Copyright Board Canada

Commission du droit d'auteur Canada

Date 2005-03-29

Citation File: Media Monitoring 2000-2005

Regime Media Monitoring
Copyright Act, Section 70.15

Members Mr. Stephen J. Callary
Mrs. Sylvie Charron
Ms. Brigitte Doucet

Statement of Royalties to be collected by CBRA for the fixation and reproduction of works and communication signals, in Canada, by commercial media monitors for the years 2000 to 2005 and non-commercial media monitors for the years 2001 to 2005

Reasons for decision

On May 29, 1999, the Copyright Board published in the *Canada Gazette* a proposed statement of royalties filed by the Canadian Broadcasters Rights Agency (CBRA) pursuant to section 70.13 of the *Copyright Act* (the "*Act*"). The statement related to the use of private broadcasters' programs and communication signals by media monitors (hereinafter "commercial media monitors") in 2000 to 2002. On May 13, 2000, the Board published a proposed statement targeting the use of the same repertoire by non-commercial media monitors in 2001 and 2002. Further statements for 2003 to 2005 were published on May 11, 2002. In each instance, the Board advised prospective users of their right to object to the proposals.

Nielsen Media Research, Ad-Watch Inc., Ashworth Associates, Broadcast Monitoring Services Ltd. and Bowdens Media Monitoring objected to the commercial tariff, as did the Canadian Association of Broadcast Monitoring, a coalition consisting of *Réseau Caisse, Chartier et associés*, Mediascan, J&A Media Services, NewsWatch, *l'Opéra de Québec*, BDDS Shandwick, *la Corporation de gestion des marchés publics de Montréal*, Imperial Oil Ltd. and Intermedia. AC Nielsen was granted leave to intervene. The governments of British Columbia, Ontario, Saskatchewan, Alberta and Manitoba took issue with the non-commercial tariff, as did the Attorney General of Canada, acting on behalf of a number of federal departments and agencies. The Canadian Broadcasting Corporation intervened in both matters but essentially did not participate in the process.

Twice, CBRA applied for an interim tariff. These applications were denied on May 3, 2001 and

June 11, 2003.

Over time, CBRA signed licence agreements with ten commercial and three non-commercial monitors.[1] Those who had filed objections ceased to pursue them,[2] as did two objectors bought out by firms that had signed agreements.[3] As a result, only CBRA participated in the one-day hearing into this matter, which took place on April 27, 2004.[4]

In reaching its decision, the Board took into account comments received by objectors before they withdrew from the proceedings. This includes some substantive representations made by the Canadian Association of Broadcast Monitoring in its opposition to CBRA's 2001 application for an interim tariff. The Board also took into account two letters of comments that it received in early 2004. The first came from Mr. Guy Boivin, *directeur des acquisitions de biens et services, Secrétariat du Conseil dutrésor, gouvernement du Québec*. The second came from J&A Media Services who had reached an agreement with CBRA"with great reluctance", while still hoping to have its concerns heard by the Board.

Two witnesses appeared on behalf of CBRA: Mr. Grant Buchanan, a partner at McCarthy Tétrault, President of CBRA since it was founded and its operating head since 2000, and Ms. Diana Cafazzo, then a partner at McMillan Binch, CBRA's corporate counsel from the beginning. They provided the Board with an overview of the manner in which CBRA got involved in this market, of how the market has evolved and of the reasons behind various changes made over time to the terms and conditions of licences. They also helped in dealing with a number of legal and other issues, some of which were addressed in written submissions filed on May 17, 2004.

Evidence and argument concerning commercial media monitors occupied the bulk of the record. For this reason, that tariff is addressed first. Matters concerning non-commercial monitors are addressed subsequently, to the extent they differ from those raised with respect to commercial monitors.

I. THE COMMERCIAL MEDIA MONITORING TARIFF

A. BACKGROUND

Pursuant to section 3 of the *Act*, broadcasters hold rights in certain programs, including the right to reproduce those programs. Pursuant to section 21 of the *Act*, broadcasters also hold rights in their communication signal, including the right to fix that signal.

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[1] See Appendix A.

[2] Though Bowdens, NewsWatch, J&A MediaServices, British Columbia, Ontario and Alberta reached agreements, only Ontario formally withdrew its objection. Manitoba also withdrew its (late) objection. ACNielsen, Nielsen Media Research and Canada reached agreements in principle on the eve of the hearings.

[3] Mediascan (absorbed by Bowdens) and*Réseau Caisse Chartier et associés* (absorbed by Transcriptions Verbatim).

