Annual Report 2012-13

Copyright Board of Canada

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Board Members and Staff

as of March 31, 2013

Chairman:	The Honourable William J. Vancise, Q.C.
Vice-Chairman & Chief Executive Officer:	Claude Majeau
Member:	J. Nelson Landry
Secretary General:	Gilles McDougall
General Counsel:	Mario Bouchard
Legal Counsel:	Sylvain Audet Valérie Demers
Director, Research and Analysis:	Dr. Raphael Solomon
Economic Analyst:	Marjolaine Jarry
Assistant Clerks:	Nadia Campanella Maryse Choquette Roch Levac
Registry Officers:	Sid J. Bateman Tina Lusignan
Manager, Corporate Services:	Nancy Laframboise
Financial and Administrative Assistant:	Joanne Touchette
Technical Support Officer:	Michel Gauthier

Chairman's Message

This is the twenty-fifth Annual Report of the Copyright Board of Canada and the eighth annual report during my tenure as Chairman in which I described the Board's activities during the past fiscal year.

In 2012-13, the Board held three hearings dealing with: the simulcasting and webcasting of sound recordings; private copying; and, the copying of documents by provincial and territorial governments.

During the fiscal year the Board issued a total of 13 final or interlocutory decisions. Five dealt with the public performance of music: recorded music accompanying live events; a variety of general purpose tariffs for the Society of Composers, Authors and Music Publishers of Canada (SOCAN); recorded music accompanying physical activities; music transmitted by online music services; and, musical works used for ringtones and ringbacks. Three dealt with the reproduction of music: musical works embodied in cinematographic works; an interim decision reopening the tariff for musical works embodied in cinematographic works; and, an interim decision in respect of the Commercial Radio Tariff. The Board also issued a decision on the royalties payable for the copying of documents in elementary and secondary schools, following a decision of the Supreme Court of Canada remitting the matter to the Board to redetermine.

Three decisions dealt with arbitration involving either the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) and the Canadian Broadcasting Corporation (CBC) or SODRAC and Astral. Finally, one interim decision dealt with the retransmission of distant television signals.

All of these decisions are summarized in this report, along with Court decisions, and in particular those of the Supreme Court of Canada.

During this fiscal year, the Board also issued eight licenses pursuant to the provisions of the *Copyright Act* which permits the use of published works when copyright owners cannot be located.

I was invited to represent the Board in a panel session entitled *Music Industry Issues including Collecting Societies*, at the 20th Annual Conference on Intellectual Property Law & Policy at Fordham University.

In 2012, Jacinthe Théberge left the Board after serving a five-year term as full-time member of the Board. I thank her for her dedicated service and contribution to the Board.

I wish to thank my colleagues as well as the Board's staff for their support and assistance during this very busy year. The Board is fortunate to have qualified and dedicated employees who truly bring meaning to the concept of public service, otherwise the work of the Board would be impossible to achieve. Their expertise and work ethic make the work of the Board possible.

The Honourable William J. Vancise, Q.C.

Mandate of the Board

The Copyright Board of Canada (the "Board") was established on February 1, 1989, as the successor of the Copyright Appeal Board. The Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective society. Moreover, the Board has the right to supervise agreements between users and licensing bodies, issue licenses when the copyright owner cannot be located and may determine the compensation to be paid by a copyright owner to a user when there is a risk that the coming into force of a new copyright might adversely affect the latter.

The *Copyright Act* (the "*Act*") requires that the Board certify tariffs in the following fields: the public performance or communication of musical works and of sound recordings of musical works, the retransmission of distant television and radio signals, the reproduction of television and radio programs by educational institutions, and private copying. In other fields where rights are administered collectively, the Board can be asked by a collective society to set a tariff; if not, the Board can act as an arbitrator if the collective society and a user cannot agree on the terms and conditions of a license.

The responsibilities of the Board under the *Act* are to:

- certify tariffs for
  - the public performance or the communication to the public by telecommunication of musical works and sound recordings;
  - the doing of any protected act mentioned in sections 3, 15, 18 and 21 of the Act, such as the reproduction of musical works, of sound recordings, of performances and of literary works; and,
  - the retransmission of distant television and radio signals or the reproduction and public performance by educational institutions, of radio or television news or news commentary programs and all other programs, for educational or training purposes;
- set levies for the private copying of recorded musical works;
- set royalties payable by a user to a collective society, when there is disagreement on the royalties or on the related terms and conditions;
- rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals, when the copyright owner cannot be located;
- examine agreements made between a collective society and a user which have been filed with the Board by either party, where the Commissioner of Competition considers that the agreement is contrary to the public interest;
- receive such agreements with collective societies that are filed with it by any party to those agreements within 15 days of their conclusion; and,
- set compensation for formerly unprotected acts in countries that later join the Berne Convention, the Universal Convention or the Agreement establishing the World Trade Organization.

Finally, the Minister of Industry can direct the Board to conduct studies with respect to the exercise of its powers.

Operating Environment

Historical Overview

Copyright collective societies were introduced to Canada in 1925 when PRS England set up a subsidiary called the Canadian Performing Rights Society (CPRS). In 1931, the *Copyright Act* was amended in several respects. The need to register copyright assignments was abolished. Instead, CPRS had to deposit a list of all works comprising its repertoire and file tariffs with the Minister. If the Minister thought the society was acting against the public interest, he could trigger an inquiry into the activities of CPRS. Following such an inquiry, Cabinet was authorized to set the fees the society would charge.

Inquiries were held in 1932 and 1935. The second inquiry recommended the establishment of a tribunal to review, on a continuing basis and before they were effective, public performance tariffs. In 1936, the *Act* was amended to set up the Copyright Appeal Board.

On February 1, 1989, the Copyright Board of Canada took over from the Copyright Appeal Board. The regime for public performance of music was continued, with a few minor modifications. The new Board also assumed jurisdiction in two new areas: the collective administration of rights other than the performing rights of musical works and the licensing of uses of published works whose owners cannot be located. Later the same year, the *Canada-US Free Trade Implementation Act* vested the Board with the power to set and apportion royalties for the newly created compulsory licensing scheme for works retransmitted on distant radio and television signals.

Bill C-32 (*An Act to amend* the *Copyright Act*) which received Royal Assent on April 25, 1997, modified the mandate of the Board by adding the responsibilities for the adoption of tariffs for the public performance and communication to the public by telecommunication of sound recordings of musical works, for the benefit of the performers of these works and of the makers of the sound recordings ("the neighbouring rights"), for the adoption of tariffs for private copying of recorded musical works, for the benefit of the rights owners in the works, the recorded performances and the sound recordings ("the home-taping regime") and for the adoption of tariffs for off-air taping and use of radio and television programs for educational or training purposes ("the educational rights").

The *Copyright Modernization Act* (Bill C-11) received Royal Assent on June 29, 2012, and many of its provisions came into force on November 7, 2012. Though this legislation does not change the mandate of the Board or the way it operates, it provides for new rights and exceptions that will affect the Board's work.

The coming into force of new distribution and making available rights for authors, performers and makers of sound recordings, and the addition of education, parody and satire as allowable fair dealing purposes may affect existing and future tariffs or licences. New or modified exceptions dealing with non-commercial user-generated content, reproductions for private purposes, program copying for the purpose of time-shifting, backup copies, ephemeral copies by broadcasting undertakings and certain activities of educational institutions, among others, may affect some uses that are or may be subject to a Board tariff.

General Powers of the Board

The Board has powers of a substantive and procedural nature. Some powers are granted to the Board expressly in the *Act* and some are implicitly recognized by the courts.

As a rule, the Board holds hearings. No hearing will be held if proceeding in writing accommodates a small user that would otherwise incur large costs. The hearing may be dispensed with on certain preliminary or interim issues. No hearings have been held to date for a request to use a work whose owner cannot be located. Information is obtained either in writing or through telephone calls.

The examination process is always the same. Tariffs come into effect on January 1. On or before the preceding March 31, the collective society must file a statement of proposed royalties which the Board then publishes in the *Canada Gazette*. Users (or, in the case of private copying, any interested person) or their representatives may object to the statement within 60 days. The collective society and the objectors present oral and written arguments. After deliberation the Board certifies the tariff, publishes it in the *Canada Gazette*, and provides written reasons for its decision.

Guidelines and Principles Influencing the Board's Decisions

The decisions the Board makes are constrained in several respects. These constraints come from sources external to the Board: the law, regulations and judicial pronouncements. Others are self-imposed, in the form of guiding principles that can be found in the Board's decisions.

Court decisions also provide a large part of the framework within which the Board operates. Most decisions focus on issues of procedure, or apply the general principles of administrative decision-making to the specific circumstances of the Board. However, the courts have also set out several substantive principles for the Board to follow or that determine the ambit of the Board's mandate or discretion.

The Board also enjoys a fair amount of discretion, especially in areas of fact or policy. In making decisions, the Board itself has used various principles or concepts. Strictly speaking, these principles are not binding on the Board. They can be challenged by anyone at any time. Indeed, the Board would illegally fetter its discretion if it considered itself bound by its previous decisions. However, these principles do offer guidance to both the Board and those who appear before it. In fact, they are essential to ensuring a desirable amount of consistency in decision-making.

Among those factors, the following seem to be the most prevalent: the coherence between the various elements of the public performance of music tariffs; the practicality of the administration to avoid tariff structures that make it difficult to administer the tariff in a given market; the search for non-discriminatory practices; the relative use of protected works; the taking into account of the Canadian environment; the stability in the setting of tariffs that minimizes disruption to users; as well as the comparisons with "proxy" markets and comparisons with similar prices in foreign markets.

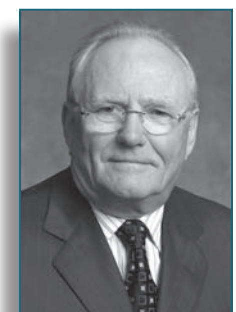
Members

Board members are appointed by the Governor in Council to hold office during good behaviour for a term not exceeding five years. They may be reappointed once.

The *Act* states that the Chairman must be a judge, either sitting or retired, of a superior, county or district court. The Chairman directs the work of the Board and apportions its caseload among the members.

The *Act* also designates the Vice-Chairman as Chief Executive Officer of the Board, exercising direction over the Board and supervision of its staff.

Chairman

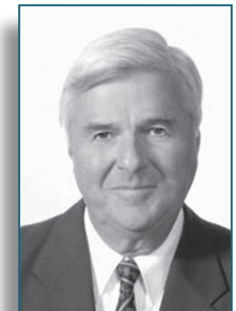


The Honourable William J. Vancise, Q.C., a retired justice of the Court of Appeal for Saskatchewan, was appointed part-time Chairman of the Board in May 2004 and reappointed in 2009 for a five-year term. The Honourable William J. Vancise was appointed to the Court of Queen's Bench in 1982 and to the Court of Appeal for Saskatchewan in November 1983 where he served until he retired in January 2013. In 1996, he was appointed Deputy Judge of the Supreme Court of the Northwest Territories. He earned an LL.B. from the University of Saskatchewan in 1960 and was called to the Saskatchewan Bar in 1961. He joined Balfour and Balfour as an associate in 1961 and in 1963 he was named a partner at Balfour, McLeod, McDonald, Laschuk and Kyle, where he became the managing partner in 1972. The Honourable William J. Vancise received his Queen's Counsel designation in 1979.

Vice-Chairman & Chief Executive Officer

Claude Majeau was appointed as full-time Vice-Chairman and Chief Executive Officer in August 2009 for a five-year term. He occupied the position of Secretary General of the Copyright Board from 1993 until his appointment as Vice-Chairman. Before joining the Board, Mr. Majeau worked for the Department of Communications of Canada from 1987 to 1993 as Director (Communications and Culture) for the Quebec Region. From 1984 to 1987, he was Chief of Staff to the Deputy Minister of the same department. Before 1984, he occupied various positions dealing with communications and cultural industries and public policy. Mr. Majeau earned an LL.B. from the Université du Québec à Montréal in 1977 and has been a member of the Barreau du Québec since 1979.

Member



J. Nelson Landry was appointed in February 2010 as a part-time member for five years. Since 2001, Mr. Landry is serving as a domain name arbitrator for the World Intellectual Property Organisation, WIPO. From 2002 to 2005, he was an instructor of the Patent Agent Training Course – Infringement and Validity at the Intellectual Property Institute of Canada. In 2003, he taught part-time management of intellectual property at the MBA level at the *Hautes Études Commerciales* of the *Université de Montréal* and from 1969 to 2002, Mr. Landry was a lawyer at Ogilvy Renault where he retired as senior partner in 2002. Mr. Landry obtained a BA in 1959 and a BSc in 1965 from the *Université de Montréal*. He also graduated with a B.C.L. from McGill University in 1968 and was called to the Québec Bar in 1969.

*Note: Detailed information on the Board's resources, including financial statements, can be found in its Report on Plans and Priorities for 2012-13 (Part III of the Estimates) and its Performance Report for 2012-13. These documents are or will soon be available on the Board's Web site (**www.cb-cda.gc.ca**).*

Public Performance of Music

Background

The provisions beginning with section 67 of the *Act* apply to the public performance of music or the communication of music to the public by telecommunication. Public performance of music means any musical work that is sung or performed in public, whether it be in a concert hall, a restaurant, a hockey stadium, a public plaza or other venue. Communication of music to the public by telecommunication means any transmission by radio, television or the Internet. Collective societies collect royalties from users based on the tariffs approved by the Board.

Filing of Tariff Proposals

In March 2013, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and the Re:Sound Music Licensing Company (Re:Sound) filed their respective statements of proposed royalties to be collected in 2014; some tariffs cover more than one year.

Hearings

During the fiscal year, the Board held one hearing, concerning Re:Sound Tariffs 8.A and 8.B (Simulcasting and Webcasting; Semi-Interactive Webcasting). The hearing took place from September 24 to October 4 and on November 6, 2012.

Decisions

Six decisions were rendered during the fiscal year, as follows:

May 25, 2012 – Re:Sound Tariff 5 (Use of Music to Accompany Live Events, 2008-2012)

On March 30, 2007, Re:Sound filed its tariff dealing with public performance and communication to the public by telecommunication of recorded music to accompany live events for the years 2008 to 2012. The Hotel Association of Canada (HAC) was the only objector to the proposed tariff. On March 20, 2009, the Board granted intervenor status with full participation rights to a certain number of parties, regrouped as the Arts objectors, Festivals objectors, Hospitality objectors and Sports objectors.

Following negotiations of agreements between the parties, Re:Sound proposed, on June 15, 2010, a new text for the tariff, consisting of the following parts:

- Part A: recorded music accompanying live entertainment in cabarets, cafes, clubs, restaurants, roadhouses, taverns and similar establishments;
- Part B: receptions, conventions, assemblies and fashion shows;
- Part C: karaoke bars and similar establishments;
- Part D: festivals, exhibitions and fairs;
- Part E: circuses, ice shows, fireworks displays, sound and light shows and similar events;
- Part F: parades; and
- Part G: parks, streets and other public areas.

Re:Sound requested that the Board certify these parts of the tariff, consistent with the agreements it had signed with the parties.

Before certifying a tariff based on agreements, it is usually preferable to examine: (a) the extent to which the parties to the agreements can speak for all users and (b) if the arguments put forward by former parties or third-party users were taken into account.

The Canadian Restaurant and Foodservices Association and HAC, which represent, respectively, more than 30,000 restaurant members and more than 90 per cent of hotels in Canada, agreed to Parts A to C of the proposed tariff. Parts D to G were agreed to by the Festivals objectors. The Board concluded that these represented the interest of these parts of the tariff. Having reviewed the comments and arguments offered by former parties and non-parties, the Board also concluded that all issues relevant to these proceedings had been addressed.

