Copyright Board Canada

Commission du droit d'auteur Canada

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Citation FILE: Reproduction of Musical Works 2001-2004

Regime Reproduction of Musical Works
Copyright Act, subsection 70.15(1)

Members Mr. Justice John H. Gomery
Mrs. Sylvie Charron
Ms. Brigitte Doucet

Statement of Royalties to be collected by CMRRA/SODRAC inc. for the reproduction of musical works, in Canada, by commercial radio stations in 2001, 2002, 2003 and 2004

Reasons for decision

I. INTRODUCTION

On May 29, 1999, May 13, 2000, and April 21, 2001, pursuant to subsection 70.13(1) of the *Copyright Act* (the *Act*), SODRAC and CMRRA filed proposed tariffs for the reproduction in Canada of musical works by commercial radio stations. The SODRAC proposals (Tariffs 3 and 3.A) cover the years 2000 to 2005, while CMRRA proposal (Tariff 1) covers the years 2001 to 2005.

The Board notified users of their right to object to the proposed tariffs within the prescribed time. The Canadian Association of Broadcasters (CAB) exercised that right. *Les Entreprises Radiomédia inc.*, *Radiomédia inc.*, *Radiomutuel inc.*, Corus Radio Co. and *Télémédia communications inc.*, which had objected to SODRAC's first proposal, subsequently withdrew.

The Board granted a request from the CAB to examine all of these proposals at the same time. SODRAC and CMRRA subsequently requested that the Board approve a joint tariff for the years 2001 to 2005; SODRAC abandoned its proposed tariff for the year 2000. The hearing was held over a nine-day period between April 22 and May 16, 2002.

II. LEGAL FRAMEWORK

Subsection 3(1) of the *Act* spells out the various components of copyright, including the right to reproduce and to communicate a work to the public by telecommunication.[1] These are "distinct rights in theory and practice [...] sufficiently distinct that they are generally assigned separately, and administered by different entities."[2] It is the first time that the Board is asked to certify a tariff for the reproduction of musical works by commercial radio stations.

It is also the first time the Board certifies a tariff under the so-called general regime. This regime (sections 70.1 *et seq.* of the *Act*) has been in place since 1989. It applies to collective societies that are not subject to the specific regimes set out in the *Act* (public performance and communication to the public of musical works or sound recordings, retransmission of distant signals, reproduction and performance of broadcast programs by educational institutions and private copying). Prior to 1997, collective societies had to reach agreements with individual users. When requested to do so, the Board would intervene when a society and a user were unable to agree on the royalties and the terms and conditions of a licence. Since 1997, the *Act* has given collective societies the option of filing a proposed tariff with the Board. The review and certification process for such tariffs is the same as under the specific regimes. The certified tariff is enforceable against all users; however, in contrast to the specific regimes, agreements signed pursuant to the general regime take precedence over the tariff.

The Board dealt with reproduction rights when it set, pursuant to subsection 70.2(1) of the *Act*, the terms and conditions of a licence allowing *MusiquePlus inc*. to reproduce works within SODRAC's repertoire.[3] That case involved the Board's use of its power of arbitration under the general regime, not the power to set a tariff that is enforceable *erga omnes*. This is an important distinction, as will become clear later in the following reasons.

Finally, the *Act* provides, at sections 30.8 and 30.9, for an exception for ephemeral recordings, which will be addressed later in this decision.

III. FACTS

SODRAC and CMRRA are collective societies which administer the reproduction right in musical works. SODRAC represents the repertoire of the vast majority of rights holders in Quebec and most works written in French by Canadians. It also administers in Canada the repertoire of many foreign collectives. CMRRA represents the repertoire of a large number of Canadian and foreign English-language music publishers.

SODRAC administers all components of the reproduction right. Until very recently, CMRRA

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[1] Throughout these reasons, the words communicate/communication and broadcast/broadcasting are used indiscriminately to refer to the right of communication to the public by telecommunication as set out in subsection 3(1)(*f*) of the *Act*.

[2] *Bishop* v. *Stevens*, [1990] 2 R.C.S. 467, 477-478.