[4] Ad-Watch Inc., Ashworth Associates, *l'Opéra de Québec,* BDDS Shandwick, *la Corporation de gestion des marchés publicsde Montréal,* Imperial Oil Ltd., Intermedia and Broadcast Monitoring Services Ltd. either did not participate in the hearings or ceased responding to the Board's notices.

A commercial media monitor systematically monitors sources of information with a view to providing its clients with information that interests them. Monitors provide copies of print materials; this is not relevant in these proceedings. Monitors also provide excerpts, transcripts and other forms of information concerning radio and television programs, mostly news, information and public affairs. In order to do so, monitors reproduce programs and fix the communication signals that carry them. To do either, they require a licence.

CBRA started as a retransmission collective in 1989. It now is the exclusive agent for the vast majority of Canadian private, radio and television, conventional and cable broadcasters in the media monitoring market.[5] In that role, CBRA is governed by sections 70.1 to 70.6 of the *Act*, sometimes referred to as the general regime. CBRA has the option of negotiating individual licence agreements or seeking certification of a tariff that applies to all users other than those who have signed licence agreements. CBRA chose to do both: after filing its proposed tariffs, it started negotiations with a variety of monitors. Its first agreement was with Canada's largest monitoring firm, Bowdens. That agreement took effect in August, 2000.[6] CBRA now has agreements with ten commercial monitors representing at least 95 per cent of the market in Canada.[7]

CBRA wants to provide monitors with all the rights they need to maintain their current business practices, but no more than those rights. The proposed statements that were published in the *Canada Gazette* (the original tariff proposal) were based on certain assumptions about how monitors operate, what they provide to their customers and what rights they need in order to do so. Many of those assumptions proved to be incorrect and had to be set aside. As a result, the terms of the licences CBRA has issued to date differ significantly from the original tariff proposal. A few examples will help to illustrate this.

First, the original tariff proposal allowed a monitor to reproduce no more than five minutes of a single work and to fix no more than one hour of a communication signal in any given 24-hour period. In fact, monitors record programming without interruption; only then do they produce the excerpts they provide to their clients. A licence or tariff that does not allow uninterrupted taping is of no use to monitors. As a result, the licences issued to date allow a monitor to reproduce programs and fix communication signals in their entirety[8] and, with some allowance, to reproduce no more than two excerpts of no more than ten minutes per program.[9]

Second, the original tariff proposal allowed a monitor to sell, rent, make available or otherwise commercially exploit reproductions and fixations. The licences are more specific with respect to the uses they allow. A monitor can sell or rent copies of excerpts. It can allow selected customers

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[5] CBRA does not represent the Canadian Broadcasting Corporation, educational broadcasters such as TVO or *Télé-Québec*,foreign broadcasters or rights owners otherthan private broadcasters.

[6] At the time, Rogers, a member of CBRA, may have held a significant interest in Bowdens. This clearly was no longer the case at the time of the hearings.

[7] In a letter to the Board dated March 16, 2001, CBRA estimated that at the time it signed its first licence agreement and beforeit absorbed Mediascan, Bowdens accountedfor "the majority of the Canadian market".

[8] CBRA does not purport to grant a licence inprogramming that is not part of its repertoire.

[9] See sections 4 and 5 of the commercialmedia monitoring tariff.

to listen to audio recordings of excerpts by telephone or to receive video recordings. It can maintain a database of excerpts to which customers have access. The conditions attached to the various uses allowed under the licence also are more detailed. Access to a database of excerpts is subject to stringent controls. Monitors are required to degrade the video quality of excerpts they provide, presumably to ensure that they are not a substitute to the actual program.

Third, the rate base originally included only amounts paid in connection with the sale, rental, making available or other commercial exploitation of CBRA's repertoire. However, monitors derive a significant part of their income from using copies of programs and broadcast signals in a manner that does not require a licence. A client may pay a regular fee to be kept informed of what is being said on a particular issue without ever receiving a program excerpt. Clients receive summary notes[10] and monitoring notes;[11] though these are not broadcasters' works, they cannot be prepared without a fixation of the broadcasters' programs and signals. To account for this activity, the licences now provide that royalties are paid on all income derived from the use of CBRA works or CBRA signals, even though that use may not itself require a CBRA licence.[12]

Fourth, the licences limit the use of excerpts in ways that were not contemplated in the original tariff proposal. Limits are put on how long a monitor is entitled to retain copies and excerpts. Broadcasters can impose an embargo on certain materials. Monitors are only allowed to deal with corporations and organizations that have agreed to comply with certain minimum terms of use.[13] CBRA considers these additional conditions as the logical consequence of allowing further uses that were not permitted in the original tariff proposal. For example, limits are now imposed on the amount of time copies and excerpts can be kept as a result of the licences allowing uninterrupted taping.

