Copyright Board
Canada


Commission du droit d'auteur
Canada

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| Members | Mr. Justice Donald Medhurst<br>Michel Hétu, Q.C.<br>Dr. Judith Alexander<br>Mr. Michel Latraverse |

# Statements of royalties to be paid for the retransmission of distant radio and television signals in 1990 and 1991

## Reasons for decision

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# I. CHRONOLOGY AND DESCRIPTION

## A. THE HEARING

Pursuant to section 70.61 of the *Copyright Act*, (hereinafter, the "*Act*") eleven collecting bodies (or "collectives") filed fourteen statements of proposed royalties for the retransmission of distant radio and television signals, on June 30, 1989: the American College Sports Collective of Canada Inc. (ACS); the Border Broadcasters' Collective (BBC); the Canadian Broadcasters Retransmission Rights Agency Inc. (CBRRA); the Canadian Reprography Collective (CANCOPY); the Canadian Retransmission Collective (CRC); the Canadian Retransmission Right Association (CRRA); the Composers, Authors and Publishers Association of Canada, Limited (CAPAC); the Copyright Collective of Canada (CCC); the Major League Baseball Collective of Canada, Inc. (MLB); NHL Services, Inc. (now known as FWS Joint Sports Claimants (FWS)); and the Performing Rights Organization of Canada Limited (PROCAN). All submitted statements for works carried on distant television signals, and three, CBRRA, CAPAC and PROCAN, also submitted statements for works carried on distant radio signals.

The statements were published in the Canada Gazette of August 12, 1989. The Board received objections from the Canadian Cable Television Association (CCTA), Canadian Satellite Communications Inc. (CANCOM), and C1 Cablesystems Inc. (C1).

The Board issued a directive on procedure, which specified deadlines for the filing and exchange of written material. All collecting bodies except ACS filed replies by September 29, 1989. Interrogatories and responses had been served by November 6, 1989, and pre- hearing memoranda by October 27, 1989.

At a pre-hearing conference on November 10, 1989, the Board established the order of presentation of the case. November 20, 1989 was set as the date for disposing of matters arising from the interrogatories and all parties reviewed the cable data bases provided by CRRA and CCC on November 21, 1989.

The hearing started November 27, 1989 and occupied 57 days until May 10, 1990. The Board heard evidence from more than 80 witnesses and received as exhibits over 350 documents, all focused on the royalties to be paid for the retransmission of distant television signals. Radio was not discussed. In March, 1990, the collecting bodies representing owners of works carried on distant radio signals and the CCTA reached an agreement, which they submitted to the Board for consideration.

Intervenors were restricted to making written submissions. The 22 who did so supported in general the position espoused by CCTA.

The Board received written arguments on April 20, 1990, replies were submitted on May 4, 1990 and the Board posed questions to all parties on May 9 and 10, 1990. Because a year had passed since the original filing of proposed royalty statements, the parties were allowed to inform the Board of revisions that they would like considered. These revisions were received during the second week of May, 1990.

The Board recalled the parties on September 19, 1990 to clarify the ownership of the programs on which one proposal for allocation had been based.

## B. THE LEGISLATIVE FRAMEWORK

Until recently, the protection afforded to works in paragraph 3(1)(f) of the *Copyright Act* was restricted to their communication by radiocommunication, which meant broadcasting. Liability for the retransmission of distant signals flows from amendments to the *Act*, effected as part of the *Canada-United States Free Trade Agreement Implementation Act* (FTA), (S.C. 1988, C.65) and proclaimed into force on February 13, 1989.

An amendment to paragraph 3(1)(f) broadens the broadcasting right to "the right to communicate the work to the public by telecommunication." "Telecommunication" is defined in section 2 as "any transmission of signs, signals, writings, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system." This extends the liability for copyright to those who use either cable or satellite technology.

The FTA also introduced a compulsory licensing scheme for retransmission rights, the implementation of which is left to the Copyright Board. Sections 70.61 to 70.67 of the *Act* describe the steps to be followed, from the filing of statements of proposed royalties by the collecting bodies, to the decision of the Board fixing the royalties for the retransmission of distant signals.