[3] *SODRAC* v. *MusiquePlus inc*., Board's decision of November 16, 2000, http://www.cb-cda.gc.ca/decisions/a16112000-b.pdf; (2000) 10 C.P.R. (4th) 242.

was not able to licence copies made in the course of broadcasting operations. Since the end of 2000, it has been urging music publishers, whether or not they use its services for other purposes, to have CMRRA manage their right to licence such copies. The extent of the repertoires administered by these collectives is analysed later in these reasons.

In January 2002, SODRAC and CMRRA created CMRRA/SODRAC Inc. (CSI) to administer the joint tariff that the collectives are asking the Board to certify.

Radio stations have been copying musical works for over 40 years. Initially, records were copied onto cartridges. This ensured better on-air sound quality and more homogeneous programming; it also made things easier for radio hosts. While the advent of the compact disc (CD) eliminated the need to make copies for these reasons, radio stations continued to copy music for montages, compilations, mixes and medleys, and to record and broadcast night-time programming.

The way music is used by radio stations – from receiving compact discs to making copies to broadcasting the music – was explained during the hearing. A technical demonstration gave an overview of the computer systems and software functions used by stations to manage and broadcast their programming. The evidence clearly illustrated the benefits to stations, particularly those arising from the storage of musical works on a central server, in terms of efficiency, control, quality, flexibility and cost.

Some stations still broadcast music from CDs, but most do so from a hard drive. Reproduction allows the stations that do so to create on a hard drive their own music catalogue. This practice optimizes the operation of programming management software and makes the music easier to use.

Music is still reproduced so that it can be used in the event of equipment failure, in particular onto tapes. Finally, backup copies of music are made on various media and sometimes through the Internet on outside servers.

IV. THE PARTIES' ARGUMENTS

The collectives propose a tariff structure that is a function of annual income and music use. Stations that draw on their repertoire for less than 20 per cent of their air time would pay 0.28 per cent on their first $625,000 of annual income, 0.56 per cent on the next $625,000 and 0.84 per cent on all other income. Stations that do not copy any music onto a hard drive would be subject to the same rates. The rates for other stations would be 0.65 per cent, 1.30 per cent and 1.95 per cent respectively.

The CAB requests that the royalty be capped at 0.32 per cent, or 10 per cent of what stations pay to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) to broadcast its repertoire. The CAB acknowledges that stations have been copying music for a long time without ever having to pay royalties for doing so. However, it argues that a rate equal to a small proportion of the SOCAN tariff would accurately reflect the relationship that ought to exist between the communication of music by radio stations and the reproduction of music for the purpose of facilitating that communication. In support of its arguments, the CAB made a number of points.

First, music is only one of the factors that determine the success of radio programming. Information, hosts and promotion are just as important, if not more so.

Second, copies of musical works made by radio stations are used solely to facilitate programming; from the listener's perspective, no value is added. These copies do not reduce costs. If costs are lower, it is more because of the new broadcasting techniques stations use; the efficiencies made possible by these techniques should remain with the stations.

Third, these copies have little or no value because they are optional, technical and secondary copies. The copy is optional because stations can broadcast music using the CDs on which it is already recorded. It is technical because it only involves a transfer of format. It is secondary because it is used only to communicate music for which the station has already paid royalties to SOCAN. There is no economic value associated with this sort of copy of music; consequently, no royalties should be paid for it. The legislative history illustrates the low value that Parliament intended to place on this form of reproduction and that ought to attach to transfer of format and ephemeral reproductions.

Fourth, a high tariff would have an adverse effect on the efficiency of radio stations and on competition in the commercial radio market. It would discourage stations from using existing technology, slow down the adoption of emerging technologies and constitute a sort of tax on new technologies. The royalties paid to SOCAN already provide full compensation for the value of a musical work as broadcasting input.

The collectives, meanwhile, underscore the importance of music to radio stations. Music is an important factor in attracting and keeping listeners and, therefore, in generating income. Commercial radio draws a specific audience based on the station's music programming format. A radio station's identity and thus its place in the market are defined first and foremost by the music the station plays and then, to a lesser degree, by information, hosts and promotion. Musical content is far and away the most important reason why listeners choose one radio station over another.

