

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

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**Regime** Public Performance of Music  
*Copyright Act*, Section 67.2

**Members** Mr. Justice Donald Medhurst  
Michel Hétu, Q.C.  
Dr. Judith Alexander  
Mr. Michel Latraverse

**Proposed Tariffs Considered** 1.A, 1.B, 1.C, 2.D, 5.A and 13.A

**Statement of Royalties to be collected for the performance in Canada of dramatico-musical or musical works in 1992**

**Reasons for decision**

Pursuant to section 67 of the *Copyright Act* (hereinafter, the “*Act*”), the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed with the Board a statement for the performance, or the communication by telecommunication in 1992, in Canada, of musical or dramatico-musical works.

The statement was published in the *Canada Gazette* on September 28, 1991. At the same time, the Board notified prospective users and their representatives of their right to file objections to the proposed tariff, no later than October 26, 1991.

This decision covers six tariff items: 1.A (commercial radio); 1.B (non-commercial radio); 1.C (Canadian Broadcasting Corporation – radio); 2.D (Canadian Broadcasting Corporation – television); 5.A (Exhibitions and Fairs); and 13.A (aircraft). Objections to each of these tariff items were filed with the Board within the prescribed period. Publication of the approved tariffs in the *Canada Gazette* will take place shortly. The Board will address the other tariffs proposed by SOCAN, in a later decision, once it has finished considering them.

## **I. TARIFF 1.A: COMMERCIAL RADIO**

Commercial radio stations have paid 3.2 per cent of their gross revenues to the performing rights societies for a number of years. In 1987, the societies asked that the rate be raised to 3.5 per cent, while the Canadian Association of Broadcasters (the “CAB”) requested that it be lowered to 3.0 per cent. Following a decision by the Board to maintain the status quo, the CAB and the performing rights societies signed an agreement to keep the rate at its current level until the end of 1992. In 1991, two radio stations, CFRB and CFMX objected to the rate and, after a hearing, the Board established a new rate of 1.4 per cent, applicable to radio stations using protected music for less than 20 per cent of their broadcast time.

On February 5, 1992, SOCAN appeared before the Board to argue that the lower rate in tariff 1.A, as approved by the Board in 1991, is unworkable. SOCAN did not object to the tariff being maintained but asked that the wording be changed to stipulate that all commercial radio stations be obliged to pay the higher rate unless they have maintained, and hold available, records to support their claim of reduced use of protected music. SOCAN sought no more than a redrafting of the tariff.

The only timely objector to SOCAN’s tariff proposal was radio station CFRB – a member of the Standard Radio network. CFMX, a radio station dedicated to classical music, was granted intervenor status. It had filed a late objection.

### **A. THE EVIDENCE**

SOCAN, through the testimony of its Chief Operating Officer, Mr. Michael Rock, focused on the practical application of the tariff and the criteria by which the 20 per cent threshold might be measured. His evidence recounted SOCAN’s experience with the only station to avail itself of the new rate in 1991, CFMX. Some other stations had called SOCAN to enquire about the new rate and in response a representative of SOCAN had “read the text [of the tariff] and said that as far as we knew it meant what it said. Then they said thanks and we didn’t hear from them again.”

CFMX, on the other hand, wrote to SOCAN in October 1991, claiming the lower rate. On a request from SOCAN for documentation for a particular week, it proffered a log of its playlist for that week. SOCAN’s preliminary analysis of this list showed that the use of protected music was just over 20 per cent of the broadcast day and that the record was incomplete in not including “production music.”

According to Mr. Rock, SOCAN had not yet completed its analysis of that one week and he was not prepared to say how much time might be required to decide whether or not CFMX met the requirements of the lower rate.

The rest of Mr. Rock’s evidence was essentially hypothetical. It concerned the possible difficulties that might arise with sampling music use, with burdens of proof if SOCAN and any radio station went to Court over disputes about the application of the tariff, with possible ambiguities in the inclusion or exclusion of production music and with the interpretation of the 20 per cent threshold given in the tariff. None of this was based on actual experience with either CFMX or any other radio station.