The terms "local signal", "distant signal" and "area of transmission" were defined in the *Local Signal and Distant Signal Regulations*, SOR/89-254. These definitions establish a royalty liability for retransmission to any location more than 32 kilometres from every point on the grade B contour of a television station.

The Board's responsibilities, according to subsection 70.63(1) of the *Act* are to:

> "(a) establish, having regard amongst others to the criteria established under subsection (4),
>
> (i) a manner of determining the amount of the royalties to be paid by each class of retransmitter, and
>
> (ii) such terms and conditions related to those royalties as the Board considers appropriate;
>
> (b) determine what portion of the royalties referred to in paragraph (a) is to be paid to each collecting body;
>
> (c) vary the statements accordingly; and
>
> (d) certify the statements as the approved statements, whereupon those statements become for the purposes of this *Act* the approved statements."

Subsection 70.63(4) provides that the Governor in Council may make regulations establishing criteria to which the Board must have regard under paragraph 70.63(1)(a), but no such

regulations have been passed.

Subsection 70.64(1) requires the establishment of a preferential rate for small retransmission systems. The *Definition of Small Retransmission Systems Regulations*, SOR/89- 255 define a small retransmission system as one retransmitting a signal to no more than 1,000 premises in the same community; the definition excludes any master antenna system within the service area of a large retransmission system.

The Governor in Council may, under subsection 70.67(1), vary the Board's decision on the manner of determining the royalties to be paid.

## C. CABLE SYSTEM INFORMATION

Distant signals were critical to the development and growth of the cable industry. In many communities cable increased the number of stations available; in others it provided better or more reliable reception of signals than was available through directional roof antennas. Most communities outside Toronto were served by only two local Canadian commercial stations broadcasting in the language of the community.

Today, cable subscribers are offered a much wider variety of signals and services. Most subscribers are offered at least three local unduplicated Canadian commercial stations in the language of the community, an educational service, five or six Canadian satellite services, two Canadian pay-TV services, many U.S. specialty services packaged with Canadian services, a community channel and a number of alpha-numeric services.

In contrast, the number of distant signals offered has not changed much; they now represent about 25 per cent of all services available, the others being local signals and non-broadcast services.[1] Table I shows the number of local and distant signals, and their subscriber reach, received by large systems.

**TABLE I: DISTRIBUTION OF DISTANT AND LOCAL SIGNALS**
**TABLEAU I: RÉPARTITION DES SIGNAUX ÉLOIGNÉS ET LOCAUX**

| | | | | BASIC SIGNALS ONLY<br>SIGNAUX DE BASE SEULEMENT | | |
|---|---|---|---|---|---|---|
| | Basic Signals<br>Signaux de base | Discretionary Signals<br>Signaux facultatifs | Total<br>Total | Average Signals/ System<br>Moyenne de signaux par système | Average Signals/ Subscriber<br>Moyenne de signaux par abonné | Total Signals/ Subscriber<br>Total des signaux/ abonné |
| LOCAL/LOCAUX | 2,227 | 0 | 2,227 | 5.75 | 8.30 | 52,471,432 |
| DISTANT/ÉLOIGNÉS | 2,275 | 61 | 2,336 | 5.88 | 4.56 | 28,798,592 |

[1] According to CCC's electronic data base, 4,066 "special signals" are transmitted. These are not defined more precisely. This gives a total of 8,629 different services (unweighted for subscriber reach), of which distant signals are 27 per cent.

| | | | | | | |
|---|---|---|---|---|---|---|
| **TOTAL** | **4,502** | **61** | **4,563** | **11.63** | **12.86** | **81,270,024**[2] |

The evidence was that, in November, 1988, 21.9 per cent of Canadian viewing was of programs on distant signals.

CCC provided statistics on the industry derived from Mediastats[3] data. CRRA's data was not directly comparable with CCC's since it did not provide a simple description of the cable industry but focused on the signals themselves and contained no information on discretionary signal carriage. The two collectives agreed that their data bases were generally consistent. All parties agreed that the data helped to clarify discussions at the hearing. The Board found these data bases extremely useful, and hopes that the collecting bodies will continue to provide updates.