Even though no objector raised the question, the Board questioned the parties about the differences between the proposed royalty rates for the different Parts of the tariff and the corresponding SOCAN tariffs. Re:Sound explained the differences between the rates were the result of an overall compromise between Re:Sound and the objectors, in order to set the tariffs without a hearing. They took into account the difference between the rights administered by the two collective societies and the fact that the SOCAN rates had not been revised for a long time.

The rates certified by the Board were as follows:

<table>
<tr><th>Tariff Part</th><th>Title</th><th colspan="3">Royalties</th><th>Minimum</th></tr>
<tr><td>5.A</td><td>Recorded music accompanying live entertainment in cabarets, cafes, clubs, restaurants, roadhouses, taverns and similar establishments</td><td colspan="3">0.9 per cent of compensation paid for entertainment</td><td>$37.64</td></tr>
<tr><td rowspan="4">5.B</td><td rowspan="4">Receptions, conventions, assemblies and fashion shows</td><td>1-100 persons of capacity</td><td>$9.25 without dancing</td><td>$18.51 with dancing</td><td rowspan="4">n/a</td></tr>
<tr><td>101-300 persons of capacity</td><td>$13.30 without dancing</td><td>$26.63 with dancing</td></tr>
<tr><td>301-500 persons of capacity</td><td>$27.76 without dancing</td><td>$55.52 with dancing</td></tr>
<tr><td>More than 500 persons of capacity</td><td>$39.33 without dancing</td><td>$78.66 with dancing</td></tr>
<tr><td rowspan="2">5.C</td><td rowspan="2">Karaoke bars and similar establishments</td><td>no more than 3 days per week</td><td colspan="2">$86.06</td><td rowspan="2">n/a</td></tr>
<tr><td>4 or more days per week</td><td colspan="2">$124.00</td></tr>
</table>

Tariff Part	Title	Royalties			Minimum
5.D	Festivals, exhibitions and fairs	up to 25,000 attendance	$8.39	per day	n/a
		25,001 to 50,001	$21.78		
		50,001 to 75,000	$42.05		
		If more than 75,000 persons attend			
		Up to 100,000	$0.0054	per person	
		next 100,000 patrons	$0.0024		
		next 300,000 patrons	$0.0018		
		additional patrons	$0.0013		
5.E	Circuses, ice shows, fireworks displays, sound and light shows and similar events	0.8 per cent of gross receipts			$61.85
5.F	Parades	$4.39 per float			$32.55
5.G	Parks, streets and other public areas	$16.28 per day, up to $111.47 per 3-month period			n/a

The Board estimated that these rates should generate about 1.8 million dollars in royalties for 2008.

The Arts objectors and Sports objectors, still in negotiations with Re:Sound in relation to parts of the tariff applying to other live events, such as sporting events, concerts, comedy shows, magic shows, theatrical shows and dance performances, nevertheless made comments on the use of background music in Part E of the tariff and on the sharing of information collected in the course of the application of the tariff between Re:Sound and SOCAN.

Part E of the tariff, as proposed, targets all music use during the event. The Arts objectors objected that Part E applied to all music use, foreground or background. According to them, this leads to royalties for background music which are incorrectly based on ticket sales for the event. In its decision, the Board clarified that a live event with only background music is not subject to the proposed tariff, and changed the tariff wording as a result.

The Board agreed with Re:Sound and disagreed with the Sports objectors, taking the position that information sharing among collective societies dealing with the same users for the same rate base is desirable and efficient. The tariff permits, therefore, sharing of information between Re:Sound and SOCAN. Furthermore, other Board tariffs permit the sharing of information between collective societies whose tariffs are not joint. The Board also concluded that the time limits for correcting payment errors should remain the same, even if Re:Sound and the objectors agreed to indefinite limits to correct underpayments and a one year limit to correct overpayments.

June 29, 2012 – SOCAN General Purpose Tariffs

SOCAN filed proposed statements of royalties to be collected for the performance in public or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works for the years 2006 through 2013. These proposals were published in the *Canada Gazette* accompanied by a notice indicating that prospective users or their representatives could object to the tariffs within the prescribed deadlines. Many of the tariffs addressed in these reasons were not objected to and were certified as filed. Some reflect agreements reached between SOCAN and users. Two matters were left in abeyance.

The following proposed tariffs were unchanged from the last time they were certified. No one objected to them. The Board certified them as filed.

For the years 2009-2010

- Tariff 13.A (Public Conveyances – Aircraft)

For the years 2009-2012

- Tariff 2.D (Television – Canadian Broadcasting Corporation)
- Tariff 5.A (Exhibitions and Fairs)
- Tariff 12 (Theme Parks, Ontario Place Corporation and Similar Operations; Paramount Canada's Wonderland and Similar Operations)
- Tariff 13.B (Public Conveyances – Passenger Ships)
- Tariff 13.C (Public Conveyances – Railroad Trains, Buses and Other Public Conveyances, Excluding Aircraft and Passenger Ships)

For the years 2009-2013

- Tariff 2.B (Television – Ontario Educational Communications Authority)

For the years 2011-2012

- Tariff 3 (Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns and Similar Establishments)
- Tariff 7 (Skating Rinks)
- Tariff 8 (Receptions, Conventions, Assemblies and Fashion Shows)
- Tariff 10 (Parks, Parades, Streets and Other Public Areas)
- Tariff 11 (Circuses, Ice Shows, Fireworks Displays, Sound and Light Shows and Similar Events; Comedy Shows and Magic Shows)
- Tariff 14 (Performance of an Individual Work)
- Tariff 18 (Recorded Music For Dancing)
- Tariff 19 (Fitness Activities and Dance Instruction)
- Tariff 20 (Karaoke Bars and Similar Establishments)
- Tariff 21 (Recreational Facilities Operated By a Municipality, School, College, University, Agricultural Society or Similar Community Organizations).

The Board declined to certify uncontested Tariff 13.A (Public Conveyances – Aircraft) beyond 2010, since the proposed tariff for 2011 and 2012 includes substantive changes from the version the Board last certified in 2008. It also declined to certify unopposed Tariff 5.B, which deals with concerts offered during exhibitions and fairs. This tariff is intended to mirror Tariff 4 (Concerts), which was under examination. The Board preferred to deal with both tariffs 4 and 5.B at the same time.

The Board certified the Background Music tariffs (15.A – Background Music in Establishments Not Covered by Tariff No. 16, 15.B – Telephone Music on Hold, and 16 – Background Music Suppliers) after objections to them were abandoned. These tariffs now specify that music played on a television set is covered; however, the Board found that this use was always included in the language of the tariffs. The Board certified the Tariff 23 (Hotel and Motel In-Room Services) after the objection was abandoned. The Board certified, pursuant to an agreement with SOCAN, an increase in the *Société de télédiffusion du Québec*'s annual royalty payments from $180,000 to $216,000. The Board certified, pursuant to an agreement between the Motion Picture Theatre Associations of Canada and SOCAN, new royalty rates under Tariff 6 (Motion Picture Theatres). These rates reach $1.50 per seat in 2013. The Board certified, pursuant to an agreement between the various sports leagues and SOCAN, new rates for Tariff 9 (Sports Events). These rates reach 0.1 per cent of revenues in 2011 and 2012.

Finally, the Board certified Tariff 24 (Ringtones and Ringbacks) for the years 2006 to 2013, pursuant to an agreement between some of the objectors to the Tariff and SOCAN. It analyzed the agreement and asked the remaining objectors to state whether they wished to maintain their objections. All withdrew. The Board was satisfied that the parties to the agreement were capable of representing the interests of all relevant users. The rates it certified are six per cent of revenues for the period up to June 30, 2009, and five per cent of revenues thereafter.

July 6, 2012 – Re:Sound Tariff 6.B (Use of Recorded Music to Accompany Physical Activities, 2008-2012)

On March 30, 2007, Re:Sound filed its first proposed statement of royalties for the use of recorded music to accompany dance and fitness (Tariff 6). On July 15, 2011, the Board issued its decision on Tariff 6.A (Use of Recorded Music to Accompany Dance).

This decision dealt with Tariff 6.B for the use of recorded music to accompany physical activities. The Fitness Industry Council of Canada (FIC) and Goodlife Fitness Centres Inc. (Goodlife) (together, the "Objectors") took a position with respect to the activities covered by Tariff 6.B. The tariff proceedings were mainly about fitness centres but other forms of physical activity targeted in the tariff, such as dance instruction and skating, were also addressed in the decision.

For fitness venues, Re:Sound initially proposed a rate of 5 per cent of gross receipts, with a yearly minimum of $100. For fitness classes, it proposed a fixed fee of $3 per class. In its statement of case, Re:Sound proposed to collapse the two rates into one of $1.55 per member per month.

The Objectors proposed alternative rates of $0.78 annually multiplied by the average weekly number of participants in fitness classes and $0.15 annually multiplied by the average weekly number of participants in workout areas.

The core of Re:Sound's case rested on two reports: one by Dr. Adriana Bernardino, and one by Dr. John McHale. Dr. Bernardino's report describes the two information gathering exercises she conducted to determine the value that clients of fitness centres attribute to recorded music to accompany fitness: a qualitative exercise (focus groups) and a quantitative exercise (a survey).

Survey respondents had to choose their preference between two hypothetical clubs. The clubs differed in their characteristics, including how crowded they were, how experienced the instructors were, and (most importantly for our purposes) the nature and extent of the use of recorded music. Survey respondents were then required to assume that their current club would no longer use recorded music and then asked questions to find out how much the price of their membership would have to drop for them to remain at their current, music-less club instead of leaving for the alternative, music-using club. Dr. Bernardino estimated that amount at 32 per cent of membership fees, or approximately $15 of the average monthly fee of $45.

Dr. McHale described the market for fitness club memberships. He assumed that the supply-side exhibits constant marginal cost: the cost to any given club of each additional member is constant. Dr. McHale further assumed that the demand curve faced by clubs exhibits constant elasticity: the number of members that would leave if fees increased by a given percentage would be the same, irrespective of the amount. Dr. McHale's final assumption was that fitness centres and music collectives would share the surplus value of music equally. His conclusion was that the value of recorded music to fitness clubs is 16 per cent of clubs' total revenue. Half of this amount was allocated to SOCAN. Finally, a repertoire use adjustment was required. Re:Sound multiplied the 8 per cent by the 53 per cent obtained by Re:Sound in its repertoire use analysis to arrive at a tariff of 4.24 per cent of revenues. Based on average club size and revenues, Re:Sound converted this figure to $1.55 per member per month.

Testifying for the Objectors, Dr. David Reitman presented a counter-proposal, with one rate (Part A) for fitness classes and one (Part B) for workout areas. The Part A rate is based on SOCAN Tariff 19 (Fitness Activities and Dance Instruction). The Part B rate was related mathematically to the Part A rate and based on SOCAN Tariff 22.A (Limited Downloads), the Re:Sound Satellite Radio Tariff and Re:Sound Tariff 3 (Background Music). Before repertoire adjustment, Dr. Reitman proposed $1.71 and $0.33 for Part A and Part B rates, respectively. He used a different repertoire adjustment than Re:Sound, based on Dr. Bernardino's survey – namely 45.82 per cent, to arrive at his final rates of $0.78 and $0.15.

Board's Analysis

Before examining the evidence in respect of rates, the Board considered four legal issues. First, which sound recordings are eligible for remuneration? This is based on the status of the maker and the location of the fixation of the sound recording, not the maker's agent or representative and not the performer's citizenship or residence. Second, does Re:Sound represent all eligible sound recordings? The Board found that it represented only those that are properly part of its repertoire. Third, how does a sound recording become part of Re:Sound's repertoire? It does so when either the maker or one of the performers assigns their rights to Re:Sound. Finally, who is entitled to collect royalties paid to Re:Sound? Royalties must be paid to the performers and makers, *or to any successor*.

The Board then analyzed the various claims to representation in the Goodlife list of recordings. It determined that 36.6 per cent of those recordings were in Re:Sound's repertoire.

The reliability of the Re:Sound proposal depends on the reasonableness of the assumptions in the economic models of Drs. Bernardino and McHale, the reliability of the data collected (i.e. the survey methodology) and the accurateness of the calculations to produce final numbers. The Board enumerated a large number of difficulties with the assumptions, the data collection, and the accurateness of the calculations, as well as an overall problem with the result. Consequently, the Board rejected Re:Sound's proposal.

The Board found that SOCAN Tariff 22.A and Re:Sound Satellite Radio tariff were not appropriate benchmarks and that Dr. Reitman used Re:Sound Tariff 3 improperly. The Board agreed that music in classes and in workout areas should be valued separately. All workout area music is background music, pure and simple.

The Board considered SOCAN Tariff 19 as a proxy for music in classes but identified several problems with this tariff and, in order to clarify them, it asked questions of SOCAN. As a result, the Board learned the following: first, there are many interpretations of the expression "average number of participants per week in the room", which is a problem since the average number of participants per week in the room is multiplied by $2.14 in SOCAN Tariff 19 to obtain royalties payable; second, there may be a tariff enforcement problem, in the sense that not everyone who needs to buy a license from SOCAN is doing so; third, SOCAN has conducted very few audits of Tariff 19; and, fourth, SOCAN collects 31 per cent of its revenue "from Tariff 19" pursuant to agreements between it and users of the tariff, copies of which were filed with the Board at its request.

The Board considered several other options to set royalties for the use of music in fitness classes. It considered using the amount collected under SOCAN Tariff 19, adjusted for repertoire. It also considered a tariff based on the decision by the Copyright Tribunal of Australia relating to music in fitness centres. It also examined the possibility of a tariff based on SOCAN Tariff 7, which covers music played at roller and skating rinks, as well as one based on SOCAN Tariff 18 (Recorded Music for Dancing). Finally, the Board considered certifying no tariff at all. The Board rejected all of these options, since the link between their markets and that of Re:Sound was either too weak, or otherwise problematic.

The Board's preferred course of action was to set a flat fee for all users. The advantage of the flat fee is that compliance monitoring becomes easy. If a fitness centre is using Re:Sound repertoire, it must pay the flat fee.

The flat fee is based on some of the agreements mentioned above and is an average of the amounts paid to SOCAN. The average obtained from the agreements it used is $288.90. The Board adjusted this figure for Re:Sound's repertoire share, 36.6 per cent, and certified Re:Sound Tariff 6.B as a flat fee of $105.74 per venue using recorded music in fitness classes. This is in addition to the royalties payable under Re:Sound Tariff 3 for the use of background music in workout areas.

According to the agreements mentioned above, the royalties paid for dance instruction are essentially the minimum set out in SOCAN Tariff 19. Adjusting the Tariff 19 minimum of $64.00 to Re:Sound's repertoire share of 36.6 per cent yields $23.42. This is what the Board certified as the flat yearly fee, per venue, for dance instruction.

Finally, the Board certified a rate for skating rinks. The royalties in SOCAN Tariff 7 are 1.2 per cent of gross receipts from admissions, subject to a minimum annual fee of $104.31. An adjustment to reflect Re:Sound's repertoire share of 36.6 per cent yields a rate of 0.44 per cent and a minimum of $38.18. These are the royalties the Board certified.

[NOTE: This decision currently is the subject of an application for judicial review filed by Re:Sound (File: A-353-12).]

October 5, 2012 – SOCAN Tariff 22.A (Online Music Services, 2007-2010) and CSI Tariff (Online Music Services, 2008-2010)

In March of 2006, 2007, 2008 and 2009, SOCAN filed proposed statements of royalties for the communication to the public by telecommunication of musical works by online music services for 2007, 2008, 2009 and 2010. In March of 2007, 2008 and 2009, CMRRA/SODRAC Inc. (CSI) filed proposed statements of royalties for the reproduction of musical works by online music services for 2008, 2009 and 2010.