CFRB's position was that the tariff, as written, seemed to be workable and that it was prepared to test it in 1993, after amassing sufficient documentation of its own use of music. It believed, not that the tariff had been tried and found wanting, just that it had not been tried.

Its witness, Mr. Peter Grant responded to questions on whether radio stations would or should document their use of music to support their claims of low use of protected music by saying:

I think in practice, in order to avoid the costs of a court case of that kind, stations would be likely to set up systems and keep suitable records, suitable enough to be able to convince a court if it came to that, that they in fact qualified.

## **B. ANALYSIS**

Only one radio station, CFMX, has attempted to pay at the reduced rate and the outcome has not yet been reached. To decide that the tariff is unworkable on the basis of one instance and to tinker with the wording is unreasonable. The tariff requires that music use be based on a past year and this necessarily delays its application. CFRB gave evidence that it is prepared to test the tariff in 1993.

That few stations could avail themselves of the new tariff was brought out at the hearing on the 1991 tariff, where a study (exhibit STANDARD-9) showed that fewer than 4 per cent of commercial radio stations, or 17 out of a possible 470, used protected music for less than 30 per cent of their broadcast hours. These would probably be the only stations that would seriously entertain the idea of invoking the low-use tariff. Of these, only six used copyrighted music for less than 20 per cent of their broadcast time, which is the threshold set out for the low use tariff.

Only two stations appeared before the Board to claim the possibility of being eligible for it. This is not, as was stated by Mr. Rock, for the lack of other stations having read the tariff and making enquiries to SOCAN.

Considerable time was spent on the question of the appropriate sample to be used in determining music use. Mr. Rock stated that he did not know what would be an acceptable rule of thumb for determining music use. He was prepared to accept a small sample when programming was consistent throughout the year, but could not define it further. Finally, he asserted that he was not an expert on the radio industry and was not prepared to define a reliable estimate. SOCAN does plan to meet with the CAB and discuss this issue.

This seems to be an unnecessary concern since statements about a station's use of music, as well as all other statements made by a licensee of SOCAN, are open to verification. Tariff 1.A has, as do many others, an audit clause:

*SOCAN shall have the right by a duly authorized representative at any time during customary business hours to examine books and records of account of the licensee to such extent as may be necessary to verify any and all statements rendered and the fee payable by the licensee.*

This clause exists even in tariffs where the tariff is not defined on financial variables but on

capacity, square footage, attendance or other physical quantities (see for example tariffs 9, 10, 13, 18 and 19). SOCAN always has the right of invoking this clause to verify any statements made by stations about their use of protected music. In no tariff is there further elaboration of how this audit right might be exercised. SOCAN did not convince the Board that any elaboration in tariff 1.A is required, at least for 1992.

The new tariff will read in part:

*“(i) 1.4 per cent for a station which has broadcasted works for which SOCAN has power to grant a performing licence for less than 20 per cent of its total broadcast time in 1991.”*

## **II. TARIFF 1.B: NON-COMMERCIAL RADIO**

SOCAN reached an agreement with the three objectors to the non-commercial radio (tariff 1.B). These objectors between them represent 44 non-commercial radio stations. They are The National Campus and Community Radio Association; *L’Alliance des radios communautaires du Canada*; and *L’Association des radios communautaires du Québec*.

The parties informed the Board of their agreement on February 26, 1992, at the outset of the hearing which had been scheduled for this tariff item. Under this agreement, SOCAN withdraws its proposal for an increase in the royalty rate. The 1991 rate was set by the Board at 2.7 per cent of a station’s gross operating costs. While the objectors continue to express concern with the 2.7 per cent rate, they are prepared to accept it for 1992.

The parties also undertook to hold further discussions on a tariff formula for 1993 which takes into account each station’s amount of music use and audience share.

The Board sees no reason to vary the 2.7 per cent rate in 1992, particularly as the objectors are no longer challenging this year’s tariff formula. It welcomes SOCAN’s undertaking to explore with the objectors the possibility of basing future tariffs on audience share and music use.

## **III. TARIFFS 1.C AND 2.D: CBC RADIO AND TELEVISION**

SOCAN also reached an agreement with the CBC on the 1992 royalties. Under that agreement, which was filed on December 20, 1991, the royalties for radio would be set at \$1.165 million for radio and \$6.350 million for television. SOCAN had initially proposed a figure of \$2.5 million for radio and \$7 million for television.