CCC's data base was filed in its original form on October 4, 1989, with revisions on November 2, 1989 and March 14, 1990. The data presents, with some exceptions, a snapshot of the industry on March 31, 1989. The data base includes for each cable system in Canada: its name and location, the number of subscribers to its basic service, the minimum monthly subscription fee, its annual revenue from subscriptions and the call letters and network affiliation of each terrestrial television station it carries. For systems having more than 1,000 subscribers, there is a list of all distant signals and the extent to which each is distant.

Table II shows the distribution of cable systems and their subscribers. The Board generated it by using CCC's updated statistics. Both Tables II and III show that the distribution of cable systems is skewed towards those with few subscribers; two thirds of the systems serve less than five per cent of subscribers.

**TABLE II: DISTRIBUTION OF SUBSCRIBERS (ALL SYSTEMS)**
**TABLEAU II: RÉPARTITION DES ABONNÉS (TOUS LES SYSTÈMES)**

| System Size (Number of Subscribers)<br>Taille du système (Nombre d'abonnés) | Number of Systems<br>Nombre de systèmes | Number of Subscribers<br>Nombre d'abonnés | Percentage of Subscribers<br>Pourcentage des abonnés |
|---|---|---|---|
| OVER/PLUS DE 500,000 | 1 | 582,718 | 8.85 |
| 250,000 – 499,999 | 1 | 360,442 | 5.47 |
| 100,000 – 249,999 | 12 | 1,728,016 | 26.25 |
| 50,000 – 99,999 | 13 | 962,732 | 14.62 |
| 25,000 – 49,999 | 28 | 980,777 | 14.89 |
| 10,000 – 24,999 | 56 | 836,010 | 12.69 |
| 6,000 – 9,999 | 28 | 224,801 | 3.41 |
| 1,001 – 5,999 | 248 | 643,127 | 9.76 |
| 0 – 1,000 | 1,082 | 267,738 | 4.07 |

[2] This total is for basic distant signals only, to conform to CCC-47, Tab 2.
[3] Mediastats gathers and publishes statistical information on the broadcasting and cable industries. Its electronic data bases are used by the CRTC, the Department of Communications, the Communications departments of the provinces of Ontario and Quebec, and the CBC.

| | | | |
|---|---|---|---|
| **TOTAL** | **1,469** | **6,586,361** | **100.01** |

## TABLE III: DISTRIBUTION OF SUBSCRIBERS (SMALL SYSTEMS)
## TABLEAU III: RÉPARTITION DES ABONNÉS (PETITS SYSTÈMES)

| System Size<br>Taille du système | Number of Systems<br>Nombre de systèmes | Number of Subscribers<br>Nombre d'abonnés |
|---|---|---|
| 901 – 1000 | 24 | 23,016 |
| 801 – 900 | 17 | 14,543 |
| 701 – 800 | 26 | 19,676 |
| 601 – 700 | 33 | 21,670 |
| 501 – 600 | 55 | 30,366 |
| 401 – 500 | 57 | 25,595 |
| 301 – 400 | 92 | 31,446 |
| 201 – 300 | 151 | 37,470 |
| 101 – 200 | 306 | 44,921 |
| 1 – 100 | 300 | 19,035 |
| 0 | 21 | 0 |
| **TOTAL** | **1,082** | **267,738** |

In the large systems, the average number of distant signals received by a subscriber is 4.56 (28,798,592/6,318,623) although cable companies retransmit an average of 5.88 (2,275/387) signals on basic or 6.04 (2,336/387) when discretionary signals are included. These numbers appear in Table IV, which shows the distribution of distant signals among the 387 large systems in Canada. The reach of cable systems is defined here as the number of signals which subscribers received summed over all subscribers. Of these 28.8 million separate signals, 4.5 million are English language Canadian signals, 2.2 million French language Canadian signals, and 22.1 million are U.S. signals. Close to 85 per cent of the programs supplied and more than 90 per cent of the programs watched on distant signals are foreign produced programs.[4]