Bell Canada, Rogers Communications Inc., Telus Communications Company and Videotron Ltd. (jointly the "Cable/Telcos"), Apple Canada Inc. and the Canadian Recording Industry Association (CRIA, now Music Canada) filed objections to the tariffs.

CSI initially requested that the Board proceed with the examination of its tariff. The Board, in agreement with the objectors, rather ruled that it would examine it jointly with those of SOCAN, which was not then ready to proceed.

CSI later requested that the Board jointly examine the tariffs of both societies. The objectors opposed the request again, arguing that, among other things, the Board should not proceed until the Federal Court of Appeal had disposed of the five applications for judicial review of SOCAN's tariffs for online music services certified by the Board in 2007. The Board decided not to wait for the outcome of the proceedings and granted CSI's request to proceed. The matter was heard over eight days in June of 2010.

Over the course of the Board's deliberations, the five applications for judicial review were dismissed. Leave to appeal to the Supreme Court of Canada was granted in three cases (*Bell v. SOCAN*, *ESA v. SOCAN* and *SOCAN v. Bell Canada*) and on July 12, 2012, the Supreme Court of Canada rendered its decisions in these three cases. *[See the summaries of these decisions in the Court Proceedings section of this report.]* These decisions ruled: (a) that the Internet delivery of a permanent copy of a file containing a musical work does not involve a communication of that work; (b) that a communication to the public can result from a series of non-simultaneous transmissions of a musical work (as long as this does not result in the delivery of a permanent copy of a file containing the work); and, (c) that previews of downloads constituted fair dealing for the purposes of research.

On July 20, 2012, the Board issued an order stating that, following the decisions of the Supreme Court, the Board concluded preliminarily that SOCAN no longer has the right to a tariff for permanent or limited downloads and that previews are just as much fair dealing for the purposes of research in 2007-2010 as they were in 1996-2006. Among the options suggested by the Board to take the decisions into account, the parties agreed the Board could adjust its reasons and tariffs without hearing from the parties again. No-one challenged the Board's preliminary conclusions. As such, the Board did not certify a SOCAN tariff for permanent or limited downloads or for previews.

CSI proposed the following rates: for permanent and limited downloads, 9.9 per cent of the amount paid by consumers and subscription revenues, respectively; for on-demand streams, 5.9 per cent for 2008 and 2009; and, 6.1 per cent for 2010 of subscription revenues.

CSI's evidence was based on a report by Messrs. Audley and Hyatt, which updated the Board's calculations in *CSI – Online Music Services (2007)*. In this decision, the Board used as a proxy for the permanent download rate the penny rate paid by the record labels for the reproduction of musical works on a prerecorded CD, and converted this rate into a percentage of the retail price of a download ("MLA model"). As the penny rate has increased since 2007, Audley and Hyatt calculated new rates of 10.0 per cent for 2008 and 2009 and 10.3 per cent for 2010. In its 2007 decision, the Board set the rate for limited downloads at two-thirds of the rate for permanent downloads. Messrs. Audley and Hyatt contended that the CSI rate should be the same for both, by reason that both involve the same uses of the reproduction and communication rights. For on-demand streams, they recommended the rates as ultimately proposed by CSI.

SOCAN's proposed rates for permanent and limited downloads became irrelevant as a result of the Supreme Court decisions. For on-demand streams, SOCAN proposed rates of 8.1, 8.4, 8.3 and 8.5 per cent of gross revenues for each year from 2007 to 2010. SOCAN proposed that the tariff apply to video-clips and that the rates be the same as for audio files.

SOCAN's evidence was based on a report by Dr. Liebowitz in which he argued that increases in the penny rate and the further-enhanced profitability of the digital market relative to the proxy CD market warranted an increase in the rates. Dr. Liebowitz also was of the opinion that music is as important in video-clips as in audio-only files. He therefore argued that the rate should be the same.

Apple and the Cable/Telcos proposed that the combined royalties payable to SOCAN and CSI for all audio offerings be fixed in a range between 7.5 and 10 per cent for 2008 and 2009 and between 7.5 to 10.3 per cent for 2010, of the amount paid by consumers. For video-clips, they suggested that the SOCAN royalties be set between 0.7 to 2.2 per cent.

Apple and the Cable/Telcos economic expert, Dr. Chipty, concluded that the combined rate for the reproduction and communication of permanent downloads should not exceed the reproduction rate for CDs. She then used the Nash model of economic bargaining to develop a rate as if CSI and SOCAN had bargained with the online music services. This approach yielded combined rates ranging between 7.3 and 8.8 per cent of the retail price of permanent downloads. For video-clips, she adjusted the rates downwards to take into account the non-music contributions (choreography, acting, script, etc.) that add value to video-clips and concluded that the rate should be between 0.7 and 2.2 per cent of a clip's retail price.

CRIA contended that the combined rate for the bundle of rights should be set at 6.96 per cent of the price paid by consumers. With respect to the communication right for video-clips, CRIA agreed with the proposal put forward by Apple and the Cable/Telcos. CRIA's evidence was based on a report by Dr. Barker, which concluded that a comparison with foreign rates was the most suitable way to determine the bundle rate for permanent downloads.

Board's Analysis

Permanent Downloads

The Board rejected the objectors' proposed economic models. Dr. Barker's model was based on unreasonable hypotheses, such as that the MLA model's rate is linked to the retail price of music, which it is not. Dr. Chipty's bargaining model involved three players – SOCAN, CSI, and online services – but that excluded the record labels, leads to unreasonable results. Also, the approach ignored the principle established by the Board that, all things being equal, using two rights should cost more than using only one.

The Board used CSI's approach to determine the CSI rate for permanent downloads and certified a rate of 9.9 per cent for all three years from 2008 to 2010. This corresponded to an increase of 12.5 per cent compared to the rate previously certified.

Limited Downloads

CSI proposed the same rate for permanent and limited downloads. Conceptually, the main difference between permanent and limited downloads from the perspective of the consumer is that the first represents an acquisition, while the second is equivalent to a rental. In both cases, however, only one transmission of a music file is required. As a rule, the market should reflect the lower value of the rental through a lower price. This means that even when applying the permanent downloads rate to limited downloads, lower royalties would be obtained for the latter, a result that the Board wished to obtain. Consequently, the Board set the same rate as for permanent downloads, that is, 9.9 per cent.

On-Demand Streams

CSI contended that the rate for on-demand streaming be set somewhere between the rate for limited downloads and half the rate CSI gets from the Digital Pay Audio (DPA) services, similar to what the Board did in 2007. SOCAN sought the same percentage of the bundle it had received (62 per cent) based on the argument that the communication right is more important in streams than the reproduction right. No objector took a position on how the royalties should be split between CSI and SOCAN, but they agreed that the bundled rate should be the same for on-demand streaming and for permanent downloads.

The Board decided not to reuse the 2007 formula. It concluded however that the previous formula could serve as a starting point for its analysis. That starting point is 4.6 per cent. The reasons for the increase in the CSI rate for downloads of 12.5 per cent are just as relevant to streams. Therefore, the CSI rate was increased from 4.6 to 5.18 per cent.

The Board found no reason to raise or lower the SOCAN rate for streaming and left it at 7.6 per cent.

Video-clips

Only SOCAN applied for a tariff for the music used in video-clips for 2010. SOCAN argued that the rate for video-clips should be the same as the rate for audio tracks. It maintained that the video-clip is nothing more than a sophisticated presentation of the audio track.

Apple and the Cable/Telcos argued that the entirety of the price differential between the audio track and the video-clip is attributable to non-audio inputs. They proposed that the price of a video-clip be set at the ratio of the mid-price audio track to the mid-price video-clip. The Board agreed and set the rate for on-demand streams of video-clips by applying the proportion of 0.66 to the on-demand streaming rate of 7.6 per cent, which yields a rate of 5.02 per cent.

Rate Base

CSI and the objectors proposed that the rate base remain the amounts subscribers pay for their downloads and streams, while SOCAN asked that the base be expanded to include non-user revenues. The Board agreed with CSI and the objectors. Non-user revenues appear to accrue largely to sites that offer on-demand streams at very low or zero costs to the user. Minimum fees are a response to this. Also, non-user revenues appear to remain relatively modest and determining the role music plays in attracting non-user revenues is far from easy. Finally, the administrative burden created by changing the rate base retroactively would probably outweigh any gains made by doing so.

Minimum Fees

For both permanent and limited downloads, the Board found no reason to modify the formula it used in its previous decision to set minimum fees, that is to set such fee at two-thirds of the amount generated by the rate. The minimum fees certified are indicated in the table below.

For on-demand streams, the Board concluded that it was preferable to calculate minimum fees in the same way as limited downloads. Since the average monthly subscription price for on-demand streams is unknown, the Board assumed that the subscription price for non-portable limited downloads and for on-demand streams were the same. The minimum fees were set as in the table below.

For video-clips, the Board wanted SOCAN to receive the same amount as for an audio file. The easiest way to do this was to apply the minimum fees for the second to the first.

Ten Per Cent Discount

In 2007, the Board further reduced the rates by 10 per cent, to apply only for the duration of the tariff in question. The Board saw no reason to continue to apply this deduction. In addition, the Board did not apply this discount to video-clips because it does not constitute a new industry.

	Royalties to be paid to CSI (2008-2010)	Royalties to be paid to SOCAN (2007-2010)
Permanent Downloads	9.90% of the amount paid by the consumer *Minimum fee* 3.92¢ per file in a bundle of 13 tracks or more 6.86¢ per file otherwise	n/a
Limited Downloads	9.9% of the amount paid by subscribers *Minimum fee* 99¢ per month, per subscriber, if portable limited downloads are allowed 66¢ if not	n/a
On-Demand Streams	5.18% of the amount paid by subscribers *Minimum fee* Free streaming: 0.09¢ per file streamed per visitor, up to a maximum of 34.53¢ per visitor per month Otherwise 34.53¢ subscriber per month	7.60% of the amount paid by subscribers *Minimum fee* Free streaming: 0.13¢ per file streamed per visitor, up to a maximum of 50.67¢ per visitor per month Otherwise, 50.67¢ per subscriber per month
Video-Clips (2010 only) On-Demand Streams	n/a	5.02% of the amount paid by subscribers *Minimum fee* Free streaming: 0.13¢ per file streamed per visitor, up to a maximum of 50.67¢ per visitor per month Otherwise, 50.67¢ per subscriber per month

December 21, 2012 – Commercial Radio Tariff – Application to Vary

[This decision is summarized in the General Regime section of this report.]

January 18, 2013 – SOCAN Tariff 24 (Ringtones, 2003-2005 and Ringtones and Ringbacks, 2006-2013) – Application to Vary

On June 29, 2012, the Board certified SOCAN Tariff 24 for the years 2006-2013. This tariff applies to ringtones (a digital audio file whose performance indicates an incoming telephone call) and ringbacks (a digital audio file whose performance is heard by the person calling before the call is answered). *[This decision is summarized before in this section of the report.]*

Following two decisions of the Supreme Court of Canada, *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada* [*ESA*] and *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada* [*Rogers*], Bell Mobility, Rogers Communications Partnership, TELUS Communications Company and Quebecor Media Inc. asked the Board to modify the SOCAN tariff for the years 2003 to 2005 ("the 2003-2005 tariff") and the SOCAN tariff for the years 2006 to 2013 ("the 2006-2013 tariff") by repealing them. According to the Applicants, *ESA* and *Rogers* establish the principle that an Internet transmission of a permanent copy of a file containing a musical work does not involve and has never involved a communication of that work, such that the two tariffs are null and should be repealed. Apple Inc. supported the request while SOCAN opposed it. The request was abandoned for ringbacks.

According to article 66.52 of the *Copyright Act*, the Board has the power to modify a decision if it believes that there has been a material change in circumstances since the time the decision was issued. Nevertheless, the Board rejected the application to vary the 2003-2005 tariff and the 2006-2013 tariff up to November 6, 2012, the last day before the coming into force of amendments dealing with the so-called making available right of Canadian authors, performers, and makers. The Board found that the application, if accepted, would accomplish no more than what is already set forth in the two tariffs, which stipulate that no SOCAN license is required if the transmission of a ringtone is not a protected use of SOCAN's repertoire and that the Applicants do not have to comply with the tariffs.

The Board was of the opinion that the question is one of the legal effect of certified tariffs and whether the Applicants have the right to reimbursement of royalties paid or have to continue to pay royalties. In addition, with respect to the 2003-2005 tariff, it would ill-behoove the Board to set aside a decision upheld by the Federal Court of Appeal, especially when leave to appeal to the Supreme Court of Canada was refused.

Unlike the Applicants and SOCAN, who submitted that the power to rescind a decision is included in the power to modify, the Board is of the opinion that it should not read into the *Act* powers that are not contained therein. The Board's power to vary is limited to the power to change aspects of an existing relationship between rightsholders and users when required by a material change in circumstances. It does not include or extend to the authority to end their relationship or to declare that such relationship no longer exists. In the Board's opinion, the power to refuse to certify a tariff *ex ante* does not of itself imply that the power to vary such tariff will include the power to rescind it *ex post facto*. Furthermore, if the Applicants' interpretation was correct, it would imply that Board decisions are never final.

The Board found that even if it had the power to repeal the tariff, it would have rejected the Applicants' request, since the courts, not the Board, are the appropriate forum to deal with the issues raised. They are all questions of ordinary law which include whether and if so, to what extent, the principle of finality requires that a certified tariff be binding on all concerned even though it relies on an interpretation of the law now known to be incorrect. In addition the question of whether the Applicants are entitled to a royalty refund raises a number of legal issues including mistake of law or mistake of fact, restitution and unjust enrichment. A decision of a court would be more effective and would have more immediate and more general effect.

In essence, the application was about whether SOCAN can enforce the tariff, i.e. whether the Applicants are entitled to a refund for the past and whether SOCAN can invoke the 2006-2013 tariff to get paid for the future. Enforcement issues are outside the power of the Board.

To the extent that the 2006-2013 tariff is not otherwise enforceable, the coming into force of amendments to the *Act* dealing with the so-called making available right of Canadian authors, performers and makers on November 7, 2012 may validate SOCAN's royalty claim notwithstanding *ESA*. For this reason, the application to vary the 2006-2013 tariff beginning from November 7, 2012, will be examined in due course.

General Regime

Background

Sections 70.12 to 70.191 of the *Act* give collective societies that are not subject to a specific regime 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.

Filing of Tariff Proposals

The following tariff proposals were filed with the Board in March 2013 pursuant to section 70.13 of the *Act*:

- Tariff filed by the Audio Visual Licensing Agency (AVLA) for the reproduction of sound recordings by the Canadian Broadcasting Corporation (CBC), in Canada, in connection with its over-the-air radio broadcast, for the years 2014 to 2016;
- Tariffs filed by the Canadian Broadcasters Rights Agency (CBRA) for the fixation and reproduction of works and communication signals, in Canada, by commercial and non-commercial media monitoring, for the years 2014 to 2016;
- Tariffs filed by CMRRA-SODRAC Inc. (CSI) for the reproduction of musical works, in Canada, by non-commercial radio stations, commercial radio stations, and online music services, for the year 2014;
- Tariffs filed by the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) for the reproduction of musical works embedded in music videos, in Canada, by online music services and for the reproduction of musical works embedded in cinematographic works, for the year 2014;
- Tariff filed by the Canadian Musical Reproduction Rights Agency (CMRRA) for the reproduction of musical works embodied in music videos, in Canada, by online music services, for the year 2014; and,
- Tariff filed by Access Copyright for the reprographic reproduction, in Canada, of works in its repertoire by post-secondary educational institutions for the years 2014 to 2017.