The collectives argue that a copy made in the course of broadcasting operations has intrinsic value, although that value is difficult to quantify, irrespective of its optional, technical or secondary character. The tangible and intangible benefits of reproduction are significant and identifiable. The former include reduced staff and space requirements and smaller losses attributable to errors in inserting advertisements. The latter include improved productivity, easier production of better-quality programs, improvements to the station's competitive position, improved product quality and the ability to better meet the needs of clients.

The collectives brush aside the CAB's argument that the royalties paid to SOCAN fully account for the value of the copy made in the course of broadcasting. The *Act* recognizes the existence of reproduction rights separate from communication rights. By doing so, it requires that authorization be obtained from rights holders before either right is exercised; as a result, it becomes necessary to value each right. A person who, for whatever reason, decides to use a technology that requires the exercise of any right must pay for that right. The potential decrease in profit margin is not an argument that could be used to justify not compensating the holder of a right recognized by the *Act*.

V. ANALYSIS

A. PRELIMINARY ISSUES

For the most part, the collectives use as the starting point for their proposal the agreements that SODRAC reached with TVA and TQS television networks. From the outset, the Board expressed reservations about this approach. As the participants did not seem inclined to put forward other starting points, the Board eventually insisted that they do so. The collectives responded by filing a document that analysed several scenarios; the CAB objected on the grounds that the document, filed at the very end of the hearing, contained new evidence. Also at the very end of the process, during argument, the CAB finally committed itself by suggesting to the Board a tariff equal to one tenth of the royalties that stations pay to SOCAN.

The Board dismisses the CAB's objection. The circumstances of this matter warrant consideration of the documentation filed late in the process, including the CAB proposal, and any correspondence exchanged after the hearing. That documentation was submitted in response to requests made by the Board. The information it contains is needed to reach an informed decision. Finally, the CAB had an opportunity to express its views in writing.

The CAB also objected to the filing of a revised version of the proposed tariff. The collectives argue that the new version is more in line with the evidence submitted by the CAB at the hearing. The Board dismisses that objection as well. True, the Board has refused to increase proposed tariffs in the past[4]: a collective society cannot unilaterally increase published proposals. In this instance, the collectives are not looking to increase the amount of the royalties. They are amending the rates (downward) to better reflect the circumstances of some stations. They are changing the related terms and conditions without trying to impose on users obligations greater than those set out in the initial proposal. This approach is perfectly in line with the purpose of reviewing proposed tariffs: to make such changes as the Board deems necessary. Moreover, the CAB cannot complain that it was caught short, as it had the opportunity to comment in writing on the new proposed tariff.

In a letter of March 14, 2003, the CAB went further and submitted that procedural fairness required the Board to indicate which of the collectives' draft proposals (the published draft tariff or the draft filed in the course of the hearing) will be the basis for the decision. The Board dismisses this argument. Its duty to be fair is met since the CAB had the opportunity to make submissions on all drafts under consideration.

B. ANALYSIS OF PROPOSED STARTING POINTS

Notwithstanding the Board's reservations, the collectives maintain as the starting point for their proposal the agreements that SODRAC reached with TVA and TQS television networks. The collectives' evidence and arguments did not allay the Board's reservations for the following reasons.

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[4] Ruling of the Board of December 13, 2001 on SOCAN's request to increase its proposed Tariff 17.A for 2001.

First, the issue here is radio, not television, which is what these agreements address. The right may be the same, but the use made of it and the context in which this is done are very different. The use of reproduction rights is more diverse in television than in radio. For example, television broadcasters synchronize musical works with images as part of their reproduction activities. Radio broadcasters do not do that type of synchronization. The collectives' arguments that music is less important in television than in radio does not further the analysis. What the Board is trying to gauge in this instance is the value of reproduction in radio, not the value of music.

Second, television broadcasters have no choice but to reproduce music so that they can include it in their programming. Radio stations have the option of reproducing music for broadcast. However, they can also choose not to reproduce it or to reproduce only a small amount of it (something the collectives' proposed tariff addresses).

Finally, the relative magnitude of the amounts in question skews the comparison. TVA and TQS pay a relatively small percentage of their revenue to SODRAC. Faced with a relatively small mandatory payment, the payer is often willing to pay more to avoid the cost of protracted negotiations and the resulting uncertainty. There is no way to determine the role these or other factors equally irrelevant to the instant debate may have played in the negotiation of those agreements.