In essence, having gained a better understanding of how media monitors conduct their business, CBRA was able to design, with their help, terms of licence that are much better suited to the needs of the market than the original tariff proposal ever would have been. CBRA now asks that the Board help it go one step further. As part of its evidence, CBRA filed a new tariff proposal. As it mostly mirrors the terms and conditions of the licences issued to date, the new tariff proposal is significantly different from the original tariff proposal. The significance of those differences is addressed below.

B. ANALYSIS

The situation the Board is asked to address is an unusual one. CBRA has reached agreements with users representing virtually all the relevant market. These agreements have been in place long enough for CBRA to argue, not unreasonably, that they are workable. Subject to the comments received from persons who are no longer participating in the process, no one is taking

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[10] Defined as "an extended written summaryof a ... program".
[11] Defined as "a short written description of a ... program".
[12] See the definition of "CBRA-related grossincome" in the commercial media monitoring tariff.
[13] The purpose of this provision, which is reflected in subsection 11(2) of the tariff, isto ensure that monitors deal only with persons who are able to live up to the conditions that are implicitly imposed on customers by the terms of the CBRA licence. That being said, monitors apparently only serve corporate customers in any event.

issue with any of the terms of the new tariff proposal. It was up to the Board to identify many of the issues that are addressed in the rest of these reasons, some of which for future reference as it would not be appropriate or possible to dispose of them now. Despite CBRA's significant efforts to explain the nature of the market to which the tariff will apply, the Board still felt in the end that it would be certifying a tariff based on an understanding of the media monitors' business practices and needs that it finds less than fully satisfactory.

C. LEGAL ISSUES

The Board raised several legal issues with CBRA. Only two warrant a mention in these reasons.

D. ULTRA PETITA

The new tariff proposal probably is more demanding for some than the original tariff proposal. The Board asked CBRA to discuss the applicability of the *ultra petita* principle in the circumstances.

When *ultra petita* applies, a decision-maker cannot grant more than what was asked unless the claim is amended. CBRA argues that the principle is not relevant in this instance. Users are not materially prejudiced by the proposed changes, which are mostly procedural in nature. Many changes exist because the tariff now authorizes more uses; attaching conditions to new uses is not an additional burden. Finally, the agreements reached with users demonstrate that the new tariff proposal is fair.

These arguments have merit. Having said this, a less contextual examination of the *ultra petita* principle is required.

The Board has always considered it possible to set higher rates if this could be done fairly, such as when all the affected users can be made aware of that possibility. There are cogent reasons why *ultra petita* ought not to apply in tariff setting proceedings generally, and in proceedings before the Board specifically.

Ultra petita supports the proposition according to which parties generally control the issues, the process, evidence, arguments and potential outcomes of a proceeding.[14] As participants exercise less control over the proceeding, the relevance of the *ultra petita* principle decreases. The Board has the power to certify tariffs; as a result, some measure of control that would otherwise be exercised by rights holders or users is transferred to the Board. To apply the *ultra petita* principle would defeat that transfer of control.

Applying the *ultra petita* principle causes even more problems in setting related terms and conditions, as opposed to the royalties to be paid for the use of a repertoire. The Board can radically alter a tariff formula. That formula largely dictates what are appropriate terms and conditions; a sensible condition under one formula may become absurd under another.

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[14] In the province of Québec, this is generally known as the "judicial contract": *Droit de la famille - 871*, [1990] R.J.Q. 2107, 2108 (C.A.).

In this instance, applying the *ultra petita* principle would force the Board to certify a tariff that does not reflect the media monitors' business practices. Tailoring tariffs to reflect the business models of users should be encouraged.

There remains the issue of what is fair under the circumstances. Fairness does not require reopening tariff proceedings if nothing useful can be added. Tariffs are regulatory instruments. Being fair in tariff proceedings is not as demanding as in cases affecting individual rights. Some form of notice of the contemplated changes is appropriate in most cases; still, there are instances, such as this one, where no useful purpose can possibly be served by doing so.

In a decision issued on December 14, 2004, the Federal Court of Appeal ruled on an application for judicial review of the Board's most recent private copying decision. One challenge involved the Board having set royalties that were higher than what the rights holders had applied for. The Court concluded that under the circumstances, the Board was entitled to rule as it had.[15] Though limited in its form to the private copying regime, the decision appears to endorse to some extent the analysis outlined above.