Hearings

During fiscal year 2012-13, the Board held a hearing (from October 23 to November 5, 2012) to examine the question of fair and equitable royalties to be paid by provincial and territorial governments for the right to make reprographic reproductions of protected works.

Decisions

Four decisions were rendered during the fiscal year, as follows:

October 5, 2012 – SOCAN Tariff 22.A (Online Music Services, 2007-2010) and CSI Tariff (Online Music Services, 2008-2010)

[This decision is summarized in the Public Performance of Music section of this report.]

November 2, 2012 – SODRAC Tariff 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition, 2009-2012)

On March 28, 2008, pursuant to subsection 70.13(1) of the *Act*, SODRAC filed proposed Tariff 5 for the reproduction, in Canada, of musical works embedded into cinematographic works for the purposes of distribution of copies of the cinematographic works for private use or of theatrical exhibition for the years 2009 to 2012. The proposal was published in the *Canada Gazette*.

The Canadian Association of Film Distributors and Exporters (CAFDE), the Motion Pictures Theatre Associations of Canada (MPTAC) and the Canadian Motion Picture Distributors Association (now Motion Picture Association – Canada) (MPA-C) filed timely objections to the proposal. On June 4, 2009, MPTAC withdrew its objection, as did MPA-C who asked to remain as an intervenor; that application was denied.

The Board consolidated the proceedings in this tariff with the SODRAC v. CBC/Astral arbitrations. The hearings started on June 1st, 2010, and lasted for 13 days.

Tariff 5 concerns two types of copies of music: DVD copies for retail sale or rental, and theatrical copies for showing as a movie.

Initially, SODRAC proposed a DVD rate of 1.2 per cent of distribution revenues subject to minimum fees of 8¢ per DVD sold to consumers and 32¢ per DVD rented to consumers. SODRAC revised its proposed rate to 1.92¢ for the first fifteen minutes, 1.18¢ for the next fifteen minutes and 0.71¢ thereafter. For background music, the proposed rate was 0.78¢, 0.47¢ and 0.28¢, respectively.

CAFDE contended that producers had already cleared the required rights through to the viewer. CAFDE's alternative proposal was a tariff that did not differentiate between foreground and background music. The Board understood CAFDE's proposal at the time to be 0.65¢ per minute for the first 15 minutes, 1.25¢ for the next fifteen minutes and 2.0¢ for the rest, and that royalties would be capped at 1.2 per cent of distribution revenues. *[The Board's understanding was false, see below.]*

CAFDE argued that the Board should not impose a separate tariff on theatrical copies by reason that producers already clear the necessary rights. A trailer has no commercial value and generates no revenues because the movie-going public will not pay to see it. CAFDE's alternative proposal was $100 per distributor per year.

The Board abandoned the percentage rate of 1.2 per cent in favour of the rate structure used for CBC sales of programs to consumers for three reasons. First, that structure appears to have served CBC and SODRAC well. Second, the parties agreed to use this structure. Third, this approach allows royalties to vary with the extent to which distributors need access to the SODRAC repertoire.

The tariff was set at 0.65¢ per minute, per copy for the first 15 minutes, 1.25¢ for the next fifteen minutes and 2.0¢ for the rest.

The Board did not cap royalties at 1.2 per cent of distribution revenues because it did not have any reason to believe either that the cap is appropriate or that the cap should be 1.2 per cent.

The Board also certified a nominal tariff for theatrical copies, trailers (except out-of-context uses) and other distribution incidental copies of $100 per year for each distributor who distributes any film containing any SODRAC music, for the following reasons.

First, the Board had to set a price for these copies. Second, SODRAC offered no evidence in support of its proposed rate of 1.2 per cent of distribution revenues. Third, SODRAC failed to demonstrate that distribution incidental copies have any standalone significant value. Fourth, the vast majority of movies shown in Canadian cinemas are American. American movie producers tend to clear the rights required making distribution incidental copies of music except for out-of-context use in trailers.

[NOTE: This decision currently is the subject of an application for judicial review filed by CAFDE (File: A-525-12) and was suspended by the Board on December 20, 2012, as described below.]

December 20, 2012 – Interim Decision on SODRAC Tariff 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition, 2009-2012)

[Note that the decision was issued on December 20, 2012, with reasons to follow. Those reasons were issued on April 26, 2013. What follows is a summary of those reasons.]

On November 2, 2012, the Board certified *SODRAC Tariff no. 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition), 2009-2012.*

On December 3, 2012, CAFDE asked the Board to amend this tariff. CAFDE alleged that the Board, after stating that it wished to certify the tariff proposed by CAFDE, had certified something else. SODRAC objected to this request. It submitted that the November 2 decision does not establish that the Board intended to accept CAFDE's proposal. It added that, in any event, the Board did not have the implicit or express authority to amend the tariff.

The Board concluded that its November 2 decision contained a palpable error. The Board stated that it "accept[ed] the distributors' proposition." It believed this proposal was, like the CBC 2002 Agreement, a cents-per-minute, per-copy rate, whereas CAFDE's proposal was actually for a cents-per-copy rate, depending on the amount of music used. The Board misinterpreted CAFDE's proposal, leading to royalties that are 15 times higher or even more than the Board intended to certify.

The Board has the authority to correct this error, for two reasons. First, the error is palpable, and the Board has the authority to correct such an error. Second, the error led to the certification of a tariff *ultra petita*, thereby resulting in a breach of procedural fairness.

The Board's error was not a simple clerical error. It was also not an error apparent from a mere reading of the decision; it was, however, an error on the face of the record.

CAFDE relied on *Chandler v. Alberta Association of Architects* to allege that the principle of finality should be applied more flexibly to administrative tribunals. This flexibility would require that the Board be allowed to reopen its decision to correct its error. By contrast, SODRAC submitted that *Chandler* is not relevant. The Board does not have the authority to correct the error, even if we assume there is one. In support of its argument, SODRAC relied on *Munger v. Cité de Jonquière*.

The Board erred. It believed it was using one tariff structure while it was actually certifying another. The source of the error was inadvertence or distraction. It was also palpable. Without doubt, what the Board thought CAFDE sought was not what CAFDE proposed. It follows that the Board had the authority to reopen its decision and correct its error. This pragmatic conclusion was made all the more necessary by the fact that on judicial review, the Federal Court of Appeal would have no choice but to allow the application and remit the matter to the Board. Waiting for that to happen will result in a sub-optimal use of the time and resources of that jurisdiction.

The Board then turned to the *ultra petita* issue. CAFDE submitted that the certified tariff imposes higher royalties for certain uses than what SODRAC requested in its original proposed tariff. As a result, the Board exceeded its jurisdiction and must be able to reopen the decision. On the other hand, SODRAC argued that the Board is not obliged to accept the full position of either party and may vary the royalties and their related terms and conditions on the basis of what it deems to be necessary.

It is easily established that the royalties payable under the certified tariff will ultimately exceed what would have been payable under SODRAC's proposal. That led the Board to conclude that the decision was *ultra petita*, both for individual works and as a whole.

In *Canadian Private Copying Collective v. Canadian Storage Media Alliance (2005)*, the Federal Court of Appeal determined that the Board may certify a tariff that is higher than the one proposed by a collective, without regard to the *ultra petita* principle, as long as procedural fairness is not breached. In this instance, as the parties did not have an opportunity to be heard on the selected tariff structure, procedural fairness was breached. This breach rendered the certification of SODRAC Tariff 5 null and void.

The Board suspended the application of the 2009-2012 tariff and granted the application for an interim decision.

December 21, 2012 – Commercial Radio Tariff – Application to Vary

On July 9, 2010, the Board certified the *Commercial Radio Tariff (SOCAN: 2008-2010; Re:Sound: 2008-2011; CSI: 2008-2012; AVLA/SOPROQ: 2008-2011; ArtistI: 2009-2011)*. In respect of SOCAN and Re:Sound, the tariff targets the communication of musical works, as well as sound recordings of these works and performances incorporated in these recordings. In respect of CSI, AVLA and the *Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec* (SOPROQ) (jointly AVLA/SOPROQ), as well as ArtistI, the tariff allows the reproduction of these same works, recordings and performances.

As of December 21, 2012, commercial radio stations continued to pay royalties under the tariff. In every respect except one, these were interim royalties, by operation of subsection 68.2(3) and section 70.18 of the *Act*. The royalties were final with regard to CSI, for which the tariff expired on December 31, 2012.

On November 7, 2012, certain provisions of the *Copyright Modernization Act*[1] came into force. The next day, the Canadian Association of Broadcasters (CAB) requested that the Board: (1) issue an interim decision reducing the royalties paid by commercial radio to CSI, AVLA/SOPROQ and ArtistI by 90 per cent, from November 7, 2012 until the Board renders a decision on the merits; (2) declare that, as of that same date, there is no longer a legal basis for a tariff targeting the reproduction of a sound recording, or a performer's performance or work that is embodied in a sound recording, by commercial radio stations; and (3) issue a decision rescinding the CSI tariff as of that same date.

CAB's application was based on recently enacted sections 29.24 and 30.71 of the *Act*, section 30.9 as amended, and *SOCAN v. Bell Canada*. Essentially, CAB submitted that their combined effect was such that stations were no longer making reproductions protected by copyright since listening to and creating copies for evaluation purposes is fair dealing for the purpose of research under section 29 of the *Act*; the stations' programming process, from putting together the content to broadcasting, is a single technological process within the meaning of section 30.71 of the *Act*; backup copies are permitted under section 29.24 of the *Act*; and all of the stations are in compliance with section 30.9 of the *Act*.

The Board's decision was rendered on the basis of the facts alleged by CAB and on findings of facts made by the Board in previous cases. No one else was asked to provide arguments for or against the application.

The Board found that it is incorrect to claim that because of the rules invoked by CAB, there is no legal basis for any tariff dealing with the reproduction of a sound recording, or a performer's performance or work that is embodied in a sound recording, by commercial radio stations. Assuming that every station could rely on all of the provisions on which the application is based at the time of the determination, it would be impossible for them to prove that they would comply with them in the future. Each station must show whether it may avail itself of an exception in respect of each protected use the station makes. Some might not be able to show that they comply with all of the conditions of all the exceptions for all of the reproductions they make.

The question of the impact of the rules invoked by CAB on the scope and value of the protected reproduction activities in which stations may engage will have to be resolved.This may result in the certification of reduced royalties or of a scaled tariff allowing a station to pay more or less depending on its compliance with the conditions provided for under these exceptions.

1. S.C. 2012, c. 20. (Previously Bill C-11)

The Board decided that it is preferable to dispose of the application on the merits at the same time as for all of the proposed tariffs for commercial radio, rather than as part of a process dealing solely with CAB's claims.

The Board found that CAB's arguments could not justify a royalty reduction for an entire industry unless all the stations operate in the same way and noted that CAB has always insisted that the proceedings in which it participates be split up as little as possible.

As such, the Board found that the application would have to be decided on the merits and that it would be preferable to consider it at the same time as all other issues raised by the proposed tariffs for commercial radio. The tariff was made interim from November 7, 2012 for CSI. In all other respects, the Board denied the application for an interim decision.

January 18, 2013 – Access Copyright Tariff (Educational Institutions, 2005-2009) – Redetermination

On June 26, 2009, the Board issued its reasons for certifying the *Access Copyright Elementary and Secondary School Tariff, 2005-2009* ("Access Tariff"). The royalties were set at $5.16 per full-time equivalent (FTE) student, based on a volume survey conducted by the parties. Of the slightly more than 246 million copies for which royalties were set, 6,995,451 were for ministry examinations and 16,861,583 were "Category 4" copies, that is, at the teachers' initiative with instructions to students that they read the material.

Judicial review of this decision was rejected in part by the Federal Court of Appeal. Leave to appeal that decision was granted and the appeal was heard by the Supreme Court of Canada. *[See the summary of the Supreme Court decision in the Court Proceedings section of this report.]*

The Federal Court of Appeal remitted the decision to the Board in part, to determine the meaning of the words "in a medium that is appropriate for the purpose" as found in subsection 29.4(3) of the *Copyright Act* and to assess whether examination copies came within the meaning of these words. The Supreme Court of Canada concluded that the Board had erred in its application of the principle of fair dealing to Category 4 copies and remitted the matter to the Board for redetermination.

Following the Supreme Court of Canada decision, the Board ruled on September 19, 2012, after consulting with the parties, that all that needed to be done was to determine the impact of removing Category 4 copies from the calculation of the FTE rate with the result that the FTE rate was lowered from $5.16 to $4.81.

With respect to the decision of the Federal Court of Appeal remitting the matter to the Board, the parties agreed that the Board should rule on the basis of the existing record and of additional written arguments. Subsection 29.4(2) of the *Act* provides that it is not an infringement of copyright for an educational institution to copy a work as required for a test or examination. Subsection 29.4(3) provides that subsection (2) does not apply if the work is commercially available in a medium that is appropriate for the purpose referred to in subsection (2).

The *Act* required the Board to determine whether the works were commercially available and whether such availability was in an appropriate medium. The Federal Court of Appeal concluded that the Board did the first, not the second. The sole remaining task was to do the second.

The objectors argued that subsection 29.4(3) exists to protect existing markets. To be in an appropriate medium, the work must already be in the physical form the teacher will use to administer the test or examination (e.g., standardized tests that are sold to educational institutions). Legal authorization to transfer a work to a medium does not make the work available in that medium. Access argued that a licence to copy a work to a medium makes the work available in that medium and if the medium on which the work is copied is appropriate for the purposes of a test or examination, the carve-out applies.

The Board concluded that if the tariff authorizes an institution to copy a work onto the medium that will be used to administer a test or examination, the work is available "in a medium that is appropriate for the purpose" of that test or examination.

To interpret subsection 29.4(3) (and thus, by extension, subsection 30.1(2)) as the objectors suggest would render paragraph (*b*) of the definition of "commercially available" meaningless. If a licence does not make a work available in any medium, the "appropriate medium" condition can never be satisfied through a licence being available within the meaning of paragraph (*b*). Access submitted that a licence to copy a work to a medium makes the work available in that medium. This interpretation does not lead to absurd results; on the contrary, it is the only one that gives meaning to paragraph (*b*) of the definition of "commercially available". A work for which a collective's licence is available is available in an appropriate medium if, and only if, the licence authorises the institution or teacher to use (copy, perform, communicate) the work in the medium that is appropriate to that particular test or examination.

Arbitration Proceedings

Pursuant to section 70.2 of the *Act*, on application of the collective society or the user, the Board can set the royalties and the related terms and conditions of a license for the use of the repertoire of a collective society subject to section 70.1, when the collective society and a user are unable to agree on the terms of the license.

In 2012-13, the Board did not hear any applications for arbitration.

Requests

The Board received one request for arbitration in the year 2012-13, as follows:

- February 4, 2013 – Request for arbitration between SODRAC and Astral for a final licence for the period September 1st, 2012 to August 31, 2016.

Decisions

The Board rendered three decisions during the fiscal year, as follows:

April 30, 2012 – SODRAC v. CBC (Interactive Kiosks, Explora, Blanket Licence, 2012-2016) – Interim Decision

This decision disposed of all pending applications by SODRAC for interim licences targeting the use of its repertoire by CBC for the interactive kiosks, the Explora service, and all other uses of SODRAC works.

On December 16, 2011, SODRAC asked the Board to set the terms and conditions of an interim and final licence for the reproduction of musical works in its repertoire by CBC in eight interactive kiosks. These kiosks, installed throughout Canada and available from October 31, 2011 to March 28, 2012, provided public access to musical moments, photos and videos from Radio-Canada's archives as a tie-in with a CD box set celebrating the 75th anniversary of CBC. SODRAC asked for interim royalties of $1 per work in the repertoire of SODRAC, since the parties could not have reasonably contemplated this activity when SODRAC and CBC reached their first licence agreement in 1992. CBC argued that the contemplated use was already targeted in subparagraph 2(e) of the March 2009 interim licence, a general provision relating to all reproduction activities not expressly targeted in earlier provisions. The Board agreed with SODRAC and granted the application for an interim licence.