It is true that the Board used those agreements as the starting point in the decision dealing with SODRAC and *MusiquePlus inc*.,[5] but the situation was different. The Board had to resolve a dispute between parties in a context of arbitration. The arbitration involved the reproduction of musical works for broadcast on television, as was the case for the agreements in question. Moreover, the parties had agreed to use that starting point as a basis for calculation and the Board noted that choice. The Board stressed that "any attempt at characterizing the present reasons as a precedent, whether generally or in the matter of reproduction rights, would be ill-advised."[6]

The collectives also tabled, at the Board's request, a document evaluating the relevance of other possible substitute prices or points of comparison. The collectives concluded from their analysis that none of those alternatives was adequate in the circumstances. The Board agrees with this conclusion for the following reasons.

Hence, it is not possible to use an estimate of the economic value associated with reproduction as a basis for calculating the tariff. The evidence shows that the use of new broadcasting techniques, which involve copying onto a hard drive, has reduced programming and production costs. Be that as it may, the magnitude of the reduction was not quantified. The collectives were able to show that there are advantages in using these techniques, among them the ability to remain competitive but there is nothing to enable the Board to quantify this value. Neither does the record of the proceedings allow the Board to assess the value of any other sort of reproduction made in the course of broadcasting activities.

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[5] *Supra* 3.
[6] *Supra* 3, page 2.

Comparisons with foreign countries also raise problems. The participants filed evidence comparing the royalties paid by broadcasters for reproduction and communication rights in other countries. The Board has in the past expressed reservations about using such comparisons as a starting point in calculating a tariff. Even though the evidence shows whether, in each of the countries studied, an exception is (or is not) made for ephemeral reproduction and the terms and conditions under which such exception applies, it does not indicate the extent to which the exception has affected the establishment of tariffs. Neither does the record indicate whether foreign broadcasters copy to their hard drive and, if so, whether the current tariffs take that use into account. The data are therefore insufficient and can be used only as guidance.

A series of agreements allows SODRAC to represent the repertoire of foreign collectives in Canada. Some thirty of these agreements establish the relationship that must exist between royalties for reproduction rights and royalties for communication rights. These data cannot be used as a starting point in setting the tariff, if only because they are found in agreements between collective societies and involve no input whatsoever from the users concerned. These data, like the others, can be used only as guidance.

Comparisons with royalties the Canadian Broadcasting Corporation pays to SODRAC and SOCAN raise just as many problems. The last agreement with SODRAC dates from 1995, and a renewal agreement is still being negotiated. The agreement, which covers both television and radio, does not specify the proportions of royalties attributable to each medium. Finally, because it is an agreement, it is subject to the same reservations as those expressed in connection with the agreements with TVA and TQS.

French-language community radio stations recently agreed to pay $250 a year to SODRAC. The evidence does not show whether community radio stations copy musical works as much as commercial stations. Based on the small amount of evidence available, the Board finds that the differences between community and commercial radio stations are too great to permit valid comparisons.

The CAB's proposal to fix the tariff at one tenth of the royalties paid to SOCAN is not acceptable because it is not based on compelling evidence or a convincing theoretical analysis.

C. SETTING THE TARIFF

In setting a new tariff, the Board often tries to find proxies such as substitute prices or points of comparison that can be used as a starting point to determine the amount of the royalty. Where it is unable to find proxies that are especially appropriate in the circumstances, the Board tends to identify a range within which it will set the tariff.

In the case at hand, the Board must identify a range within which it can fix the tariff. The collectives proposed a tariff of 1.95 per cent, the CAB a tariff of 0.32 per cent. Those high and low values already establish a useful range.

The Board has identified a number of factors that will have a bearing on where the tariff falls within that range.

First, the reproduction right is a self-standing right separate from the communication right. Its very existence tends to plead in favour of a royalty that is more than nominal, even though its use in the course of broadcasting operations is secondary to broadcasting.

Second, the use of new broadcasting techniques lowers costs for radio stations. Copying music to a hard drive optimizes the use of these new techniques, thus entitling rights holders to a fair share of the efficiencies arising from this reproduction.