E. FAIR DEALING

Shortly before the hearing on this matter, the Supreme Court of Canada issued its decision in the matter of *CCH Canadian Ltd. v. Law Society of Upper Canada*.[16] The decision contains two rulings concerning the concept of fair dealing – more specifically, fair dealing for the purpose of research – that may be relevant to this and other tariffs. The first is that profit-driven research may constitute fair dealing. The second is that the person who facilitates another person's fair dealing may be entitled to the same protection under the *Act* as the first person. Until subsequent judgements clarify the portent of the CCH decision, this leaves open the possibility that certain activities of media monitors may not constitute protected uses for which they would require a licence.

The Board agrees with CBRA that this is neither the time nor the place to dispose of this issue. Even though the issue was alluded to in a number of comments, there is no evidence on the record of these proceedings that would allow the Board to assess the extent, if any, to which the monitors' use of the repertoire may constitute fair dealing for the purpose of research. However, the Board hesitates to be as dismissive as CBRA appeared to be as to the relevance of the argument. It would appear at least arguable that some monitoring activity may constitute research or the facilitation of research, some of which may in turn constitute fair dealing. In any event, this is a matter best left to another time.

F. THE RATE

Initially, CBRA sought royalties of 25 per cent of a monitor's income for the reproduction of the broadcasters' programs and 25 per cent for the fixation of their signals. It soon became clear that even a rate of 10 per cent would prove to be a stumbling block. Apparently, individual

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[15] *Canadian Private Copying Collective v.Canadian Storage Media Alliance* 2004 F.C.A. 424, paras. 169 to 179.
[16] [2004] 1 S.C.R. 339.

broadcasters in other countries sometimes license media monitors on an *ad hoc* basis for a royalty in the order of 8 per cent. For media monitors, this became a sort of benchmark. On the other hand, media monitors recognized the advantages of dealing with a single collective society for a significant share of the repertoire for which they need a licence, and were willing to pay a premium for the added value this provides. The rate finally agreed upon was 9 per cent.

Comments to the effect that the rate is unreasonably high were not supported by evidence or argument. By contrast, the record establishes that monitors representing the lion's share of the market have been able to pay that rate. The record also tends to establish that in this tariff as in some others,[17] the royalty burden is often passed on to the payor's customers.

One comment raised the possibility that the ability of a monitor to simply pass on the royalty burden to its customers may mean that monitors were less than vigorous in pursuing the best possible terms with CBRA. That is a theoretical possibility that ought to be kept in mind. However, given the record of the proceedings and evidence on foreign practices, the Board concludes that the rate is fair under the circumstances.

G. SPECIFIC TARIFF PROVISIONS

No one objects to the provisions of the new proposed tariff; only a few comments remain. The Board wishes to address certain issues concerning either the rate base or some other provisions, either because comments the Board received take issue with them or because they are sufficiently unusual to warrant attention.

H. NON-APPLICABILITY OF TARIFF

CBRA proposes a clause whereby the tariff does not apply in certain circumstances. The Board understands the importance of this clause to inform commercial and non-commercial media monitors who have signed agreements with CBRA that the tariff does not apply to them. Section 70.191 of the *Act* already stipulates that the approved tariff does not apply where there is an agreement if the agreement is in effect during the period covered by the approved tariff. However, for ease of clarity, the Board has added section 3(5) to the tariff, which has been adjusted to reflect the wording of the *Act*.

I. INCLUDING UNPROTECTED USES IN THE RATE BASE AND RESTRICTING USES AUTHORIZED BY THE ACT

One person commented that royalties should be payable only when the use of CBRA's repertoire is pivotal in the provision of a good or service to a client. This would exclude, for example, summary notes, monitoring notes, access to databases or research fees. CBRA submits that once a licence is required, determining the rate base is an economic issue, not a legal one. The Board agrees with CBRA. A monitor cannot prepare notes, conduct research or provide access to a database of excerpts until it has reproduced a broadcaster's programs and fixed its signal.

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[17] SOCAN's tariff for music played duringreceptions (Tariff 8) is a case in point.

Therefore, it makes sense to include the revenues from these activities in the rate base.

Imposing restrictions on uses already authorized by the *Act* is a different issue. So is any attempt to restrict the use of subject-matters that are not in the collective's repertoire. CBRA argues that this can be done as part of the conditions of the tariff. Copyright holders often purport to impose such restrictions through contracts. That practice is not without controversy: at least one participant disagreed with it. As a matter of policy, the Board is of the view that such restrictions should be avoided. Earlier decisions of the Board limit the uses to which works obtained through a licence can be put; such limits, however, should not normally extend to restricting authorized uses. Neither should there be limits imposed on the use of a work product which is derived from the use of the repertoire when such work product is not part of the repertoire. In the case at hand, for example, section 3 of the tariff provides that copies of excerpts cannot be used except pursuant to the tariff, but does not so provide in the case of summary notes, which probably are independent works created by the monitors.