On March 26, 2012, SODRAC asked the Board to set, on an interim and final basis, the terms and conditions of a blanket licence for the reproduction of musical works in its repertoire by CBC for the period from April 1, 2012 to March 31, 2016. The application also targeted the Explora service, from its launch on March 28, 2012.

SODRAC argued that an interim licence is needed to prevent a legal void beyond March 31, 2012. It proposed that the March 2009 interim licence be extended starting on April 1, 2012, and until the Board disposes of the arbitration for the blanket licence for 2008 to 2012. From that date, SODRAC proposed that the final licence for 2008-2012 apply on an interim basis. CBC argued that the application is both unnecessary and premature. It is unnecessary because section 1 of the March 2009 interim licence already stipulates that it applies until the Board disposes of the matter under advisement; as a result, no legal void exists. It is premature because the parties cannot negotiate a licence for the period starting April 1, 2012 until a decision has been issued in the matter under advisement.

The Board agreed with SODRAC. The application is not premature. The conditions set out in section 70.2 of the *Copyright Act* have been met. Neither is the application unnecessary. The March 2009 interim decision does provide that it applies until the Board disposes of the matter under advisement. That decision targets uses ending on March 31, 2012. The date has passed. It is therefore possible, if not probable, that the March 2009 interim licence has ceased to be in effect.

The application with respect to Explora was granted, given the consent of CBC, at a rate of $1 per month.

November 2, 2012 – SODRAC v. CBC/SRC and SODRAC v. Astral

Two licences were delivered as part of this matter:

- A licence for the reproduction of musical works in SODRAC's repertoire by the Canadian Broadcasting Corporation (CBC) from November 14, 2008 to March 31, 2012.
- A similar licence for the specialty television channels of *Les Chaînes Télé Astral* other than *MusiquePlus, MusiMax* and Teletoon Inc. (Astral) from December 19, 2008 to August 31, 2012.

The CBC arbitration concerned all reproductions of musical works made by CBC in its television, radio and Internet operations. The Astral arbitration concerned only copies made in its specialty television and Internet operations; its radio activities were not at issue.

Until March 31, 2009, two agreements defined the relationship between SODRAC and CBC. The first, reached in March 1992, licensed the use of the SODRAC repertoire on radio, on television and for certain ancillary purposes ("the 1992 Agreement"). The second, reached in October 2002, allowed the use of the same repertoire in programming merchandise such as DVDs ("the 2002 Agreement"). Both agreements were renewed by the parties until the Board issued an interim licence for CBC on March 31, 2009.

No such agreements existed between Astral and SODRAC. The Board also issued an interim licence for Astral on December 14, 2009.

The Board consolidated the examination of both arbitration matters and SODRAC Tariff 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition). *[The decision rendered is summarized in the General Regime section of this report.]* The hearings started on June 1, 2010 and lasted for 13 days.

SODRAC argued that the synchronization licences it issues to producers do not authorize downstream copies. Consequently, Astral and CBC must licence all broadcast-incidental copies they make. CBC also needs a licence to create, use, distribute and otherwise market its in-house productions and co-productions.

SODRAC proposed deriving royalties for broadcast-incidental and synchronization copies by using ratios derived from earlier Board decisions and existing licensing contracts.

CBC and Astral argued that a functioning market currently exists, since producers who synchronize music into an audiovisual work secure through-to-the-viewer licences. CBC acknowledged that it needs a SODRAC synchronization licence, but only for its television in-house productions, for its television co-productions and for its radio activities. This licence should be through to the viewer, to reflect market practices. Astral's position was that it does not need a licence. It asked that the royalties for its licence be either zero or very low, and include all Internet uses.

SODRAC relied on the testimony of two experts. Dr. Michael Murphy described the digital content management systems used by CBC and Astral. In his opinion, radio and television use similar or identical technologies; their uses of the reproduction right and the nature of the copying activities are comparable. Professor Marcel Boyer commented on the Board's use of ratios to set tariffs. According to him, using ratios is appropriate to capture the relative intensity and importance of uses, whether it be the same right in separate markets or separate rights in the same market. Professor Boyer's review of earlier Board decisions led him to conclude that the Board generally favours a 3 to 1, primary to secondary ratio, adjusted to market circumstances.

CBC and Astral argued that the established practice for licensing music used in audiovisual works is for the producer to secure a buyout licence, that SODRAC's licensing practices are inconsistent with those of the rest of the industry and that broadcast-incidental copies are part of the business of broadcasting. Broadcasters expect the ability to make such copies is secured by the producer in the synchronization license.

Dr. Gerry Wall and Bernie Lefebvre, two experts for CBC and Astral, concluded that any fee set for broadcast-incidental copies should be nominal to reflect their inherently low value and to avoid discouraging the adoption of new technology and that a through-to-the-viewer synchronization license fee can be set based on actual market rates, adjusted for market conditions.

Board's Analysis

The Board noted that copyright owners are generally free to structure their dealings with users as they wish. However, owners who ask a collective society to administer their rights are no longer free to structure their copyright dealings as they wish. Once the Board sets the terms and conditions of a licence, concerned users can insist that the collective society deal with them accordingly. Finally, the Board cannot impose liability where the *Act* does not or remove liability where it exists.

The Board also examined how synchronization licences are designed and issued by copyright owners generally, and by SODRAC in particular. To the extent that its licensing practices are both consistent and significant in the relevant market, they cannot simply be set aside as deviant. The record of these proceedings confirmed that licensing practices for the use of music in audiovisual works are far more complex and varied than either side suggests. Producers generally negotiate synchronization licences one at a time. Practices vary from market to market.

The Board disagreed that through-to-the-viewer licensing in general, and buyouts in particular, is the dominant model in the rest of Canada. The Board reviewed the large number of licences signed by SODRAC and other copyright owners filed in these proceedings and concluded that outright buyouts are not the dominant model in Canada and that SODRAC licences are not ambiguous. The collective has issued few, if any, through-to-the-viewer licenses. Furthermore, when a SODRAC licence authorizes the user to authorize copies made by a third party, that user is, virtually always, the broadcaster, not the producer.

Setting the Royalties

In establishing the royalties, the Board began by setting out some general propositions. First, when new technologies involve the use of additional copies, some of the benefits associated with the technologies must be reflected in the remuneration that flows from these incidental, additional copies. Second, the Board can only rule on the licensing relationship between SODRAC and CBC/Astral. The Board cannot dictate to SODRAC or the producers how they will deal with one another, let alone influence the conduct of producers who deal with copyright owners other than SODRAC. Third, producers should remain free to decide whether they wish to offer a turnkey service for the audiovisual works they licence, or whether they wish to pay only for the rights they use. The most the Board could do was to design the broadcaster's licence in such a way that it need not pay royalties when the producer is able to provide the broadcaster with the needed authorization.

SODRAC does not represent all copyrighted music. A repertoire adjustment needed to be applied to the rate for radio broadcast-incidental copies. SODRAC performed a detailed analysis and concluded that its repertoire represents 34.5 per cent of music played on radio. CBC suggested using 33 per cent instead, reflecting the fact that the CMRRA-CBC Radio Agreement postulates that the CMRRA repertoire represents 67 per cent of music played. The CMRRA figure is a rough estimate. The Board adopted the more transparent and accurate analysis performed by SODRAC.

Broadcast-incidental Copies – Radio

CBC, relying on the testimony of Messrs. Wall and Lefebvre, proposed using the 1992 Agreement as starting point. SODRAC disagreed, if only because at the time, neither party had any information with respect to the use being made of its repertoire. SODRAC proposed to use the approach in the CMRRA-CBC Radio Agreement and set the royalties for the reproduction right at one third of those for the communication right, adjusted for repertoire, or $170,986 per year. CBC argued that this would result in increases that are out of line with historical changes in copyright payments to SOCAN. The Board saw no reason to simply set aside the CMMRA-CBC Radio Agreement, the best benchmark available in these proceedings. The Board used this Agreement as validation of the 3.2-to-1 ratio used in *Commercial Radio (2010)*.

Broadcast-incidental Copies – TV

Astral and CBC sought royalties that were either nil or very low, based on the assumption that they do not need a licence for such copies. Thus, Messrs. Wall and Lefebvre proposed valuing any licence for Astral's broadcast-incidental copies at no more than 5 per cent of the total value of the licences secured by the producers whose programs are aired on Astral stations. The Board disagreed since through-to-the-viewer licensing is not as prevalent in the relevant market as the objectors maintained.

Relying on Dr. Murphy's testimony that the use of copies on radio and television is virtually the same, SODRAC argued that a ratio analysis that is valid for CBC radio is equally valid for CBC television and that any ratio analysis valid for CBC television is equally valid for Astral. This led SODRAC to propose royalties of $1,069,078 for conventional television broadcast-incidental copies and 0.63 per cent of gross income, adjusted for repertoire use, for specialty television. The Board agreed with SODRAC, applied the same ratio for television as for radio and certified the rates as indicated in the table below.

Synchronization

For synchronizing musical works into in-house productions and co-productions for CBC, SODRAC proposed royalties of $1,381,248 for conventional television, 0.393 per cent of gross revenues for *RDI* and 0.124 per cent of gross revenues for News Network. To set these rates, SODRAC used the ratio of 1.9 that exists between permanent downloads and on-demand streams and applied it to the broadcast-incidental reproduction rate to obtain the synchronization reproduction rate. Messrs. Wall and Lefebvre challenged this approach, arguing that it is awkward to set the value of a primary right as a function of a secondary right. Also, the similarities between the online music services and television markets are far from obvious. CBC rather proposed to use the 1992 Agreement as starting point. Alternatively, CBC proposed using blanket synchronization licenses between SODRAC and certain broadcasters to derive comparable, blanket through-to-the-viewer royalties for CBC. The Board agreed with SODRAC that this approach failed to consider differences in revenues and scale of operations, assumed similar use patterns of the relevant repertoires and wrongly assumed that each broadcaster produces programs in-house.

CBC finally proposed to determine the amount, in seconds, of pre-existing and commissioned musical works in the repertoire of SODRAC used in its in-house productions and co-productions during the course of a year and to multiply it by the set price for each category. The Board estimated that this transaction-based approach provides the best estimate of the royalties. Since it relies on CBC's actual use of the repertoire, it can be adjusted to CBC's music consumption patterns. It applies different prices to pre-existing and commissioned work, as is the case in the existing market and yields sufficiently reliable and fair results. The rates the Board certified are shown in the table below.

Internet Audio and TV

The CMRRA-CBC Radio Agreement sets royalties of four per cent of conventional radio royalties for simulcasting and streams, and three per cent for podcasting, resulting in a total Internet royalty "top up" of seven

Items	CBC rates	Astral rates
Broadcast-incidental copies – Radio 2008 2009 2010 2011 2012	 $174,476 $177,251 $180,955 $184,574 0.1065 x 2012 SOCAN royalties	
Broadcast-incidental copies – TV	**Conventional television** 14.478% of SOCAN royalites **RDI** 0.217% of gross income **News Network** 0.093% of gross income **Bold** 0.253% of gross income **Documentary Channel** 0.347% of gross income	As % of gross income: *VRAK.TV:* 0.296% *Canal D:* 0.168% *Canal Vie:* 0.130% *Ztélé:* 0.085% *Historia:* 0.113% *Séries+:* 0.163% Teletoon (English): 0.114% *Télétoon (French):* 0.125% Teletoon Retro (English): 0.0004% *Télétoon Rétro (French):* 0.002%
Synchronization (per year) Pre-existing musical works Commissioned musical works	 $581,749 $250,730	
Internet Audio (Internet services and podcasting) **TV**	4% + 3% of conventional radio royalties 4% of all TV royalties	 4% of all TV royalties
Sale of programs to consumers for private use (per minute) **Feature music** First 15 minutes Next 15 minutes Thereafter **Background music** First 15 minutes Next 15 minutes Thereafter	 1,44¢ 0,87¢ 0,52¢ 0,58¢ 0,35¢ 0,21¢	
Sale or licensing of programs to third-party broadcasters and carriers	3% of revenues, adjusted for repertoire	

per cent. SODRAC proposed the rate of seven per cent for audio and four per cent for TV. CBC did not propose a royalty amount, arguing that Internet-related copies have little value and that audio and audiovisual services only use music owned by persons who warrant that they are not members of any copyright collective. The Board already found that copies required to facilitate the use of new modes of delivery deserve remuneration. According to the Board, the Agreement's price is as reliable a benchmark for Internet as it is for conventional radio. The Board certified the rates as proposed by SODRAC.

Sales of programs to consumers for private use (DVDs and downloads)

With respect to DVD copies, CBC sought the status quo while SODRAC proposed a 57 per cent increase, without providing any supporting evidence. The Board preferred using the existing rates, adjusted for inflation.

With respect to online sales, SODRAC proposed to set the same royalty rate as for DVD sales. CBC stated that based on its understanding of the market, the fees for online sales should be lower than for DVD copies. Given the lack of evidence, the Board saw no reason to treat these types of sales differently.

Sale or licensing of CBC programs to third-party broadcasters and carriers

SODRAC proposed that the royalties for copies CBC makes in connection with the sale or licensing of programs to third-party broadcasters and carriers be the same as those the Board set in 2000 for *MusiquePlus*, or three per cent of revenues, adjusted for actual repertoire use in the licensed program. CBC asked instead to rely on a recent licence between SODRAC and a Quebec broadcaster, who does not pay additional royalties for such copies. The agreement CBC referred to is not a reliable benchmark and appeared to be atypical. By contrast, the rate set in *MusiquePlus (2000)* was *prima facie* reasonable. The royalties were thus set at three per cent of revenues, adjusted for repertoire.

The Board estimated the amount payable by CBC in 2008 for all its uses of the SODRAC repertoire, excluding the sale of programs to consumers and the licensing of CBC programs to third-party broadcasters and carriers to be $2.3 million. For Astral, the Board estimated the royalties payable at $370,000.

[NOTE: This decision currently is the subject of two applications for judicial review: one filed by CBC (File: A-516-12) and the other by Astral (File: A-527-12).]

January 16, 2013 – SODRAC v. CBC/SRC – Interim Decision

This decision dealt with the application for an interim licence by SODRAC for the use of its repertoire by CBC.

On March 26, 2012, SODRAC asked the Board to set the interim and final terms of a licence authorizing CBC to reproduce works from the SODRAC repertoire from April 1, 2012, to March 31, 2016. The application also concerned the Explora channel.

SODRAC proposed that the interim licence issued on March 31, 2009 be extended until the

Board render a final decision in the application for arbitration filed by SODRAC for the period from November 14, 2008, to March 31, 2012. On April 30, 2012, the Board allowed the application and established an interim royalty of $1 per month for the Explora channel.

On November 2, 2012, the Board rendered its final decision on the November 14, 2008 licence application (the “2008-2012 licence”). The next day, SODRAC asked the Board that, effective November 3, 2012, the 2008-2012 licence frame its relationship with CBC on an interim basis pending the Board’s final decision with respect to the licence application for the 2012-2016 period. The application suggested an additional interim royalty of $1 per month for activities related to the Explora channel, which was not targeted by the 2008-2012 licence.

CBC claimed that the 2008-2012 licence in no way represents the status quo, for three reasons. First, the 2008-2012 licence imposed a significant retroactive increase. Citing its difficult financial situation, CBC claimed that it is being forced to review immediately its dealings and to adjust its operations, for example by switching to a transactional licensing model for clearing reproduction rights for synchronization purposes. Second, copyright case law has evolved. In particular, in *SOCAN v. Bell Canada*, the Supreme Court clarified the Canadian concept of fair dealing, with material consequences in this instance. Third, the *Copyright Modernization Act* came into force on November 7 of last year. This statute, particularly new sections 29.24 and 30.71 and section 30.9 as amended, also has material consequences in this instance.