## TABLE IV: DISTRIBUTION OF DISTANT SIGNALS
## TABLEAU IV: RÉPARTITION DES SIGNAUX ÉLOIGNÉS

| BASIC AND DISCRETIONARY DISTANT SIGNALS<br>SIGNAUX ÉLOIGNÉS DE BASE ET FACULTATIFS | | | BASIC ONLY<br>SIGNAUX DE BASE SEULEMENT | |
|---|---|---|---|---|
| Number of Distant Signals<br>Nombre de signaux éloignés | Number of Systems<br>Nombre de systèmes | Total of Signals Carried<br>Total des signaux retransmis | Number of Subscribers<br>Nombre d'abonnés | Total of Distant Signals/Subscriber<br>Total des signaux éloignés/abonné |
| 1 | 13 | 13 | 700,832 | 679,665 |
| 2 | 11 | 22 | 215,013 | 271,010 |
| 3 | 14 | 42 | 133,834 | 388,133 |
| 4 | 57 | 228 | 724,004 | 2,538,688 |

[4] These figures are derived from the summary tables of CCC-55 and CCC-56.

| | | | | |
|---|---|---|---|---|
| 5 | 58 | 290 | 1,768,527 | 7,057,870 |
| 6 | 76 | 456 | 1,193,181 | 6,380,737 |
| 7 | 69 | 483 | 933,862 | 5,986,397 |
| 8 | 43 | 344 | 254,148 | 1,957,259 |
| 9 | 20 | 180 | 294,757 | 2,543,862 |
| 10 | 15 | 150 | 76,961 | 715,176 |
| 11 | 6 | 66 | 9,633 | 105,963 |
| 12 | 4 | 48 | 10,181 | 122,172 |
| 13 | 0 | 0 | 0 | 0 |
| 14 | 1 | 14 | 3,690 | 51,660 |
| **TOTAL** | **387** | **2,336** | **6,318,623** | **28,798,592**[5] |

CCC and CRC also provided information on different types of signals. Some companies receive two signals, originating in different cities, from the same network. These duplicate signals carry some identical programming. Of the 28.8 million signals provided to subscribers on basic service, 5.3 million (or 18.2 per cent) are duplicate signals. Just under one quarter of all subscribers receive no duplicate signals and 11 per cent receive only one. The number of duplicate signals increases with the number of distant signals received; on the other hand, eight systems, representing 2.98 per cent of subscribers, receive only duplicates of local signals as distant signals.

Using the data provided by CCC, the Board produced statistics on monthly cable fees. The average cable fee in Canada is $14.25 per month for large systems, with generally higher rates for subscribers to smaller systems. Large systems not only have lower fees, they also exhibit less variation in the fees charged.

**TABLE V: MONTHLY CABLE FEES IN CANADA, BY SIZE OF SYSTEM**
**TABLEAU V: TARIFS D'ABONNEMENT MENSUEL AU SERVICE PAR CÂBLE AU CANADA SELON LA TAILLE DES SYSTÈMES**

| | Small Systems<br>Petits systèmes | Over 1000 Subscribers<br>Plus de 1000 abonnés | All Systems<br>Tous les systèmes |
|---|---|---|---|
| Mean/Moyenne | $18.23 | $14.25 | $17.18 |
| Median/Médiane | $19.50 | $13.33 | $18.33 |
| Standard Deviation/Écart type | $ 5.50 | $ 3.88 | $ 5.42 |
| Minimum | $ 0.00 | $ 5.00 | $ 0.00 |
| Maximum | $70.00 | $29.57 | $70.00 |

CCC estimated the gross revenue of the cable industry to be $1.03 billion in 1989. This figure is consistent with the revenue figures for the years 1978-88 produced on the industry in CCC's evidence, and discussed in the section, "The Effect of the Approved Royalty on the Industry."

[5] Basic distant signals only, to conform with CCC-46 and 47.

## D. THE PARTIES TO THE HEARING

Eleven separate television tariffs were before the Board, as well as the alternative proposals of the objectors. CANCOPY withdrew its proposed statement of royalties on February 2, 1990. PROCAN's and CAPAC's statements differed only as to the rate and were treated as a joint proposal. ACS did not withdraw its statement, although it did not participate actively in any of the proceedings and presented no evidence.