The Board approves the agreement between the CBC and SOCAN. In doing so, the Board does not abandon the approach it took in the 1991 tariff, where it established a relationship between the royalties paid by the CBC and those paid by private broadcasters. The Board merely considers that under the circumstances, the agreement offers the best solution for all concerned for the current year.

## **IV. TARIFF 5.A: EXHIBITIONS AND FAIRS**

On May 22, 1992, counsel for SOCAN advised the Board that it was withdrawing its proposed changes to tariff 5.A, applicable to exhibitions and fairs. Following discussions with the

Canadian Association of Exhibitions, SOCAN is now asking the Board to approve the same tariff as that approved for 1991.

Both objectors to this tariff item, the Canadian Alliance of Music Presenters and the Hotel Association of Canada, informed the Board that they would not be challenging the new tariff proposed by SOCAN, inasmuch as it does not contain any rate increase over 1991.

The Board approves the tariff to which the parties have agreed. It shall read as follows:

A. *For a license to perform at any time and as often as desired any or all of the works in respect of which SOCAN is empowered to grant a license, covering the period of the exhibition or fair for performances accessible to attendees:*

a. *Where the total attendance (excluding exhibitors and staff) for the duration of the exhibition or fair does not exceed 75,000 persons, the fee shall be calculated as follows:*

<b>Total Attendance</b>	<b>Fee Payable</b>
Up to 25,000	\$12.25 per day
25,001 to 50,000	\$24.65 per day
50,001 to 75,000	\$61.50 per day

b. *Where the total attendance (excluding exhibitors and staff) for the duration of the exhibition or fair exceeds 75,000 persons, the fee shall be calculated as follows:*

<b>Total Attendance</b>	<b>Fee Payable Per Person</b>
On the first 100,000 persons	1.02¢
On the next 100,000 persons	0.45¢
On the next 300,000 persons	0.33¢
Additional attendance	0.25¢

*In the case of an exhibition or fair that is regularly scheduled from year to year, the fee shall be paid on the actual attendance figures in the preceding year and shall be paid on or before January 31 of the current year. The licensee shall submit with the licence fee the actual attendance for the previous year and the number of days duration of the exhibition or fair.*

*In the case of an exhibition or fair that is not regularly scheduled from year to year, the licensee shall report the attendance and duration and submit the fee based on the current year's attendance within 30 days of its close.*

*SOCAN shall have the right to examine the books and records of account of any licensee under this tariff item by a duly authorized representative or agent at any time during customary business hours for the purpose of verifying any and all statements rendered and the fee payable by the licensee.*

*Licences to which tariff No. 5A applies do not authorize performances of music at musical concerts for which an additional admission charge is made; for such concerts tariff item No. 5B applies.*

## V. TARIFF 13.A: AIRCRAFT

An agreement between SOCAN and the Air Transport Association of Canada, the sole objector to this tariff, was filed with the Board on May 28, 1992. The text of the tariff to which the parties have agreed, and which the Board certifies, reads as follows:

*For a licence to perform by means of recorded music at any time and as often as desired any or all of the works in respect of which SOCAN is empowered to grant a licence, the fee payable for each aircraft shall be:*

### 1. Take Off and Landing Music

<i>Seating capacity</i>	<i>Fee per calendar quarter</i>
0-100	\$ 40.50
101 - 160	\$ 51.30
161 - 250	\$ 60.00
251 and over	\$ 82.50

### 2. Inflight Music

<i>Seating capacity</i>	<i>Fee per calendar quarter</i>
0-10	\$162.00
101 - 160	\$205.20
161 - 250	\$240.00
251 and over	\$330.00

*The fees under this tariff are payable on March 31st, June 30th, September 30th and December 31st.*

*Where fees are paid under 13.A.2, no fees shall be required under 13.A.1.*

*SOCAN shall have the right to examine the books and records of account of any licensee under this tariff item, by a duly authorized representative or agent, at any time on reasonable notice during customary business hours to verify any and all statements rendered and the fee payable by the licensee.*



Philippe Rabot  
Secretary General