SODRAC argued that the interim application of the rates and terms of the 2008-2012 licence would harm no one. CBC remains free to adjust its practices and attempt to clear rights on a transactional basis. An adjustment can be made to the final licence if CBC is able to demonstrate changes in its actual use of the SODRAC repertoire. SODRAC also argued that eliminating the blanket licence at the interim stage could generate additional costs for the parties that could not be compensated if the Board ultimately finds in favour of SODRAC. In addition, and contrary to CBC’s claims, SODRAC noted that the total amount of royalties might in fact increase.

Interim royalties for the sale or licensing of programs remained as in the 2008-2012 licence, since CBC consented to this. The nominal interim royalty set out in the interim licence issued on April 30, 2012 for the Explora channel was maintained. Two categories of CBC activities remained, on which the parties’ views considerably diverged on how to deal with it: CBC’s incidental radio, television and Internet reproduction activities and CBC’s synchronization activities.

In the context of an application for an interim decision, the status quo is the state of the relationship existing between the parties, whether recent or not. The 2008-2012 licence represented the status quo at the time of the application. What remained to be determined was whether the licence should continue to frame the relations between the parties or whether certain adjustments were in order.

Users seeking to invoke an exception or “right” have the burden of establishing, on the basis of evidence, that they may avail themselves of that exception or right, and this is done more easily as part of the examination on the merits than at the interim stage. CBC's interpretation of some of the provisions it refers to is hardly non-contentious. Finally, in light of what we know of industry practices, it is not certain that CBC will always be able to rely on the invoked exceptions for all of its reproduction activities.

Consequently, with respect to incidental reproductions, the 2008-2012 licence was continued on an interim basis.

The fact that CBC intended to modify its operations in no way guarantees that this is indeed what will happen. There was no evidence before the Board to assess the extent and impact of these potential changes on its use of the SODRAC repertoire. An interim decision should focus not on what may be later, but on what is certain now.

The Board considered several approaches to the synchronization activities. The approach it ultimately chose was to extend the lump-sum synchronization licence at a discounted rate. There are several advantages to this approach. It communicates the Board's firm intention to consider, if not encourage, transactional dealings in the relevant rights. It leaves SODRAC essentially whole during the instance. It does not require the implementation of new administrative mechanisms, at least not for the moment, while it clearly communicates to CBC the need to preserve data that may be needed to set up a transactional licensing regime. It gives CBC the opportunity and the motivation to adjust its practices as it claims it needs to do. The Board was of the view that, in this case, a 20 per cent discount achieved the objectives described above.

[NOTE: This decision currently is the subject of an application for judicial review filed by CBC (File: A-63-13).]

Educational Rights

Background

Sections 29.6, 29.7 and 29.9 of the *Act* came into force on January 1, 1999. Since then, educational institutions and persons acting under their authority can, without the copyright owner's authorization, copy programs when they are communicated to the public and perform the copy before an audience consisting primarily of students. In a nutshell, institutions can copy and perform news and news commentaries and keep and perform the copy for one year without having to pay royalties; after that, they must pay the royalties and comply with the conditions set by the Copyright Board in a tariff. Institutions can also copy other programs and subject-matters, and keep the copy for assessment purposes for thirty days; if they keep the copy any longer, or if they perform the copy at any time, the institution must then pay the royalties and comply with the conditions set by the Board in a tariff.

Filing of Tariff Proposal

No tariffs were filed in 2012-13.

Hearings

No hearings were held in 2012-13.

Decisions

No decisions were rendered during the fiscal year.

Retransmission of Distant Signals

Background

The *Act* provides for royalties to be paid by cable companies and other retransmitters for the retransmission of distant television and radio signals. The Board sets the royalties and allocates them among the collective societies representing copyright owners whose works are retransmitted.

Filing of Tariff Proposals

In this fiscal year, tariffs were filed for retransmission of distant radio and television signals for the years 2014 to 2018.

Hearings

No hearings were held in 2012-13.

Decisions

One decision was rendered during the fiscal year, as follows:

December 21, 2012 – Interim Tariff for the Retransmission of Distant Television Signals as of January 1, 2013

On December 20, 2010, the nine retransmission collective societies and retransmitter objectors agreed on the royalties to be paid under the 2009-2013 tariff. On November 9, 2012, the collective societies agreed how to allocate those royalties.

On December 14, 2012, the Canadian Broadcasters Rights Agency (CBRA) and the Canadian Retransmission Collective (CRC) filed an application for an interim decision in order to:

- approve the royalty rates agreed to between the collective societies and retransmitter objectors;
- approve the allocation of royalties agreed to by the collective societies;
- order retransmitters to pay collective societies in accordance with the newly agreed allocation and rates as of January 1, 2013; and,
- initiate a process to deal with outstanding issues that must be addressed before a final decision can be issued.

These issues were whether there should be interest payable on inter-collective payments and how disputes should be arbitrated.

The Copyright Collective of Canada (CCC) and the Canadian Retransmission Right Association (CRRA) opposed the application. They argued that CBRA and CRC seek to alter the allocation agreement by asking that the Board formalize one aspect (allocation) but not another (interests on reallocations of royalties). They asked that the allocation agreement be approached as a whole and that the current allocation continue to apply until all issues are resolved.

The Board found that this opposition was ill-founded since the interim decision does not prejudge the issues that will be addressed in the final decision. The interim decision certified the rate agreement of 2010 and the allocation agreement of 2012.

Private Copying

Background

The private copying regime entitles an individual to make copies (a "private copy") of sound recordings of musical works for that person's personal use. In return, those who make or import recording media ordinarily used to make private copies are required to pay a levy on each such medium. The Board sets the levy and designates a single collecting body to which all royalties are paid. Royalties are paid to the Canadian Private Copying Collective (CPCC) for the benefit of eligible authors, performers and producers.

The regime is universal. All importers and manufacturers pay the levy. However, since these media are not exclusively used to copy music, the levy is reduced to reflect non-music recording uses of media.

Filing of Tariff Proposals

No tariff proposals were filed during the fiscal year.

Hearings

A hearing was held (on October 9 and 10, 2012) pertaining to the private copying royalties for the years 2012 to 2014 with respect to CDs, and on the issue of whether microSD cards qualify as an audio recording medium.

Decisions

No decisions were rendered during the fiscal year.

Unlocatable Copyright Owners

Pursuant to section 77 of the *Act*, the Board may grant licenses authorizing the use of published works, fixed performances, published sound recordings and fixed communication signals, if the copyright owner is unlocatable. However, the *Act* requires the applicants to make reasonable efforts to find the copyright owner. Licenses granted by the Board are non-exclusive and valid only in Canada.

During the fiscal year 2012-13, 24 applications were filed with the Board and the following eight licenses were issued:

- *Éditions du Quartz*, Rouyn-Noranda, Quebec, for the reproduction and the republication on hard copy of the text in a book;
- *La Presse Télé III Ltée*, Montreal, Quebec, for the synchronization, reproduction and communication to the public by telecommunication of an excerpt of a song;
- *Bibliothèque et Archives nationales du Québec* (BAnQ), Montreal, Quebec, for the reproduction and communication to the public by telecommunication of posters, periodicals and monographs;
- Canadian Institute of Natural and Integrative Medicine (CINIM), Calgary, Alberta, for the digital reproduction and the communication to the public by telecommunication of two jokes;
- Frontier School Division, Winnipeg, Manitoba, for the mechanical reproduction and public performance of a musical work;
- *Éditions du Quartz*, Rouyn-Noranda, Quebec, for the reproduction and the republication on hard copy of the text in a book; (Renewal)
- National Film Board of Canada, St-Laurent, Quebec, for the reproduction and the communication to the public by telecommunication of a photograph in a documentary film; and,
- Canada's History Society, Winnipeg, Manitoba, for the reproduction, the making available and the communication to the public by telecommunication of three paintings.

Court Proceedings

Federal Court of Appeal

Five applications for judicial review were filed with the Federal Court of Appeal in 2012-13:

- *Re:Sound v. Goodlife, et al.* (File: A-353-12), in respect of Re:Sound Tariff 6.B (Use of Recorded Music to Accompany Physical Activities, 2008-2012).
- *CBC v. SODRAC* (File: A-516-12) and *Astral v. SODRAC* (File: A-527-12), in respect of the SODRAC v. CBC and SODRAC v. Astral licences.

  The Federal Court of Appeal rendered interlocutory decisions in these matters, as follows:

  On February 12, 2013, the Federal Court of Appeal ordered that the two applications be consolidated. On February 18, 2013, CBC and Astral filed a motion asking the Court to stay the November 2, 2012 decision. On February 28, 2013, the Court stayed the November 2 decision and the licences issued pursuant to the decision. Applying the test set out by the Supreme Court in *RJR-Macdonald,* the Court concluded that the applications raised a serious question to be tried, that CBC and Astral would suffer irreparable harm if the stay was not granted and that SODRAC would suffer no harm should the stay be granted. The Court also ordered that, starting November 3, 2012, the licences that had applied until the November 2 decision was issued be extended until a final decision was rendered in the judicial review applications.

- *CAFDE v. SODRAC* (File: A-525-12), in respect of SODRAC Tariff 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition, 2009-2012).

  On February 5, 2013, the Court ordered that the decision be stayed for a period of six months, allowing the Board to issue a decision on the redetermination of the matter. This decision was issued on July 5, 2013.

- *CBC v. SODRAC* (File: A-63-13), in respect of an interim decision on a SODRAC v. CBC licence.

  On February 28, 2013, the Court ordered that the January 16 decision be stayed until a final decision is rendered. On March 20, 2013, the Court also ordered that the file be consolidated with files A-516-12 and A-527-12.

One other application for judicial review was decided by the Federal Court of Appeal in 2012-13:

- *Montage Management Inc. v. Re:Sound* (File: A-73-12), in respect of Re:Sound Tariff 6.A (Use of Recorded Music to Accompany Dance, 2008-2012 – Application to Vary.

  On September 21, 2012, the Court issued a Notice requiring the Applicant to serve and file submissions within 30 days stating reasons why the proceeding should not be dismissed for delay. As the Applicant did not comply with the Notice, the application for judicial review was dismissed.

Supreme Court of Canada

Five decisions of the Federal Court of Appeal (*summarized in the 2010-11 Annual Report*) appealed to the Supreme Court of Canada were decided in 2012-13:

***Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* [SOCAN Tariff 22.A – Online Music Services, 1996-2006]**

Reasons for Judgment: Abella J. (McLachlin C.J. and LeBel, Deschamps, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring)

SOCAN represents composers, authors and music publishers and administers their performing and communication rights. Bell Canada, Apple Canada, Rogers Communications Inc., Rogers Wireless Partnership, Shaw Cablesystems G.P. and TELUS Communications Inc. operate online music services that sell downloads of musical works. These services give consumers the ability to listen to free "previews" of musical works, usually 30 to 90 seconds of a musical track, before deciding which work to purchase. SOCAN sought compensation for the provision of those previews.

In a decision released on October 18, 2007, the Board agreed that SOCAN was entitled to collect royalties for the downloading of musical works, but not for previews. In the Board's opinion, the use of previews was not an infringement of copyright since their use was fair dealing for the purpose of research under s. 29 of the *Act* based on the factors identified in *CCH Canadian Ltd. v. Law Society of Upper Canada* (*CCH*). The Federal Court of Appeal upheld the Board's decision.

The test for fair dealing articulated in *CCH* involves two steps. First, is the dealing for the purpose of either research or private study, the two allowable purposes listed under s. 29? Second, is the dealing fair?

In *CCH*, to assist in determining whether the dealing is fair, the Court set out the following six fairness factors: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

The first inquiry in this case, therefore, is whether previews are provided for the allowable purpose of research under the first step of the *CCH* fair dealing test.

SOCAN argued that the Board and the Federal Court of Appeal misinterpreted the term "research" in two ways. It argued first that their interpretation of research was overly broad. Its second argument was that the purpose of research should have been analyzed from the perspective of the online service provider and not the consumer. From this perspective, the purpose of the previews was not research, but to sell permanent downloads of the musical works.

SOCAN offered the definition of research as being the "systematic investigation into and study of materials and sources in order to establish facts and reach new conclusions". Moreover, SOCAN argued that the goal of the research must be for the purpose of making creative works, since only uses that contribute to the creative process are in the public interest.

It is true that an important goal of fair dealing is to allow users to employ copyrighted works in a way that helps them engage in their own acts of authorship and creativity. But that does not argue for permitting only creative purposes to qualify as research under s. 29 of the *Act*.

Limiting research to creative purposes would also run counter to the ordinary meaning of research, which can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest.

In *CCH*, the Court created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair. SOCAN's submission that research be restricted to the creation of new works would conflate the allowable purpose with the fairness analysis and unduly raise the bar for entering that analysis.

SOCAN's proposed definition of research requiring systematic investigation and new conclusions is also at odds with its second submission about research, namely, that research be analysed from the perspective of the purpose of the online service providers, and not that of the users. But its own proposed definition shows that it sees research as a user-focused undertaking, since the investigation and creation of new conclusions are clearly done by a user, not a provider. The provider's purpose in making the works available is therefore not the relevant perspective at the first stage of the fair dealing analysis.

This is consistent with the Court's approach in *CCH*, where it described fair dealing as a user's right. In *CCH*, the Great Library was the provider, offering a photocopying service to lawyers requesting copies of legal materials. The Court did not focus its inquiry on the library's perspective, but on that of the ultimate user, the lawyers, whose purpose was legal research.

Similarly, in considering whether previews are for the purpose of research under the first step of *CCH*, the Board properly considered them from the perspective of the user or consumer's purpose. And from that perspective, consumers used the previews for the purpose of conducting research to identify which music to purchase.

The inquiry then moves to the second step, namely, determining whether the use of previews was fair in accordance with the *CCH* factors.

Whether something is fair is a question of fact and depends on the facts of each case. Based on all the factors, the Board properly concluded that previews amounted to fair dealing.

The first factor identified in *CCH* is the purpose of the dealing, where an objective assessment is made of the real purpose or motive behind using the copyrighted work.

SOCAN argued that the purpose of the previews was purely commercial. This is an approach that looks at the purpose of the previews from the perspective not of the consumer, but of the service providers. Rather, the predominant perspective in this case is that of the ultimate users of the previews, and their purpose in using previews was to help them research and identify musical works for online purchase. While the service providers sell musical downloads, the purpose of providing previews is primarily to facilitate the research purposes of the consumers.

The Board noted that there were reasonable safeguards in place to ensure that the users' dealing in previews was in fact being used for this purpose: the previews were streamed, short, and often of lesser quality than the musical work itself. These safeguards prevented the previews from replacing the work while still fulfilling a research function.

The second factor discussed in *CCH* is the character of the dealing. The Court stated that a particular dealing might be unfair if multiple copies of works are being widely distributed. But as the Court also pointed out, if a single copy of a work is used for a specific legitimate purpose, or if the copy no longer existed after it was used, this would favour a finding of fairness.

SOCAN's argument was based on the fact that consumers accessed, on average, ten times the number of previews as full-length musical works. However, no copy existed after the preview was heard. The previews were streamed, not downloaded. Users did not get a permanent copy, and once the preview was heard, the file was automatically deleted from the user's computer. The fact that each file was automatically deleted meant that copies could not be duplicated or further disseminated by users.

The third factor identified in *CCH* is the amount of the dealing. The Board characterized the amount of the dealing in terms of the length of each preview compared to the length of the work, concluding that streaming a preview of about 30 seconds was a modest dealing when compared to purchasing the whole work for repeated listening.