J. Restrictions on the Number and Length of Excerpts and on the Length of Retention

The licences CBRA has issued to date allow a monitor to reproduce no more than two excerpts of no more than ten minutes per program. Those limits can be exceeded with respect to 10 per cent of excerpts produced in a year. The new tariff proposal is identical to the licences in this respect.

Licences also limit how long excerpts and transcripts can be kept. The new tariff proposal imposed shorter limits in certain respects; however, CBRA now agrees that the limits in the tariff should be the same as in the licences.

One participant views those restrictions as overly onerous. The Board has difficulty understanding how a monitor can restrict itself to only two clips per program. News programs contain many more than two items that will be of interest to some of a monitor's clients. That said, monitors who signed licence agreements clearly considered this arrangement satisfactory for their purposes. Misgivings about these limits, or those pertaining to how long materials can be kept, are otherwise unsupported. Consequently, the same restrictions are included in subsection 5(1) of the tariff.

K. Subdelegation

The Board cannot include provisions in tariffs that grant to a collective society a measure of discretion that could be assimilated to a subdelegation of the Board's powers. The new tariff proposal raised a number of issues in this respect, most of which CBRA successfully addressed.

Thus, it is acceptable to codify in a tariff the manner in which a monitor can apply for a waiver. Subject to any competition law considerations, CBRA can always waive tariff conditions. Codifying the manner for so doing, as in paragraph 8(2)(iv)(*b*) of the tariff, simply provides potential users with additional useful information.

A provision that allows a broadcaster to impose an embargo on works that are otherwise part of

the licensed repertoire is more problematic. At the very least, the circumstances under which this can be done normally should be set out in the tariff. That being said, the reasons invoked by CBRA in support of the provision are eminently practical and for that reason, section 13 of the tariff so provides.

By contrast, either as a matter of law or policy, a tariff should not grant a collective society the discretion to add to the reporting requirements imposed on users.

L. DOVETAILING THE AGREEMENTS AND THE TARIFFS

CBRA submits that through its efforts, it has created a genuine marketplace for media monitoring licences, thereby providing a benchmark the Board can use in setting a tariff. The Board agrees, but only to some extent. For one thing, this appears to be a highly concentrated market, especially since the merger of previously competing firms. For another, it could be argued that once it had filed for a tariff, CBRA was able to deal with media monitors from a position of strength. On the other hand, CBRA did manage to reach virtually identical agreements with nearly all the relevant players. In such a context, the tariff becomes, at least for the time being, not so much the norm as a backdrop that will apply by default where CBRA and a monitoring firm are unable to reach an agreement.

Under those circumstances, differences between the tariff and the licences should be clearly thought out. Moreover, in the case at hand, doubts generally should be resolved in favour of users. All agreements signed to date contain parity clauses that will allow licensees to claim the benefit of the tariff if the tariff is more favourable to them than their licence agreement. On the other hand, if the tariff is more demanding than the agreements, then the monitor who did not sign the agreement will operate under less favourable conditions than those who did.

CBRA was asked to explain the reasons in support of the several differences between the terms of the new tariff proposal and those of the licences. In the end, CBRA agreed that the certified tariff should reflect the terms of the licences in all but a few respects.

The manner in which a monitor is informed of changes in CBRA's membership is a case in point. Appended to each licence is a list of CBRA members that the collective society warrants to be complete. The new proposed tariff is silent on the issue. Yet, that information is crucial to determining what goes into the rate base. The Board agrees with CBRA that merely including in the tariff a list that is likely to change over time is not the solution. The Board disagrees that it would be sufficient to rely on the obligation imposed on CBRA pursuant to section 70.11 of the *Act* to answer within a reasonable time all reasonable requests for information about its repertoire. It seems more practical to require, as in section 18 of the tariff, that CBRA provide an updated membership list from time to time or post and maintain such a list on a publicly accessible website.

The licences expressly allow a monitor's customers to internally circulate an item by various electronic means. The new tariff proposal does not. CBRA explained that this was a benefit granted for the first license term to those who had entered into agreements. It apparently intends to reexamine the issue of subsequent reuse by customers, and so does not wish to expand the arrangement to those who "simply shelter under the tariff". The Board sees no reason why such a

restriction should be imposed on those monitors. CBRA is free to withdraw that option from its future licence offerings and to ask that a future tariff be changed accordingly.

