12 per year, and the minimum royalty did not apply to professional offices.

[41] These amounts were considerably less than what was charged for commercial or industrial premises that supplied their own music. Compare Tariffs 6, 7 and 8 for 1971.

cent in 1985 and 2 per cent in 1988,[42] while the price for other locations rose progressively from $6.35 in 1983 to $7.90 in 1986, and then to $15 in 1988 and $18 in 1989. Starting in 1988, the minimum royalty was lowered for suppliers paying licences for more than 10 locations.

In 1991, CAPAC and PROCAN merged. The rates set for Tariff 16 were, on the whole, the sum of the previous rates: 4.75 per cent for industrial premises, and 7.5 per cent non-industrial premises, with a minimum of $48 for all premises except professional offices. The royalty for small commercial stores, employing five persons or less and paying $10 per month or less for their music service was set at $20 per year. The minimum royalty declined progressively from $45.60 to $33.60 for suppliers with three or more clients. In 1992 and 1993, the rates remained the same. However, the wording of the 1993 tariff was changed somewhat, giving rise to some controversies which were discussed in these proceedings.

The proposals under examination deal with the years 1994 to 1996. The 1994 proposal is identical to the certified tariff for 1993. Starting with 1995, SOCAN asks that the rate of 7.5 per cent of the cost of the music service apply to all premises licensed under Tariff 16, and that the minimum royalty be set at $90.38. The volume discount on the minimum royalty would be eliminated.

DMX Canada Partnership (DMX) objected to the 1994 proposal; that objection was withdrawn on April 15, 1995. DMX, CHUM Satellite Business Music Network (CHUM) and Standard Sound Systems (Standard) objected to the 1995 and 1996 proposals. These corporations supply music to more than half of the premises licensed under Tariff 16.

Hearings on proposed Tariff 16 were held on December 12, 13 and 14, 1995. Filing of arguments and evidence was concluded on April 4, 1996.

ii. Arguments

SOCAN's arguments in support of the change in the tariff structure are outlined as follows. First, Tariff 16 involves two separate uses, and the revenues generated from the use of music at both levels of trade should be taken into account in setting the royalties. Second, the importance of background music to commercial establishments has increased, and has brought with it increases in productivity and sales which should be taken into account in setting the price. Third, the use of music being made under the tariff has moved from being genuine background music to a much more prominent use of music, often involving playing contemporary hits at a higher volume. Fourth, the distinction between industrial and other premises has become obsolete and the small store provision is now spent. Fifth, there is no justification for either a discount or a reduced minimum on account of volume purchasing because the fees are already too low. Were suppliers true collectors, the fees they collect would be set under Tariff 15. In any event, music suppliers require their own licence and do not render SOCAN a service by paying royalties on account of the purchasers of their services.

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[42] In that same year, the threshold was lowered from $100 a month to $1,000 a year.

For their part, the objectors complained about the importance of the increase being sought by SOCAN. They rejected SOCAN's two-uses analysis. They maintained that their role should be recognized as that of collecting royalties for SOCAN, according to an arrangement which considerably reduces SOCAN's compliance and collection costs. They claimed that simply aligning the minimum rate on that of Tariff 15 misconstrues the service being performed by the service providers and does economic harm to their industry. They argued that the record revealed no justification for eliminating either the distinction between industrial and other premises or the small stores rate. While in agreement that the tariff structure may be in need of a review, they asked that the 1992 tariff formula be applied to the period under examination.

Objectors did not oppose the application of the minimum fee to professional offices.

iii. Analysis

SOCAN's attempt at convincing the Board of the need for a change in the tariff rates or its structure has failed utterly. It offered absolutely no evidence to support its contention that the rate levels are unreasonably low. The cursory "explanations" of Mr. Perkins and Ms. Pollock left unanswered the Board's repeated questions on several issues. At times, they fell considerably short of explaining anything of the background and evolution of the tariff or of the reasons behind it; at others, they distorted it. For reasons that will become clear later, Dr. Chebat's testimony was irrelevant to setting the price of the blanket licence. By contrast, the testimony of the objectors' witnesses was clear, cogent and informative.

If SOCAN has sound policy reasons for requesting an increase in the tariff, other than a bald assumption that the industry could "take it", it has kept them to itself. Its assertion that the proposed changes bring Tariff 16 rates to the same level as Tariff 15 is both incorrect[43] and insufficient as a justification.

There are a few issues that nevertheless should be addressed for the purposes of these proceedings.

SOCAN may be correct in stating that Tariff 16 sometimes involves two protected uses for which it controls the rights.[44] First, any communication taking place between the service supplier and the purchaser probably is a communication to the public. Second, the purchaser of the music service performs the music supplied by the service, and that performance is no doubt public in almost all cases.[45]

This does not mean, however, that SOCAN should receive more where a performance is effected through two protected uses rather than one. Once the need for one licence (or more) has been

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[43] Tariff 15 is based on floor area. SOCAN's proposed Tariff 16 would remain based on the cost of the service. The royalties generated by the two formulas are probably quite different, especially in the case of large stores. If SOCAN's proposal were to be adopted, only the minimum prices would be in line with one another.

[44] The exception is the minority of cases where tapes are delivered to the service purchaser.