The collecting bodies represent four types of creators: program suppliers, broadcasters, sports leagues and music copyright owners.

### i. Program Suppliers: CCC and CRC

CCC claims for the drama and comedy output of the major part of the U.S. independent motion picture and television production industry except for that carried on PBS network stations. It claims for all such programming, except that which is explicitly acknowledged to be in the repertoire of another collecting body.

CRC represents all PBS and TVOntario programming irrespective of its source and also represents owners of motion pictures and television drama and comedy programs produced outside the United States.

### ii. The Broadcasters: CRRA, CBRRA and BBC

These collectives represent the broadcasters, as creators of programs broadcast on their facilities or on other distant stations, as syndicated programs.

CRRA claims royalties for programming owned by the following five networks: CBC/Radio-Canada, Radio-Québec, ABC, CBS and NBC. CBRRA claims for programming owned by commercial television stations and networks in Canada, including the CTV, TVA, and *Quatre Saisons* networks and their affiliates, the Global Television Network, independent television stations and the privately-owned affiliates of the CBC and Radio-Canada.

BBC claims royalties for programs owned by U.S. commercial television stations.

Both CBRRA and BBC claim for works created through compilation. In addition, CBRRA claims royalties for the retransmission of programs in which a copyright interest is asserted by virtue of the exclusive territorial broadcast licence granted by the program's original owners; CRRA and CRC claim a share of the value of any compilation rights which the Board might recognize.

### iii. The Sports Claimants: FWS, MLB and ACS

FWS and MLB represent the teams in major sports leagues whose games are regularly telecast in Canada and the United States. The leagues are: the National Hockey League, the National Basketball Association, the Canadian, National and American Football Leagues and Major League Baseball. ACS represents the American colleges playing in the National College Athletic

Association of the U.S.A.

**iv. The Music Claimants: PROCAN and CAPAC**

These represent the owners of the copyright in the music that runs through all programming. Rather than claiming ownership of discrete programs, PROCAN and CAPAC ask for a share of the royalties for all works.

**v. The Objectors: CCTA, CANCOM and C1**

The objectors are engaged, or are associations of those engaged, in the delivery of television signals to the public, and will pay the retransmission royalties. CCTA represents about 545 licensed cable television systems or broadcasting- receiving undertakings. CANCOM delivers, by satellite, eight television signals and ten radio signals to cable and other retransmission systems and to households in rural areas not served by a local retransmitter. C1 Cablesystems owns and operates five regional companies managing many small retransmission systems.

## E. THE TARIFF PROPOSALS OF THE PARTIES

CCC, CRRA, CRC and CBRRA proposed "overall scenarios", with formulas based on the value of all programming on distant signals of which they claimed a special share. BBC, PROCAN and CAPAC did not propose an "overall scenario" but nevertheless expressed a view of what the total value of all programming should be. Two objectors also expressed their views. Table VI below shows these parties' suggestions of what the total value of programming on distant signals should be, based on 1989 data. The monthly rates per subscriber shown on the table do not necessarily represent what the burden on the subscriber would be, as that depends on how much of the royalty is passed forward.

**TABLE VI: AMOUNT OF ROYALTIES PROPOSED BY THE PARTIES**
**TABLEAU VI: MONTANT DE DROITS PROPOSÉS PAR LES PARTIES**

| Party<br>Partie | Total in $ Millions<br>Total en millions de $ | Average Monthly Royalty in $ per Subscriber<br>Moyenne des droits mensuels par abonné en $ | Maximum Royalty in $ per Subscriber<br>Maximum des droits mensuels par abonné en $ |
|---|---|---|---|
| CCC/SPDAC | 78.2 | 1.03 | 1.89 |
| CRC-CBRRA/ SCR-ADRRC | 67.9 | 0.90 | 1.39 |
| CRRA/ADRC | 50.3 | 0.665 | 1.00[6] |
| BBC-CAPAC-PROCAN/ BBC-CAPAC-SDE | 92.0 | 1.22 | |

[6] This maximum is only for CRTC class 2 systems, those having fewer than 6,000 subscribers, but excluding so-called "Part III licensees" who carry no more than two local television stations. Class 1 systems have 6,000 subscribers or more.

| | | | |
|---|---|---|---|
| CCTA/ACTC | 18.1 | 0.24 | 0.54 |
| CANCOM | 18.0 | 0.24 | 0.28 |

**i. CCC's Proposal**

CCC proposed that each retransmitter pay 25¢ per month per subscriber for each of the first six distant signal values (DSVs) carried and 6.25¢ for each additional one. A distant signal duplicating the network carried on another local or distant signal would attract only half the liability otherwise attached to it. The proposed formula would have generated approximately $78.2 million in 1989.