M. USE IN LEGAL PROCEEDINGS

CBRA wants the tariff to clearly state that copies made pursuant to the licence are meant strictly for internal use and cannot be used in legal and other proceedings. It does not wish to have its works used in a public forum or seen as endorsing any particular point of view in an adversarial context. The provision may prevent a monitor or its clients from willingly making use of a clip in legal proceedings. It is doubtful that it would prevent an authority empowered to compel the production of documents from ordering that a clip be provided. That being said, paragraph 11(2)(iv) of the tariff will so allow for the time being, on an experimental basis.

N. REDUNDANT PROVISIONS

The new tariff proposal includes provisions that may be redundant. Such is the case with section 9 which authorizes monitors to create monitoring notes and summary notes. That permission would be necessary only if such were derivative works, something which is at least doubtful. That being said, it would appear that monitors "appreciate the comfort" of an abundance of caution. Consequently, that provision and others are retained, sometimes in a modified form, in the certified tariff.

O. REPORTING REQUIREMENTS

The original tariff proposal required monitors to provide CBRA with the name of the recipient of each item supplied. CBRA is now content with requiring monitors to supply a list of customers once a year. Misgivings were raised about this on three accounts. First, at least one member of the CBRA offers a service that, according to one participant, competes with its own. Second, customer lists are proprietary information, and subject to some of the provisions of provincial and federal privacy legislation. Third, that information is of no apparent use to a collective society; it certainly is not required to effectively distribute royalty payments.

In the Board's view, it is reasonable to require that a monitor provide CBRA with the information it now requests. While it is not needed for the purposes of distribution, the information will allow CBRA to gain a better understanding of the market in which its repertoire is being used. As for concerns about the applicability of privacy legislation, they would appear to be ill-founded: privacy legislation only protects individuals, and subsection 11(1) of the tariff expressly provides that it does not apply to any dealings a media monitor may have with individuals.

The confidentiality concerns that were raised are not without merit. Customer lists often constitute highly sensitive and valuable information. The tariff should prevent that information from being used for purposes other than those for which it is provided. Consequently, section 20 of the tariff provides that CBRA shall treat this information in confidence and not share it in any fashion with its members, except if aggregated in such a way that prevents the sharing of commercially sensitive information.

The Board notes that as in the new tariff proposal, section 26 of the tariff imposes less demanding reporting requirements on monitors whose yearly revenues are less than $100,000.

P. INDEMNITY [SECTIONS 27 AND 28 OF THE TARIFF]

CBRA asks that the tariff provide, as the licences do, that the monitor will indemnify CBRA for damages and other expenses it may incur by reason of the breach of any provision of the tariff. According to CBRA, it is "fairly typical" in copyright licences for the user to indemnify the copyright holder against the consequences of a misuse of the licensed material by either the licensee or its clients. The provision allows CBRA to circumvent the limits imposed by the rules dealing with privity of contract. CBRA's request is acceptable, but only if reciprocated by a similar indemnity in favour of the licensee for anything that CBRA purports to grant. For example, if a monitor fixes the signal of a broadcaster who is on the latest list of CBRA members and then the broadcaster leaves the collective society, CBRA, not the monitor, should bear the consequences. Notably, the licences issued by CBRA do provide for such an indemnity.

Q. INTEREST ON LATE PAYMENTS

The Board's tariffs provide that interest on late payments is calculated daily at the Bank of Canada Rate plus one per cent and that interest does not compound. CBRA asked that the interest be set at the prime rate of the Toronto-Dominion Bank plus one per cent and that interest compound monthly, in accordance with the provision in the agreements.

The Board concludes that it would not be appropriate to adopt the proposed interest clause without further justification. It also considers that the matter could be the subject of a wider debate in the context of another proceeding where the point of view of other interested parties could be heard.

II. THE NON-COMMERCIAL MEDIA MONITORING TARIFF

Some institutions outsource their media monitoring; others do their own. Early on in their negotiations with CBRA, commercial monitors expressed concerns that if no tariff applied to institutions who conduct their own media monitoring, the demand for commercial services might artificially decrease. Partly as a result of those discussions, CBRA filed a proposed statement of royalties targeting these users, which was also revised as part of its evidence.