[45] For the purposes of this decision, it is unnecessary to determine whether performances are exempt by virtue of subsection 69(2) of the *Act* when the communication is effected using radio waves.

established, economic considerations become paramount in setting the price.[46] Music is performed in a store to be heard by the clients and employees in that store. That is the most relevant level of trade for the purpose of setting the price for the consumption of background music, which is the object of Tariff 16. That remains true whether the music is embedded in a radio signal, on a purchased CD or tape, on a music supplier's tape or signal. The number of protected uses required for the music to reach the listener's ears does not change the level of consumption of SOCAN'S repertoire. Therefore, the amount of royalties the author receives for the performance should not depend on the means being used to effect the performance. Conversely, the store performing the music should not have to pay more because of the nature of the technology being used to effect the performance.

Put another way, the copyright owner is fully compensated for the use of the music by the payment of the royalty that is set for the purposes of the principal use (the performance in the store) irrespective of whether or not a prior, incidental use (the communication to the store) is involved in the process. Any value to the composers is already accounted for by setting the price based on the purchaser's use.

Relying on Dr. Chebat's testimony, SOCAN seems to advance the proposition that carefully selected background *music*, with its attending effects on the mood of employees and clients alike, is somehow more valuable and that this should be reflected in the price of the licence. The Board disagrees. SOCAN's licence gives access to all the repertoire, however used. Any mood enhancement is achieved not by the random playing of music but by the careful selection and arrangement of works by the service supplier, thereby increasing the value of the *compilation* created by the supplier. Therefore, that added value should not be taken into account in setting the price of the public performance.

This may lead some to the conclusion that the price for background music should be the same whether or not it is purchased from a music supplier. This is not necessarily the case. All the participants agree that the rate base for Tariff 16 should remain the cost of service. This formula has been used for more than 30 years. The Tariff 15 approach has been used in the past with music suppliers; for reasons that remain untold, SOCAN and the suppliers opted for the current formula. Furthermore, there are several tariffs based on a percentage of the entertainment package of which music is part where the ultimate listener is not the purchaser of that entertainment package.[47]

There remains SOCAN's argument that there should be no volume discount. The testimony of Mr. West Sr. clearly brought out that a special arrangement has existed between SOCAN and music suppliers, which results in significant benefits to both parties and has been recognized in one form or another, in tariffs as well as in side arrangements, at least since the 1960's. By collecting royalties from music suppliers, SOCAN reduces its administrative burden and costs; it

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[46] *Statement of Royalties to be Collected for the Performance in Canada of Musical and Dramatico-Musical Works in 1990, 1991, 1992 and 1993* (1993), Copyright Board Reports, 1990-1994, 345, at 366, quoted in *Canadian Association of Broadcasters* v. *SOCAN* (1994), 58 C.P.R. (3d) 190 (F.C.A), p. 199a.

[47] Tariffs 3 and 12 come to mind. It would of course be impossible to use that rate base in Tariff 15.

also ensures full compliance in a market where it would obviously be both difficult and costly to achieve.[48] The same efficiencies dictate that the supplier be the person to whom the licence is issued.

SOCAN has offered no evidence that the discounts offered to music suppliers are out of line with the economic benefits it derives from dealing with them. If it strongly believes that this is the case and that it is capable of enforcing Tariff 15, nothing stops it from abandoning Tariff 16 altogether and collecting under Tariff 15 from each individual subscriber to a music service.

The small store discount will also be maintained because the Board is not satisfied that it is no longer of any use. On the other hand, if it is obsolete, it will simply apply to no one and SOCAN will not be worse off. The minimum price will be extended to professional offices because no reason appears to exist for their current exclusion.

The tariff wording is adjusted in several respects. Firstly, it is made clear that the tariff covers both the service purchaser's performance and, where this occurs, the service's telecommunication. Secondly, the notion of "background" music is reintroduced. Thirdly, the wording is adjusted to account for music that is delivered electronically and not in recorded form. Fourthly, allowance is clearly made for a reasonable deduction to account for the cost of equipment.

CHUM and Standard asked that the Board undertake a review of Tariffs 15, 16, 17 and 22 to better harmonize them. The object of the request appeared to seek for comparable rates for background music irrespective of the manner of delivery of the music. That is a laudable goal, and one that should be kept in mind. To do that, the Board will need to understand why the differences in rate structure between Tariffs 15 and 16 exist and whether they are justified.

As to the near future, it may become necessary, to ensure that the tariffs are as technologically neutral as possible, to adjust certain tariffs, to require suppliers of other signals, including cable operators, to pay royalties for the public performances effected by their customers. The store owner who, in the near future, will tune a radio set to a pay-audio service may be required, at law, to obtain a licence under Tariff 15. However, and subject to any evidence or argument that may be offered in due course, the same reasons that justify requiring from music services the payment of royalties for the public performances effected by their clients would seem to apply to the circumstances of cable originated services. Moreover, and again subject to evidence or argument that may be filed in the future, there would appear to be no reasons why SOCAN should derive more, or less, revenues according to the identity of the music supplier or the means of delivery.

[48] No other reason can explain the fact that SOCAN has only 3,855 accounts opened under Tariff 15.A for all of Canada. Music suppliers, on the other hand, pay royalties on account of more than 12,000 premises.

Claude Majeau
Secretary to the Board