Third, the Board must take into account the fact that the licence is optional. Once they have assessed the benefits of reproduction relative to the cost of the licence, broadcasters could choose not to make copies. If the tariff were too high, many broadcasters might choose not to purchase the licence, which would hamper the adoption of new broadcasting techniques. On the other hand, if the tariff were too low, the collectives might stop filing tariffs and opt instead for individual negotiations.

In that context, it is important on two counts to draw a distinction between the instant situation and that involving royalties to be collected by the Educational Rights Collective of Canada (ERCC) from educational institutions for the reproduction and performance of broadcast programs,[7] where the licence was also optional to users. First, the ERCC case involved a mandatory licence regime in which rights holders had no choice but to file a tariff proposal. Second, the decision had the potential to jeopardize an established market which the Board, for the reasons it gave, decided to preserve. It is for these reasons, which are not relevant in this instance, that the Board adopted a fairly high tariff even though the licence was optional.

In view of all these factors, the Board sets the base rate at 1 per cent, roughly the middle of the range, which will be adjusted later on.

This base rate is roughly one third of the royalties that stations pay to SOCAN. A rate of 1 per cent is in the range of current ratios between reproduction and communication rights in other countries where, as a general rule, reproduction rights represent between a third and half of the amount that stations pay for communication rights. This rate would lead to the payment of reasonable royalties by broadcasters, bearing in mind the ancillary nature of this use of reproduction rights.

As in the past, and for reasons that need not be reiterated, the Board does not take into account the fact that radio contributes to the promotion of music or that the Canadian Radio-television and Telecommunications Commission (CRTC) requires broadcasters to make contributions to a music industry fund.

D. SIZE OF THE COLLECTIVES' REPERTOIRES

SODRAC's repertoire is essentially stable. CMRRA's repertoire is constantly growing: it was

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[7] *Statement of Royalties to be collected by ERCC from Educational Institutions in Canada for the Reproduction and Performance of Works or Other Subject- Matters Communicated to the Public by Telecommunications for the Years 1999 to 2002*, October 25, 2002, http://www.cb-cda.gc.ca/decisions/e25102002-b.pdf

not until the end of 2000 that CMRRA asked English-language music publishers to assign to it the rights radio stations need. The collectives estimate that the proportion of the relevant repertoire they represent was 65.51 per cent in October 2001 and 82.31 per cent in April 2002.

The CAB contends that these percentages are too high for two reasons. CMRRA contacted its clients using title lists obtained from SOCAN, which may tend to artificially inflate the data. The Canadian content rules which broadcasters have to meet would have the same effect.

The Board accepts the collectives' data on the estimate of the repertoire represented on the dates indicated above. The CAB's claims in this regard do not stand up to scrutiny. Both of the factors identified by the CAB are essential to the determination of what is actually broadcast on radio and therefore the stations' actual use of the society's repertoire.

That said, the exact scope of the repertoire represented for the entire period under review is not entirely clear. It is quite certain that CMRRA's repertoire grew by leaps and bounds in 2001, the first year of the tariff. It is equally certain that CMRRA will continue to expand its repertoire in the remaining years of this tariff.

In light of the above, the Board assumes, in setting the tariff, that the collectives will represent 80 per cent of the repertoire on average for the duration of this tariff. The full rate is therefore set at 0.8 per cent.

The collectives did not ask the Board to allocate the tariff between them. This is not a case where the Board is required to do so by the *Act*. Furthermore, the Board sees no need to do so.

E. ADJUSTMENT OF THE TARIFF BASED ON USE AND INCOME

The collectives as well as the CAB request that stations which make little use of the collectives' repertoires pay approximately 44 per cent of the royalties that other stations pay. This is the same proportion used for other tariffs applicable to radio, and ought to be used again in these proceedings.

The collectives also offered to extend this favourable treatment to stations that do not use hard drive copies. The CAB, for reasons that the Board does not understand, objects to that offer. The Board accepts the collectives' suggestion.

Stations that do not copy musical works at all need not pay any royalties, as they do not need a reproduction licence.