CBRA's new proposal targets federal and provincial government departments, agencies and Crown corporations, Parliament and legislative assemblies, and federal and provincial political parties and organizations. CBRA did not seek a tariff that would apply to municipalities, private corporations, not-for-profit associations or charitable institutions. At the time of the hearings, CBRA had signed agreements with three provincial governments and had reached an agreement in principle with part of the Canadian government.[18]

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[18] The Attorney General of Canada acted on behalf of a number of federal departments and agencies. The House of Commons, the Senate and the Library of Parliament were included in the negotiations with CBRA. Crown

The new proposed tariff is somewhat confusing in its definition of "monitor", particularly at subsections (c) and (d). It includes the staff of senators, members of Parliament, members of a provincial or territorial legislature or of any party represented in the House or a legislature, but makes no mention of these institutions' members. The definition also targets registered parties, political organizations and constituency offices.

In the Board's view, this definition is repetitive and at the same time over-inclusive and under-inclusive. The Board is willing to certify a tariff that extends to members of Parliament and of legislative assemblies. It also certifies a tariff that applies to registered parties. There is no need to mention represented parties as they are also registered. The Board takes for granted that such a tariff extends to the actions of these institutions and their members' staff.

The Board also believes that a specific reference to constituency offices is redundant, given that those offices are operated by members of Parliament or of legislative assemblies who are already covered by the definition.

The Board is not willing to extend the ambit of the tariff to such vaguely defined entities as political organizations. It notes that there was a complete absence of evidence as to the relevance of a tariff to those potential users and expects to learn more in subsequent proceedings. Definitions of "government", "monitor" and "government user" have been adjusted accordingly.

CBRA asks that the non-commercial tariff mirror the commercial tariff as much as possible. The Board agrees. Main differences concern the rate base, the purpose of the monitoring and the adaptation of terms and conditions to the peculiar circumstances of non-commercial monitors. For example, the rate base has to be different. Non-commercial monitors do not have a revenue stream from their monitoring activities. Gross monitoring costs are used instead.

Other differences that CBRA proposed be made between the commercial and non-commercial tariffs are more difficult to understand. Such is the case with the contents of electronic databases, which CBRA would like to be more restrictive in the non-commercial tariff than in the commercial tariff. In this and other cases where the Board is unconvinced by the underlying rationale put forward by CBRA, no distinction has been made.

CBRA also suggests that some differences should exist between the non-commercial tariff and the non-commercial licences. Some are the natural consequence of differences that exist between a licence and a tariff. It is possible in a licence to provide added clarity to the definition of the rate base or the determination of the uses that will be allowed. That is not possible in the case of a tariff that will apply to circumstances that cannot be fully predicted.

In all other respects, the certified tariff has been adjusted to reflect the commercial tariff and the existing licences as closely as possible. Finally, the Board wishes to underline that a section has been added in respect of exemptions regarding below-threshold media monitoring costs, reflecting the exemptions afforded in the commercial tariff.

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corporations were not represented bythe Attorney General at any time during the process.

Following up on its agreement in principle with the Attorney General of Canada, CBRA proposed a further set of provisions targeting institutions or groups of institutions with more than 15 decentralized monitoring offices, generating less than $100,000 in royalties in a given year. In exchange for agreeing to pay a rate of 14 per cent (instead of 9), they would be entitled to make as many excerpts per program pertaining to government matters as necessary, some of the offices would not be required to diminish the quality of digital excerpts and some of the archiving and reporting requirements would be reduced. The addition of this option would overly complicate the text of the tariff. For one thing, the Board cannot see who else might fit those conditions. Consequently, the certified tariff does not offer this additional option.

A. TERM OF THE TARIFFS AND AMOUNTS GENERATED THEREBY

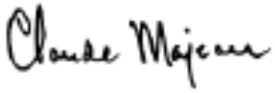
The commercial tariff takes effect on January 1, 2000. The non-commercial tariff takes effect on January 1, 2001. Those are the dates for which the tariffs had been filed. This is what CBRA asked for. Media monitors who have not signed agreements need access to the CBRA repertoire at a set price, as do those who have signed agreements that do not cover the entire period for which the tariff is in effect. The certified tariffs contain transitional provisions that grant monitors additional time to comply with their obligations relating to reporting and the destruction of materials with respect to the period elapsed before the tariffs were published.

CBRA estimates that the commercial and non-commercial licences will generate close to $2 million for the years 2000 to 2003, or, on average, $500,000 per year. Its estimates for future years are somewhat higher. Based on an assumed value of $10 million for the commercial electronic monitoring industry, the CBRA estimates that the commercial licences and tariff will generate between $700,000 and $750,000 a year. It is to be expected that as CBRA relies more and more on the tariff as legal basis for the collection of royalties, the share of that amount attributable to the tariff will increase over time.