To calculate its share, CCC defined three different groups of signals (Canadian, commercial U.S. and PBS). It claimed a different allocation for each because the supply of CCC programs on Canadian distant signals is different from that on commercial U.S. stations. It claimed 12.46¢ (just under 50 per cent of the total monthly fees) as its share of the royalties generated by the Canadian distant signals and 18.5¢ (75 per cent) of the total generated by the carriage of distant commercial U.S. signals. It claimed no royalties for distant PBS signals, which carry none of its works. Its claim represents 56 per cent, or $44 million of the total royalty it proposed.

**ii. The Proposal of CRC and CBRRA**

Under this proposal, the royalty for a large cable system would be determined by the DSVs of the signals carried and the number of subscribers. The rates proposed were: 35¢ per subscriber per month for the first DSV, 32¢ for the second, 24¢ for the third, 10¢ for the fourth and 5¢ for each additional DSV. Each discretionary DSV would incur a cost of 35¢.

CRC assigned DSVs ranging from a theoretical maximum of 1.0 for stations broadcasting 18 or more hours a day with no programming simulcast with another station in any market, to 0.5 for those TVA, CBC and SRC stations which duplicate much of the programming transmitted on other local or distant stations of the same network. ABC was assigned a DSV of 0.7 and CBS and NBC were each assigned a DSV of 0.8. These levels reflect the phenomena of simultaneous substitution and simulcasting which may occur when different stations carried on cable simultaneously air the same program.

The CRC and CBRRA formula would have generated basic and discretionary "pots", of $64.8 million and $2.5 million respectively in 1989. CRC claims 27.848 per cent of the basic "pot" and 80.069 per cent of the discretionary "pot". CBRRA claims 6.197 per cent for its own produced programming, 3.346 per cent for its members' compilation efforts and 2.5 per cent for its exclusive territorial licence claim, for a total of 12.043 per cent from the basic "pot". Out of the discretionary "pot", it claims 9.384 per cent.

**iii. CRRA's Proposal**

The CRRA statement of proposed royalties established a rate based on percentages of a

retransmitter's revenue from basic service. The percentages start at two per cent for the first distant signal, declining to 0.1 per cent for the sixth and subsequent distant signals. In its proposed amendments, CRRA limited this liability to $1 per subscriber for class 2 systems.[7] Of the total of $50.3 million that would have been generated by this formula in 1989, CRRA claims 25 per cent.

### iv. Other Proposals

CCTA filed an alternative tariff, proposing that a single formula be adopted, but left open the share that each collecting body would receive. CANCOM proposed a single formula, without any allocation, but did not file a comprehensive alternative tariff. Both proposals would have generated about $18 million in 1989.

The remaining six proposals were based solely on the amount that collecting body wanted to receive. None expected to be paid for a signal on which none of its works was carried.

BBC asked that each retransmitter pay 4¢ per month per subscriber per distant signal on which BBC works were carried.

Together, CAPAC and PROCAN claimed 2¢ per month per subscriber per distant signal.

FWS claimed a flat fee of 30.5¢ per subscriber from any retransmitter who retransmitted at least one of its works during a given month. The royalty payable is the same whether the works of FWS are carried on one or more distant signals.

MLB proposed a fee of 15¢ per month per subscriber for each distant signal on which at least one unduplicated major league baseball game is carried.

ACS also proposed a fee of 15¢ per month per subscriber for each distant signal that carried one or more NCAA events during a given month.