The two collectives and the CAB request that the tariff be adjusted based on the income segments identified earlier in these reasons. This constitutes a significant change in position for the CAB; in the past, it took the view that the same rate should apply to all stations regardless of their income. The collectives are willing to adjust the tariff by thirds, whereas the CAB proposes that the lower income segments be subject to a tariff one quarter and one half of the full tariff. The Board believes that the adjustment proposed by the collectives gives sufficient consideration to the specific circumstances of smaller stations.

Consequently, stations where works from the repertoire account for less than 20 per cent of their broadcasting time and stations that neither make nor keep hard drive copies will pay 0.12 per cent on the first $625,000 of gross annual income, 0.23 per cent on the second $625,000 and 0.35 per cent on all other income. The rates applicable to all other stations will be 0.27 per cent, 0.53 per cent and 0.8 per cent respectively.

The resulting tariff structure may seem complex. However, this structure simply reflects broadcasters' actual use of reproduction rights. It allows those who make less use of the rights held by the collectives to pay less for their licence. It does the same for small stations, whose financial health is often more precarious. In practice, the structure may create too many administrative problems. It will be up to the parties concerned to take stock when this tariff is next reviewed.

F. EXCEPTION FOR EPHEMERAL REPRODUCTION

Sections 30.8 and 30.9 of the *Act* allow a programming undertaking or a broadcasting undertaking to make ephemeral recordings under certain conditions, and which do not constitute copyright infringement. Subsections 30.8(8) and 30.9(6) state however that the provisions dealing with ephemeral reproductions do not apply where a licence for making such copies is available from a collective society. The broadcasters therefore cannot take advantage of this exception.

The CAB nevertheless urged the Board to take these provisions into account in setting the amount of the royalties. In order for this to happen, the record of the proceedings would have to show that such copies are actually being made. There is no indication that broadcasters are meeting the requirements of the *Act* regarding the reporting and destruction of copies. Rather, the evidence tends to confirm that copies of musical works are kept well past the 30-day period set out in subsections 30.8(4) and 30.9(4). There is therefore no need to take this into account in setting this tariff.

G. ABILITY TO PAY

The Board has always acknowledged that a fair tariff must take into account the ability of users to pay. In this instance, the Board believes that the commercial radio industry has the means to pay the certified tariff even though the transition to digital audio broadcasting will require a considerable outlay by broadcasters. This case clearly establishes that the radio industry as a whole is very profitable and that setting a tariff even double what the Board is certifying would have a limited impact on the industry's bottom line.

The record of the proceedings shows once again that smaller stations are generally less profitable. Inasmuch as that is relevant or significant (and there is no need to debate the issue in this case), adjustment of the tariff based on income segments is enough to take this factor into account.

Under the certified tariff, a music radio station with a revenue of $4 million will pay an annual royalty of $27,000 for a licence covering all of its reproduction activities, including hard drive copies. A smaller music radio station, for instance with a revenue of $350,000, will spend less

than $1,000 a year for the same licence. Further, the adjustment of the tariff based on income will bring the royalties down by almost $2,000 a year for a station with a revenue of $350,000 and $5,000 for the station with revenues of $4 million. The total reduction for all radio stations as a result of this adjustment will be almost $2 million.

H. TERM OF THE TARIFF

For some time and officially in a letter dated July 4, 2002, the CAB has been asking the Board to hear at the same time all proposed tariffs applicable to commercial radio, that is, the SOCAN and NRCC tariffs and the tariff being reviewed in this instance. The first two tariffs expired on December 31, 2002, but remain in effect on an interim basis pursuant to subsection 68.2(3) of the *Act*. In order to allow the CAB's request, the tariff under examination would have to expire on December 31, 2002.

First, the Board is not going to set the expiry date of this tariff at December 31, 2002, or December 31, 2003, as the collectives are required to file their tariff application before the March 31 preceding the date on which the certified tariff expires.[8] Second, the Board is not in a position in this case to make a decision on the CAB's request, as there would be an impact on other tariffs and other collective societies.

To allow a joint hearing, should the Board determine that such a hearing is appropriate when the CAB's request is reviewed with all of the stakeholders involved, the Board certifies this tariff for the years 2001 to 2004 only.