The amount that the non-commercial tariff may generate is considerably harder to estimate. For one thing, non-commercial media monitors are free to use the services of commercial media monitors if they so wish. In the end, however, CBRA offered the view that the non-commercial licences and the non-commercial tariff together should generate royalties in the order of $100,000 to $125,000 per year.

B. CONCLUSION

The Board notes that throughout this process, CBRA was willing to listen to the concerns of users and to thoroughly respond to the Board's numerous questions. The Board also notes the willingness displayed by the Attorney General of Canada in helping gather and generate information that made it possible to better understand how media monitoring takes places within the federal government.



Claude Majeau
Secretary General

APPENDIX A

Agreements entered into between CBRA and Commercial Media Monitors and filed with the Copyright Board pursuant to section 70.5 of the *Copyright Act*

- CBRA - Bowdens Media Monitoring ***(See Note 1)***
  Agreement reached August 14, 2000
  Period: August 14, 2000 to December 31, 2002
  Updated agreement reached March 21, 2002
  Period: November 1, 2001 to December 31, 2003 (extended to December 31, 2004, as per agreement reached on October 20, 2003)

- CBRA - Transcriptions Verbatim Inc. ***(See Note 2)***
  Agreement reached November 29, 2001
  Period: February 1, 2001 to December 31, 2003 (extended to December 31, 2004, as per agreement reached on October 20, 2003)

- CBRA - NewsWatch ***(See Note 3)***
  Agreement reached November 1, 2002
  Period: November 1, 2001 to December 31, 2003 (extended to December 31, 2004, as per agreement reached on October 31, 2003)

- CBRA - Carver Communications
  Agreement reached August 20, 2002
  Period: November 1, 2001 to December 31, 2003 (extended to December 31, 2004, as per agreement reached on December 5, 2003)

- CBRA - Communication Demo Inc. (CDI)
  Agreement reached August 21, 2002
  Period: February 1, 2001 to December 31, 2003 (extended to December 31, 2004, as per agreement reached on December 1, 2003)

- CBRA - Press News Limited
  Agreement reached September 9, 2002
  Period: February 1, 2001 to December 31, 2003 (extended to December 31, 2004, as per agreement reached on October 20, 2003)

- CBRA - Medianor Inc.
  Agreement reached September 10, 2002
  Period: February 1, 2001 to December 31, 2003 (extended to December 31, 2004, as per agreement reached on November 13, 2003)

- CBRA - DNA13 Inc.
  Agreement reached April 25, 2003
  Period: November 1, 2001 to December 31, 2003 (extended to December 31, 2004, as per

agreement reached on November 6, 2003)

- CBRA - J&A Media Services Inc. ***(See Note 4)***
  Agreement reached May 30, 2003
  Period: April 1, 2001 to December 31, 2003 (extended to December 31, 2004, as per agreement reached on November 17, 2003)

- CBRA - CNW Group Ltd.
  Agreement reached December 13, 2004
  Period: February 1, 2001 to December 31, 2005

Note 1*: Bowdens Media Monitoring was an objector to CBRA's proposed tariff for 2000-2002. Bowdens has absorbed Mediascan who was also an objector to CBRA's proposed tariff for the same years.*

Note 2: *Transcriptions Verbatim is not an objector, however it has absorbed Réseau Caisse, Chartier et associés inc. who was an objector to CBRA's proposed tariff for 2000-2002.*

Note 3: *NewsWatch was an objector to CBRA's proposed tariff for 2000-2002.*

Note 4: *J&A Media Services was an objector to CBRA's proposed tariffs for 2000-2002 and 2003-2005.*

Agreements entered into between CBRA and Non-Commercial Media Monitors and filed with the Copyright Board pursuant to section 70.5 of the *Copyright Act*

- CBRA - Government of Ontario ***(See Note 1)***
  Agreement reached July 14, 2003
  Period: January 1, 2001 to December 31, 2005

- CBRA - Government of Alberta ***(See Note 2)***
  Agreement reached March 10, 2004
  Period: January 1, 2001 to December 31, 2005

- CBRA - Government of British Columbia ***(See Note 3)***
  Agreement reached March 10, 2004
  Period: January 1, 2001 to December 31, 2005

Note 1: *Government of Ontario was an objector to CBRA's proposed tariffs for 2001-2002 and 2003-2005.*

Note 2: *Government of Alberta was an objector to CBRA's proposed tariffs for 2001-2002 and 2003-2005.*

Note 3: *Government of British Columbia was an objector to CBRA's proposed tariffs for 2003-2005.*