SOCAN argued, however, that the proportion of the preview in relation to the length of the whole musical work was not the proper measure, and that the Board should have considered instead the aggregate number of previews that are streamed by consumers.

SOCAN's argument conflicts with the Court's statement in *CCH* that amount means the quantity of the work taken. Since fair dealing is a user's right, the amount of the dealing factor should be assessed based on the individual use, not the amount of the dealing in the aggregate. The appropriate measure under this factor is therefore, as the Board noted, the proportion of the excerpt used in relation to the whole work. As for the quantification of the aggregate dissemination, it is already considered under the character of the dealing factor.

The fourth factor identified in *CCH* involves considering any alternatives to the dealing. SOCAN argued that there were other methods available to help users identify potential music for purchase. However, none of the other suggested alternatives can demonstrate to a consumer what previews can, namely, what a musical work sounds like. As the Board concluded, short, low-quality streamed previews are reasonably necessary to help consumers research what to purchase.

The fifth factor is the nature of the work, which examines whether the work is one which should be widely disseminated. SOCAN did not dispute the desirability of the sale and dissemination of musical works, but argued that since these works are easily purchased and disseminated without the use of previews, previews are of no additional benefit to promoting further dissemination. But the fact that a musical work is widely available does not necessarily correlate to whether it is widely disseminated. Unless a potential consumer can locate and identify a work he or she wants to buy, the work will not be disseminated.

This observation is linked to the final factor: the effect of the dealing on the work and whether the dealing adversely affects or competes with the work. Because of their short duration and degraded quality, it can hardly be said that previews are in competition with downloads of the work itself. And since the effect of previews is to increase the sale of musical works, it cannot be said that they have a negative impact on the work.

All of this confirms the Board's conclusion that previews satisfy the requirements of fair dealing.

***Entertainment Software Association and Entertainment Software Association of Canada v. Society of Composers, Authors and Music Publishers of Canada and CMRRA/SODRAC Inc.* [SOCAN Tariffs 22.B-G – Internet, other uses of music, 1996-2006]**

Joint Reasons for Judgment: Abella and Moldaver JJ. (McLachlin C.J. and Deschamps and Karakatsanis JJ. concurring)

This appeal concerned musical works contained in video games which may be downloaded from the Internet.

In the video game publishing industry, the royalties for the reproduction of any musical works which are incorporated into the games are currently negotiated before the games are packaged for public sale. Once these rights have been negotiated, the owner of the copyright in the musical work has no further rights when the game is sold. The question in this appeal was whether the rights are nonetheless revived when the work is sold over the Internet instead of in a store.

The Appellants argued that works transmitted over the Internet by downloading should not give rise to further compensation under s. 3(1)(*f*) of the *Act*. The Respondent, SOCAN, contented that reproduction and communication were different and independent rights under the *Act* and that copyright holders were entitled to remuneration for the communication of their works through Internet downloading.

The Copyright Board concluded that video games containing a musical work were subject to a royalty when sold over the Internet. Its decision was upheld by the Federal Court of Appeal.

In the Supreme Court's view, the Board's decision misconstrued the provisions at issue in the *Act*, ignoring decades of legislative history, and violated the principle of technological neutrality, which requires that the *Act* apply equally notwithstanding the technological diversity of different forms of media.

At issue was the meaning of the word "communicate" in s. 3(1)(*f*) of the *Act*, a term which is not defined in the *Act*. SOCAN applied to the Board for a tariff under this provision to cover downloads of musical works over the Internet. The Entertainment Software Association and the Entertainment Software Association of Canada (collectively, ESA), which represent a broad coalition of video game publishers and distributors, objected to the tariff, arguing that "downloading" a video game containing musical works did not amount to "communicating" that game to the public by telecommunication under s. 3(1)(*f*). Instead, a "download" is merely an additional, more efficient way to deliver copies of the games to customers. The downloaded copy is identical to copies purchased in stores or shipped to customers by mail, and the game publishers already pay copyright owners reproduction royalties for all of these copying activities.

The Court agreed with ESA and in its view, the Board's conclusion that a separate, "communication" tariff applied to downloads of musical works violated the principle of technological neutrality, which requires that the *Act* apply equally between traditional and more technologically advanced forms of the same media. The principle of technological neutrality is reflected in s. 3(1) of the *Act*, which describes a right to produce or reproduce a work "in any material form whatever". In the Court's opinion, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.

ESA's argument was also consistent with the Court's caution in *Théberge v. Galerie d'Art du Petit Champlain inc.*, that the balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creator requires recognizing the "limited nature" of creators' rights.

The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, courts interpret the *Act* in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user.

In the Court's opinion, the Board improperly concluded that the Internet delivery of copies of video games containing musical works amounted to "communicating" the works to the public. This finding is evidenced by the legislative history of the *Act*, which demonstrates that the right to "communicate" is historically connected to the right to perform a work and not the right to reproduce permanent copies of the work.

Performing a work is fundamentally different than reproducing it. As the Court concluded in *Bishop v. Stevens*, a performance is impermanent in nature, and does not leave the viewer or listener with a durable copy of the work. The term "communicate" in s. 3(1)(*f*), which has historically been linked to the right to perform, should not be transformed by the use of the word "telecommunication" in a way that would capture activities akin to reproduction.

In *Bishop*, there were two activities: 1) the making of an ephemeral copy of the musical work in order to effect a broadcast, and

2) the actual broadcast of the work itself. In this case, however, there was only one activity at issue: downloading a copy of a video game containing musical works. *Bishop* does not stand for the proposition that a single activity (i.e., a download) can violate two separate rights at the same time.

The communication right in s. 3(1)(*f*) is not a *sui generis* right in addition to the general rights described in s. 3(1). The introductory paragraph defines what constitutes "copyright". It states that copyright "means" the sole right to produce or reproduce a work in any material form, to perform a work in public, or to publish an unpublished work. This definition of "copyright" is exhaustive, as the term "means" confines its scope. The paragraph concludes by stating that copyright "includes" several other rights, set out in subsections (*a*) through (*i*). As a result, the rights in the introductory paragraph provide the basic structure of copyright. The enumerated rights listed in the subsequent subparagraphs are simply illustrative.

Therefore, the Board's conclusion that the Internet delivery of a permanent copy of a video game containing musical works amounted to a "communication" under s. 3(1)(*f*) was set aside. The Court allowed the appeal.

Dissenting Reasons: Rothstein J. (LeBel, Fish and Cromwell JJ. concurring)

Precedents of the Court have established the principles that must govern the analysis in this appeal: copyright is a creature of statute; copyright is comprised of a bundle of independent statutory rights; and, courts must give effect to these independent rights as provided by Parliament. While courts must bear in mind that the *Act* is a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator, which balance requires not only recognizing the creator's rights but in giving due weight to their limited nature, courts must still respect the language chosen by Parliament, not override it.

Generally, a technologically neutral copyright law is desirable. However, technological neutrality is not a statutory requirement capable of overriding the language of the *Act* and barring the application of the different protected rights provided by Parliament. The majority's basic propositions pre-empt the application of other rights of the copyright holder to this set of facts and divest these rights of their independent content. There is no need to revive rights that have never been exhausted.

It is standard practice within the video game publishing industry to negotiate clearance of copyright for the reproduction of the musical works incorporated in the games prior to their publication. There is no dispute that once reproduction rights are cleared, the owner of copyright in the musical work would have no further rights when the video game is sold to a customer at a bricks-and-mortar store or if a CD containing the game is shipped through regular mail.

In *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, Binnie J. noted the Board's conclusion that "an Internet communication occurs at the time the work is transmitted from the host server to the computer of the end user, regardless of whether it is played or viewed at that time, or later, or never". He found that this particular issue was "no longer contested".

The issue in this appeal was whether the transmission of a video game through an Internet download is a "communication" to the public within the meaning of s. 3(1)(*f*) of the *Act*. If it is, SOCAN is entitled to royalties for the communication of the included musical works.

The *Act* must be interpreted in accordance with the general rules of statutory interpretation. The words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of Parliament.

The definitions of "communicate" and "transmit" and the context in which the words are used in the *Act* do not support the ESA's conclusion that to "communicate" in s. 3(1)(*f*) must necessarily mean to transmit information in a humanly perceptible form for immediate perceiving and listening.

The structure of s. 3(1) implies that the communication right in paragraph (*f*) is a self-standing right independent of the performance right in the introduction of the section. On this basis, the historic relationship of s. 3(1)(*f*) with broadcasting-type industries does not support reading into the *Act* restrictions which are not apparent from and are even inconsistent with the current language of the *Act*. In particular, the historic relationship does not support adopting the ESA's proposition to read into the language of the *Act* the significant restriction that the transmission must be in a "humanly perceivable form for immediate viewing or listening."

When transmitted over the Internet, whether works are perceptible immediately or at a later moment or whether or not the technology used involves producing temporary copies, as in the case of streams, or permanent copies of the work is irrelevant to whether a communication has occurred and the work will, or has the potential to be, viewed or listened to by the receiver.

The fact that the work is transmitted over the Internet, and therefore, "communicate[d][...] by telecommunication" within the ordinary meaning of the words, for the purpose of delivering a copy of the video game containing the musical work to the user, does not change the fact that there is an Internet communication requiring authorization of the copyright holder.

The policy concern raised by ESA is that a copyright holder should not be entitled to both a reproduction and a communication right in the context of Internet downloads. The answer to this concern is straightforward: the rights of copyright holders under s. 3(1) are distinct and separate rights.

A media neutral application of the *Act* to the facts of this case would mean that the right of reproduction continues to apply to copies made through downloads, notwithstanding the fact that they are digital copies. It would also support the proposition that the communication right must continue to apply to digital communications, notwithstanding that they may differ from traditional broadcasting technologies. A media neutral application of the *Act*, however, does not imply that a court can depart from the ordinary meaning of the words of the *Act* in order to achieve the level of protection for copyright holders that the court considers is adequate.

Communicating works to the public by telecommunication is an independent and distinct right from other rights in s. 3(1) that are included within copyright. It is complete when the communication is received, in this case, when the file is downloaded to the user's computer, even though it can be perceived only after the transmission, or whether or not it is ever perceived.

***Bell Canada, Rogers Communications Inc., Puretracks Inc., and Telus Communications Company v. Society of Composers, Authors and Music Publishers of Canada* [SOCAN Tariff 22.A – Online Music Services, 1996-2006]**

Reasons for Judgment: Rothstein J. (McLachlin C.J. and LeBel, Deschamps, Fish, Cromwell, Moldaver and Karakatsanis JJ. concurring)

Concurring Reasons: Abella J.

Online music services offer permanent downloads, limited downloads and on-demand streams of files containing musical works.

On October 18, 2007, the Board certified SOCAN Tariff 22.A for the communication to the public by telecommunication of musical works by online music services. Among other things, the Board concluded that downloads and streams came within the scope of the exclusive right of copyright holders to communicate to the public by telecommunication provided by the *Act*. Accordingly, it found that a claim for communication royalties by the holders of copyright in the communicated works was well founded, in addition to any reproduction royalties received when a work was copied through the Internet. On appeal, the Federal Court of Appeal agreed.

The sole issue in the appeal was the meaning of the phrase "to the public" in s. 3(1)(*f*) of the *Act*. The online music services brought this appeal on the basis that their uses of music did not engage the right to communicate to the public by telecommunication in s. 3(1)(*f*) because they did not come within the scope of the phrase "to the public". The issue of whether downloads can be communications within the meaning of s. 3(1)(*f*) was left to be determined in the companion case *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada. [A summary of which is included in this section of the report.]* In that decision, a majority of the Court determined that musical works are not "communicated" by telecommunication when they are downloaded. As a result, the issue in the present appeal was whether streaming of files from the Internet triggered by individual users constitutes communication "to the public" of the musical works contained therein by online music services who make the files available to the users for streaming.

Standard of review

In recent decisions, the Supreme Court made clear that an administrative body interpreting and applying its home statute should normally be accorded deference on judicial review, and hence when considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness.

However, it would be inconsistent for the court to review a legal question on judicial review of a decision of the Board on a deferential standard and decide exactly the same legal question *de novo* if it arose in an infringement action in the court at first instance. It would be equally inconsistent if on appeal from a judicial review, the appeal court were to approach a legal question decided by the Board on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question. The standard of correctness is the appropriate standard of review on questions of law arising on judicial review from the Board.

A statutory scheme under which both a tribunal and a court may decide the same legal question at first instance is quite unlike the scheme under which the vast majority of judicial reviews arise. Nothing in the Court's reasons should be taken as departing from *Dunsmuir* and its progeny as to the presumptively deferential approach to the review of questions of law decided by tribunals involving their home statute or statutes closely connected to their function. Also, the Board's application of the correct legal principles to the facts of a particular matter should be treated with deference, as are the decisions of this nature by trial judges on appellate review.

Abella J. disagreed with her colleagues on this issue, concluding that the Board, when interpreting its home statute in setting tariffs for the communication of new forms of digital media, should be accorded the same deference and be reviewed on the same standard as every other specialized tribunal in Canada.

Communication "to the Public"

Before the Court, the Appellants maintained that a point-to-point communication by telecommunication of a discrete copy of a musical work is not a communication to the public, regardless of whether another copy of the same work is transmitted to a different customer at a different time. The Respondent argued the opposite. There was no dispute in this appeal that the communications in issue are "telecommunications" within the meaning of the *Act*.

Both parties in this appeal relied on *CCH* in support of their respective positions. They disagreed, however, on the meaning of the caveat in *CCH* that "a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright". Where the Appellants argued that the recipient of each transmission must be considered, SOCAN and the decisions below focused on the sender's activities in communicating a given work over time.

The Court found that the Appellants' proposition was untenable since such a rule would produce arbitrary results.

Focusing on each individual transmission loses sight of the true character of the communication activity in question and makes copyright protection dependant on technicalities of the alleged infringer's chosen method of operation. Such an approach does not allow for principled copyright protection. Instead, it is necessary to consider the broader context to determine whether a given point-to-point transmission engages the exclusive right to communicate to the public. This is the only way to ensure that form does not prevail over substance.

The Appellants' proposed rule that each transmission be analyzed in isolation because each is initiated at the request of individual members of the public would have the effect of excluding all interactive communications from the scope of the copyright holder's exclusive rights to communicate to the public and to authorize such communications. By definition, on-demand communications, relating to the so-called "pull" technologies, are initiated at the request of the user, independently of any other user, and each individual transmission happens in a point-to-point manner. None of these telecommunications would be considered as being made "to the public" simply because the actual transmission occurs at the initiative and discretion of the consumer to accept the invitation to the public to access the content.

Nothing in the wording of s. 3(1)(*f*) of the *Act* implies such a limitation. A communication is not restricted to a purely non-interactive context.

The historic relationship between the right to communicate to the public and broadcasting-type, "push" technologies, and the 1988 amendment in particular, is evidence that the *Act* has evolved to ensure its continued relevance in an evolving technological environment. The historic relationship does not support reading into the *Act* restrictions which are not apparent from and are even inconsistent with the neutral language of the *Act* itself.

In determining the extent of copyright, regard must be had for the fact that the *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. This balance is not appropriately struck where the existence of copyright protection depends merely on the business model that the alleged infringer chooses to adopt rather than the underlying communication activity. Whether a business chooses to convey copyright protected content in a traditional, "broadcasting" type fashion, or opts for newer approaches based on consumer choice and convenience, the end result is the same. The copyrighted work has been made available to an aggregation of individuals of the general public.

Where a series of point-to-point communications of the same work to an aggregation of individuals is found to exist, it matters little for the purposes of copyright protection whether the members of the public receive the communication in the same or in different places, at the same or at different times or at their own or the sender's initiative.