I. USES COVERED BY THE TARIFF

The collective societies request that the tariff establish the purpose for which copies subject to the tariff can be used. They also request that stations pay royalties as long as they keep copies made under the tariff, not just when they actually make the copies. Finally, the record shows that in the case of a network, copies made on the network server can be used by all stations in the network. The collectives therefore proposed that consideration be given to the fact that music can be copied to a network server and used by all stations in the network.

The CAB contends that spelling out the purpose for which copies can be used or requiring payment of royalties for pre-existing copies would amount to establishing a right of destination in Canadian law. The CAB's position is that only broadcasters that make copies in a given month should be required to obtain a licence to do so.

The Board does not intend to repeat here the reasons stated in the *MusiquePlus inc*. decision dealing with the right of destination, which reasons it endorses. Where it exists, a right of destination allows a copyright holder to authorize or prohibit certain third-party uses of a copy lawfully made by someone else. This has nothing to do with the rights holder's ability to precisely determine the ways in which a copy can be used and, for example, prohibit the copy

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[8] Subsection 70.13(1) of the *Act*.

being provided to a third party. Determining how a copy can be used is a lawful condition which the holder of a right may impose on a licensed user. Establishing that a lawfully made copy entitles rights holders to receive a share of revenue earned as long as the copy is kept is but a way of establishing the manner in which the royalty payable for that copy is calculated. Both are part of the establishment of the tariff and its terms and conditions.

J. MERGER OF TARIFFS

SODRAC and CMRRA had filed separate tariff proposals. They are now asking that the proposals be merged into a single certified tariff that also recognizes the establishment of CSI as the collection agent. The Board so orders.

It should be noted however that the Board does so not only because the collectives are requesting it, but because the Board still believes that it has the authority to effect such a merger, for the reasons stated in part VI.B of its decision on the NRCC and SOCAN tariff dealing with pay audio services.[9] NRCC has applied to the Federal Court of Appeal for judicial review of that decision, challenging, among other things, the Board's ability to merge tariffs against the will of the interested collective societies. Subject to legislation to the contrary, the will of the parties rarely establishes a decision-maker's jurisdiction. The Board maintains that the decision to merge tariffs is, above all, part and parcel of the process of setting their terms and conditions.

K. COLLECTION OF ROYALTIES BY CSI

Nothing in the record of these proceedings would support a finding that CSI is a collective society within the meaning of the *Act*. There is no indication, for example, that CMRRA or SODRAC have transferred to CSI the administration of their repertoire for purposes of the tariff under review. As a result, CSI cannot file a proposed tariff; by the same token, it cannot be the beneficiary of the certified tariff. That said, a collective society subject to a tariff is perfectly free to request, as part of the terms and conditions of that tariff, that collection be entrusted to a party other than the collective. In this instance, where the two collectives subject to the tariff are asking that a single collection agent be designated to act in their stead under the tariff, the solution is obvious for practical reasons. It is sufficient that the text of the tariff clearly differentiate between those who hold the rights and those who collect the royalties.

VI. TARIFF WORDING

The Board has reviewed the text proposed by the collectives, in order, among other things, to reflect its decision and to dovetail it as much as possible with the wording of earlier tariffs.

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[9] *Statement of royalties to be collected by SOCAN for the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works in respect of pay audio services for the years 1997 to 2002, and by NRCC for the communication to the public by telecommunication, in Canada, of published sound recordings embodying musical works and performers' performances of such works in respect of pay audio services for the years 1998 to 2002*, March 15, 2002, http://www.cb-cda.gc.ca/decisions/m15032002-b.pdf, page 24; (2002) 19 C.P.R. (4th) 67.

For present purposes, the Board underlines the following.

In order to make the tariff easier to understand, the Board added a definition of low-use stations that covers both stations that do not copy to their hard drives and those that use music for only a small portion of broadcasting time.

Also, a reference to so-called production music was added to the definition. That way, the issue is addressed in the same fashion as in the comparable provisions of the relevant SOCAN and NRCC tariffs. Nothing in the record of these proceedings would lead one to believe that the approach ought to be different in the instant tariff.

The definition of network put forward by the collectives is almost identical to that set out in the *Regulations Prescribing Networks (Copyright Act)*, SOR/99-348. Consequently, this word is defined by referring to that definition.