The appeal was allowed in respect of downloads and dismissed in respect of music streamed from the Internet.

***Alberta (Education) v. Access Copyright* [Access Copyright Tariff – Educational Institutions, 2005-2009]**

Reasons for Judgment: Abella J. (McLachlin C.J. and LeBel, Moldaver and Karakatsanis JJ. concurring)

In 2004, Access Copyright (Access) filed with the Board a proposed tariff for the reprographic reproduction of works in the repertoire of Access by primary and secondary educational institutions outside Quebec.

During the course of the proceedings before the Board, the parties agreed to the terms of a photocopies' volume study. It was carried out between February 2005 and March 2006. Information was recorded by observers on logging stickers posted next to each photocopier.

Based on information collected from the stickers, each incident of photocopying was divided into one of four categories. The first three dealt with copies made by teachers either for themselves or at the request of a student. All parties agreed that copies falling under these categories constituted fair dealing.

The fourth category (Category 4) dealt with copies of works made at the teachers' initiative with instructions to students that they read the material. Teachers would photocopy short excerpts from textbooks and distribute those copies to students as a complement to the main textbook the students used.

At the hearing, Access argued that the Category 4 copies did not meet the test for fair dealing identified in *CCH*. The objectors, on the other hand, contended that the Category 4 copies should be excluded from the tariff because these copies constituted fair dealing under ss. 29 or 29.1 of the *Act*.

Based on the evidence from the stickers used in the volume study, the Board concluded that the Category 4 copies were made for the allowable purpose of research or private study under s. 29 of the *Act*, but found, applying the *CCH* fairness factors, that these copies did not constitute fair dealing and were therefore subject to a royalty.

The objectors appealed only the fair dealing issue to this Court, arguing that the Board's conclusion was not in accordance with the *CCH* test and was therefore unreasonable.

The test for fair dealing was articulated in *CCH* as involving two steps. The first is to determine whether the dealing is for the allowable purpose of research or private study under s. 29, criticism or review under s. 29.1, or news reporting under s. 29.2 of the *Act*. The second step of *CCH* assesses whether the dealing is "fair". To assist in determining whether the dealing is fair, the Court set out a number of fairness factors: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

Before the Court, there was no dispute that the first step in *CCH* was met and that the dealing was for the allowable purpose of research or private study. The dispute essentially centered on the second step of the test: whether the Category 4 copies were fair in accordance with the *CCH* factors.

The key problem is in the way the Board approached the purpose of the dealing factor. The Board concluded that since the Category 4 copies were not made as a result of a student request, they were no longer for the purpose of research or private study at the second stage. This was based on its observation that in *CCH*, the Great Library was making copies at the request of lawyers. Because there was no such request for Category 4 copies, the Board concluded that the predominant purpose was that of the teacher, namely, instruction or non-private study.

Access argued that the purpose of the dealing should be seen, as it was by the Board and the Federal Court of Appeal, from the copier's, or teacher's perspective. It relied particularly on three key Commonwealth cases which found the copier's purpose in reproducing the work to be determinative.

According to the Court, these authorities are not helpful. Firstly, courts in the U.K. have tended to take a more restrictive approach to determining the purpose of the dealing than does *CCH*. More importantly, these cases involved copiers with demonstrably ulterior – i.e. commercial – motives. They invoked the allowable purposes of research or private study in order to appropriate their customers' or students' purposes as their own and escape liability for copyright infringement.

These cases, then, to the extent that they are germane, do not stand for the proposition that research and private study are inconsistent with instructional purposes, but for the principle that copiers cannot camouflage their own distinct purpose by purporting to conflate it with the research or study purposes of the ultimate user.

As noted in the companion appeal *SOCAN v. Bell*, fair dealing is a user's right and the relevant perspective when considering whether the dealing is for an allowable purpose under the first stage of *CCH* is that of the user. This does not mean, however, that the copier's purpose is irrelevant at the fairness stage. If, as in the cases Access referred to, the copier hides behind the shield of the user's allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that separate purpose will also be relevant to the fairness analysis.

Here, however, there is no such separate purpose on the part of the teacher. Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of instruction; they are there to facilitate the students' research and private study. The teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological.

The Board's approach drives an artificial wedge into these unified purposes by drawing a distinction between copies made by the teacher at the request of a student (Categories 1-3), and copies made by the teacher without a prior request from a student (Category 4). Nowhere in *CCH* did the Court suggest that the lawyer had to request the photocopies of legal works from the Great Library before those copies could be said to be for the purpose of research. On the contrary, what the Court found was that the copies of legal works were necessary conditions of research and thus part of the research process.

Similarly, photocopies made by a teacher and provided to students are an essential element in the research and private study undertaken by those students. The fact that some copies were provided on request and others were not did not change the significance of those copies for students engaged in research and private study.

The statement made by the Board that the photocopies made by teachers were made for an unfair purpose – *non*-private study – since they were used by students as a group in class, and not "privately" does not hold.

The word "private" in "private study" should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the concept of studying, the Board again artificially separated the teachers' instruction from the students' studying.

The Board's approach to the amount of the dealing factor is also problematic. In considering this factor, the Board accepted that teachers generally limit themselves to reproducing short excerpts of each textbook. The Board was required to determine whether the proportion of each of the short excerpts in relation to the whole work was fair. Rather, the Board concluded that the likelihood of repeated copying of the same class set of books tended to make the dealing unfair.

This is a flawed approach. The amount factor is not a quantitative assessment based on aggregate use, it is an examination of the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated. The quantification of the total number of pages copied, as the Court noted in *CCH*, is considered under a different factor: the character of the dealing.

The manner in which the Board approached the alternatives to the dealing factor is also a problem. The Board found that the educational institutions had an alternative to photocopying textbooks: they could simply buy the original texts to distribute to each student or to place in the library for consultation.

Buying books for each student is not a realistic alternative to teachers copying short excerpts to supplement student textbooks. First, the schools have already purchased originals that are kept in the class or library, from which the teachers make copies. In addition, purchasing a greater number of original textbooks to distribute to students is unreasonable in light of the Board's finding that teachers only photocopy short excerpts to complement existing textbooks.

The final problematic application of a fairness factor by the Board was its approach to the effect of the dealing on the work. Access pointed out that textbook sales had shrunk over 30 per cent in 20 years. However, as noted by the objectors, there was no evidence that this decline was linked to photocopying done by teachers. Despite this evidentiary vacuum, the Board nonetheless concluded that the impact of photocopies, though impossible to quantify, was sufficiently important to compete with the original texts.

Because the Board's finding of unfairness was based on a misapplication of the *CCH* factors, its outcome was rendered unreasonable. The appeal was allowed and the matter remitted to the Board for reconsideration.

Dissenting Reasons: Rothstein J. (Deschamps, Fish and Cromwell JJ. concurring)

According to the dissenting judges, the Board made no reviewable error in construing the

CCH factors and, with one relatively minor exception, its factual analysis, application of the *CCH* factors to the facts and its conclusions were not unreasonable.

With respect to the purpose of the dealing, teacher also has a purpose. It is to utilize the photocopied excerpts in the process of instructing and educating the students, the essence of the job of teaching. The teacher's role in selecting and photocopying excerpts of works is significantly different from the role of the Great Library staff in *CCH*, which was completely passive. The Board noted this difference and concluded that the teacher's purpose predominated in these circumstances. There is nothing unreasonable in this conclusion.

The Board's approach did not draw an artificial distinction between copies made by the teacher at the request of a student and those made at the teacher's own initiative. In *CCH*, the photocopies made by the staff of the Great Library were made at the request of the lawyers. Without that request from the lawyers, there would have been no photocopies. Considering, as the Board did, that the fact that the initiative for a copy came from a teacher was an indicator that the photocopy would mainly serve the teacher's purpose of teaching is not artificial or unreasonable.

The Board did not err either in equating instruction with *non*-private study, and in concluding that this tended to make the purpose of the dealing unfair.

The *Act* requires that to be fair dealing, use of a copyrighted work must be for private study. This indicates that the *Act* foresees private and non-private study. Parliament does not speak in vain. Words used by the legislator should be construed to give them some meaning. The section cannot be interpreted to strip the word "private" in private study of any meaning.

Private study cannot have been intended to cover situations where tens, hundreds or thousands of copies are made in a school, school district or across a province as part of an organized program of instruction. The Board's conclusion that, in the case of Category 4 copies, the real or predominant purpose is instruction or "non-private" study is reasonable.

With respect to the amount of the dealing, as expressed by the majority, the amount of the dealing factor is concerned with the proportion between the excerpted copy and the entire work, not the overall quantity of what is disseminated. The number of copies and the extent of the dissemination are properly considered under the "character of a dealing" factor.

However, the Board's analysis under the amount of the dealing factor remained focused on the proportion of the photocopied excerpt to the entire work. In its factual assessment of the amount of the dealing factor, the Board found that class sets will be subject to numerous requests for the same series. The Board's reliance on this finding does not indicate that it improperly considered the overall number of copies of the same excerpt distributed to a whole class.

In the Board's view, while teachers usually made short excerpts at any one time, this was offset by the fact that the teachers would return to copy other excerpts from the same books – the ones contained in class sets – thereby making the overall proportion of the copied pages unfair in relation to the entire work over a period of time. The Board's conclusion is not unreasonable.

Under the character of the dealing factor, the Board focused its analysis on the fact that multiple copies of the same excerpt are made, at any one time, to be disseminated to the whole class. Accordingly, the Board's conclusions of unfairness under the character of the dealing and the amount of the dealing factors were arrived at independently, taking into consideration different aspects of the dealing.

With respect to alternatives to the dealing, as expressed by the majority, buying books to distribute to all students does not seem like a realistic option if we are speaking of photocopies of short excerpts only, used to supplement the main textbooks already in possession of the students.

However, on the premise that the same class sets of books will be subject to numerous requests for short excerpts, it was not unreasonable for the Board to consider that the schools had the option of buying more books to distribute to students or to place in the library or in class sets instead of photocopying the books. While buying books may not be a non-copyrighted alternative such as those envisaged in *CCH*, these were relevant facts for the Board to consider in a case where it found systematic copying from the same books. Therefore, the Board's analysis does not seem unreasonable.

With respect to the effect of the dealing on the work, as expressed by the majority, the Board's conclusion that the photocopying of Category 4 copies competes with the original to an extent that makes the dealing unfair seems unsupported by evidence and is therefore unreasonable. However, an unreasonable observation under one factor is not sufficient to render the Board's overall assessment unreasonable. As noted in *CCH*, no one factor is determinative and the assessment of fairness remains fact specific. The Board considered the purpose of the dealing and the amount of the dealing factors to be the most important. In light of the conclusion that the Board's assessment under those and other factors was reasonable, one finding does not make the entire decision unreasonable.

***Re:Sound v. Motion Picture Theatre Associations of Canada* [Re:Sound Tariff 7 – Motion Picture Theatres and Drive-Ins, 2009-2011 and Re:Sound Tariff 9 – Commercial Television, 2009-2013]**

Reasons for Judgment: LeBel J. (McLachlin C.J. and Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring)

On March 28, 2008, Re:Sound filed with the Board two tariff proposals for the performance in public or the communication to the public by telecommunication of published sound recordings. Tariff 7 targeted the use of sound recordings embodied in movies shown by motion picture theatres. Tariff 9 targeted the use of sound recordings embodied in television programs.

The Respondents objected to the proposed tariffs on the ground that the definition of "sound recording" in the *Act* excluded soundtracks of cinematographic works. The definition of "sound recording" in s. 2 reads as follows:

> "sound recording" means a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work;

Re:Sound, on the other hand, submitted that a proper interpretation of the definition of "sound recording" did not exclude a pre-existing sound recording incorporated into a soundtrack. Rather, the purpose of the exclusion was to combine rights in the visual features of a cinematographic production with rights in the audio features of the same cinematographic production, and to protect those rights in a new work defined as a "cinematographic work".

The Respondents asked the Board to determine, as a preliminary issue, whether anyone could be entitled to equitable remuneration pursuant to section 19 of the *Act* when a published sound recording is part of the soundtrack that accompanies a motion picture that is performed in public or a television program that is communicated to the public by telecommunication.

The Board answered "no" and refused to certify the tariffs. It concluded that "soundtrack" included pre-existing sound recordings and that such recordings were excluded from the definition of "sound recording" when they accompanied a cinematographic work. On judicial review, the Federal Court of Appeal upheld the decision of the Board. Re:Sound appealed the decision.

The right to collect royalties on behalf of performers and makers of sound recordings, although provided for in s. 19, is dependent on the definition of "sound recording" in s. 2 of the *Act*. Unless what is being performed or communicated to the public by telecommunication is a "sound recording", the right to collect royalties on that performance or communication will not be triggered.

The main issue in the appeal thus involves the application of well-known principles of statutory interpretation. The question that must be resolved is the following: do pre-existing sound recordings incorporated into a soundtrack fall within the meaning of the undefined term "soundtrack" used in the definition of "sound recording" in s. 2 of the *Act*?

The object of statutory interpretation is to establish Parliament's intent by reading the words of the provisions in question in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of Parliament. Although statutes may be interpreted purposively, the interpretation must be consistent with the words chosen by Parliament. Moreover, the legislative history can be of great assistance in discerning Parliament's intent with respect to a particular wording in a statute.

According to s. 2, a "sound recording" is a recording consisting of sounds, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work. Therefore, a "soundtrack" is a "sound recording" except where it accompanies the motion picture. Otherwise, the exclusion would be superfluous.

When it accompanies the motion picture, therefore, the recording of sounds that constitute a soundtrack does not fall within the definition of “sound recording” and does not trigger the application of s. 19. A pre-existing sound recording is made up of recorded sounds. The *Act* does not specify that a pre-existing recording of “sounds” that accompanies a motion picture cannot be a “soundtrack” within the meaning of s. 2. In the Court’s view, a pre-existing sound recording cannot be excluded from the meaning of “soundtrack” unless Parliament expressed an intention to do so in the *Act*. It could have done this by, for example, excluding only “the aggregate of sounds in a soundtrack”.

The Board was correct in its interpretation of the word “soundtrack”. Consequently, a pre-existing sound recording that is part of a soundtrack cannot be the subject of a tariff when the soundtrack accompanies the cinematographic work.

In its decision, the Board referred to some comments made at the Standing Committee on Canadian Heritage hearing with respect to the provisions at issue. These comments confirm the interpretation made by the Board.

Finally, contrary to the Appellant’s suggestion, the Board’s interpretation is consonant with Canada’s obligations under the *Rome Convention*.

Agreements Filed with the Board

Pursuant to the *Act*, collective societies and users of copyrights can agree on the royalties and related terms of licenses for the use of a society's repertoire. Filing an agreement with the Board pursuant to section 70.5 of the *Act* within 15 days of its conclusion shields the parties from prosecutions pursuant to section 45 of the *Competition Act*. The same provision grants the Commissioner of Competition appointed under the *Competition Act* access to those agreements. In turn, where the Commissioner considers that such an agreement is contrary to the public interest, he may request the Board to examine it. The Board then sets the royalties and the related terms and conditions of the license.

In 2012-13, 212 agreements were filed with the Board pursuant to section 70.5 of the *Act*.

Access Copyright which licenses reproduction rights such as digitization and photocopy, on behalf of writers, publishers and other creators, filed 146 agreements granting educational institutions, language schools, non-profit associations, copy shops and others a license to photocopy works in its repertoire.

The *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) filed 60 agreements. COPIBEC is the collective society which authorizes in Quebec the reproduction of works from Quebec, Canadian (through a bilateral agreement with Access Copyright) and foreign rights holders. The agreements filed were concluded with various educational institutions, municipalities, non-profit associations and other users.

Finally, six agreements were filed by the Canadian Broadcasters Rights Agency.