The Board opted not to include a definition of commercial radio station, even though the proposed tariff did. The Board is of the view that since the SOCAN and NRCC tariffs do not contain such a definition, it would be inappropriate to include one in the instant tariff without checking with those collectives that the proposed definition is suitable and could be incorporated in their own tariff, if it were deemed useful to do so. The fact that there currently is no definition in these tariffs does not appear to have created any difficulties.

Provisions dealing with issues such as adjustments to payments and the delivery of notices and payments were added. Although the collectives' proposed tariff did not address those issues, the Board considers it appropriate to settle them in the tariff.

Paragraph 2c) of the tariff specifically addresses the keeping of reproductions made pursuant to the tariff. The reasons for which the Board has the power to impose such a term in the tariff are set out in the earlier section of these reasons dealing with the uses covered by the tariff.

The reporting requirements imposed by the tariff on radio stations are similar to those imposed on them by the SOCAN and NRCC tariffs. The collectives asked to receive all programming logs. Yet, even where such logs already exist in electronic format (as was the case with digital pay audio services), the Board has always imposed much more limited reporting requirements. The CAB, for its part, suggested providing the list of copies made in any given month. However, the purpose of a report is to help in royalty distribution, which will be based on the number of times a work is broadcast, not the number of copies made.

The Board expects that the collectives will cooperate with SOCAN and NRCC when seeking reports from a single user.

The instant tariff contains certain transitional provisions made necessary because the tariff is retroactive to January 1, 2001. To this end, a table sets out interest factors to be used for the monthly royalties payable from January 1, 2001 to date. These interest factors were derived using previous month-end Bank Rates. Interest is not compounded. The amount owed for any given month is the monthly amount of the approved tariff, multiplied by the factor set out for that month. The Board hopes that this will simplify the users' calculations and the collectives'

verifications.

In its letter dated March 14, 2003, the CAB appears to imply that the Board ought to have reassessed its earlier practice with respect to retroactivity. It did not offer any reasons in support of this position. Had it done so, it would have faced some difficulties in convincing the Board, given that it was responsible in large part for the delays in issuing a decision in this matter. Furthermore, it is not appropriate to deal with such an issue in the course of discussing tariff wording. This is a substantive issue, not a drafting issue. Consequently, the CAB ought to have addressed such matters during the hearing.

During the hearing, the Chairman had advised participants that the Board intended to consult them on the wording of the tariff. In the same letter, the CAB requested that consultations on the wording of the tariff take place. It has indeed happened in the past that the Board submitted a draft tariff to participants before a final text is certified, so as to ensure that changes made to the wording not have unforeseen consequences. However, in the course of its deliberations, the Board came to the conclusion that such a consultation was not necessary in this case. On one hand, the parties' point of view on the tariff wording has been clearly stated. On the other hand, the final wording is largely based on texts of tariffs already established and which have resisted the test of time (the SODRAC-MusiquePlus licence and the digital pay audio tariffs are cases in point). Consequently, there is little risk of difficulties of a practical nature arising from such wording.

VII. COMMENT ON THE PROCESS OF INFORMATION GATHERING

Early in the process of perfecting the record of these proceedings, the collectives endeavoured to establish the extent to which member stations of the CAB copy works in their repertoire. Obtaining this information was, beyond a shadow of a doubt, one of the most tedious information-gathering processes the Board has ever had to manage. At every turn, the CAB asked for changes in the collectives' proposed sample and in the number and scope of the questions that would be put to small and medium-sized stations. The Board sought to accommodate the CAB for the most part, while recognizing that doing so would seriously undermine the methodological underpinnings of the study. Things went so far as requiring the personal intervention of the Chairman of the Board to get the process moving at all, and after a considerable delay at that.

In spite of that, many of the targeted stations engaged in what was from all appearances systematic obstruction coupled with inappropriate consultations amongst themselves in preparing answers. Despite the many orders that were issued, some of the respondents still refused to the end to answer the questions addressed to them. The Board has means of compelling reluctant respondents to comply with its requests. It chose not to use those means in this case. It would be unwise to assume that the Board will display as much patience in the future.

Claude Majeau
Secretary General