## II. GUIDING PRINCIPLES FOR DETERMINING RETRANSMISSION ROYALTIES

All parties agreed that the Board has full discretion to adopt its own guiding principles for determining retransmission royalties. Whatever criteria the Board adopts, the royalties must be fair and equitable, non-discriminatory and must give a preferential rate to small systems.

The Board invited the parties to make submissions on the principles that they felt the Board should adopt. In this section, those submissions and the principles finally adopted are set out.

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[7] A description of the CRTC classification system is provided in footnote 6.

## A. THE SUBMISSIONS OF THE PARTIES

### i. The Meaning and Measurement of Fair and Equitable

The parties focused primarily on one property of the royalty formula – "fair and equitable" – and urged that the phrase be given a wide reading. BBC, PROCAN and CAPAC distinguished between the words as meaning fair to consumers and rights holders, and equitable in their impact on cable systems and on the collecting bodies.

CANCOM submitted that the statutory requirement of fairness and equity requires the Board to consider public policy objectives, the need for an orderly transition, and the diminished importance of distant signals.

CCC promoted a fair market approach. CCC cited examples of rates which might track the fair market value. These included those for specialty services and for CANCOM signals.

CRC suggested that the royalties could be determined by measuring two complementary factors, the unjust enrichment of retransmitters and the harm to copyright owners.

To establish a fair market value of its own works, FWS suggested that the Board consider the amounts paid by U.S. cable networks and by broadcasters for its works, the prices paid by specialty services offering similar programming, the value cable system managers and cable subscribers attribute to its works and the cost of production of its works.

Similarly, MLB urged the Board, in evaluating its claim, to use as a proxy the price paid in the United States by ESPN (a sports-oriented specialty service) for MLB games.

CRC also addressed allocation in its proposed criteria and stated that it should be based on the actual retransmission of works, and on a universally accepted set of data gathered for a test year.

### ii. Comparison with the U.S. Retransmission Scheme

MLB noted that the Copyright Royalty Tribunal (CRT) in the United States has relied on measures of the harm to copyright owners, the benefit to cable systems, and the market place value of the works and has avoided measures of supply and quality.

CCTA pointed out that the royalties should be "equitable and non- discriminatory," as required under the FTA and suggested that they should reflect what it saw as Parliament's intention to treat cable systems and subscribers in both Canada and the United States equitably. Indeed, all the objectors asked the Board to treat "fair and equitable" as meaning fair and equitable between Canada and the United States. CCTA also recommended that the Board consider the special features of the Canadian cable industry that make it both a valuable part of our social infrastructure and a high cost industry.

### iii. The Larger Audiences Garnered by Retransmission

CCTA argued that the benefit to broadcasters of the increase in their audiences should be taken

into account in setting retransmission royalties. It is not clear what this benefit is, unless the producer of a program is also the broadcaster.

### iv. The Outflow of Royalties from Canada

CCTA asked the Board to keep in mind that most of the royalties will flow out of Canada. However true this may be, the Board cannot discriminate between copyright owners on the grounds of their nationality or residence. If the Board wished to stem the flow of royalties from Canada, it would have to deny all copyright owners (including Canadian copyright owners) fair compensation.

The Board believes that Canadians are prepared to pay a fair price for the products they use, whatever the products' place of origin.

## B. THE PRINCIPLES ADOPTED BY THE BOARD

Many tariffs may be fair and equitable; the Board must be satisfied only that this is so for its tariff. There may be other desirable properties, and the *Act* does not prohibit their consideration. The Board believes that the tariff should:

1. be fair and equitable.
2. reflect Canadian circumstances.
3. given a choice of approaches that equally compensate copyright owners, be the one that results in the least possible disruption to the cable services available to subscribers.
4. be based on a set of statistics for a test year;
5. reflect the actual retransmission of programs and recognize that some programs may be more valuable than others;
6. be simple to administer, transparent and comprehensible.

The Board also kept in mind effects of the tariff on three groups: the retransmitters, the subscribers and the collecting bodies.

### i. The Retransmitters

A fair and equitable tariff will impose a royalty consonant with the benefits retransmitters receive from the use of distant signals. Also, retransmitters should pay to copyright owners no less than the value of the harm caused to them by the use of their works.

A fair and equitable tariff may treat retransmitters in different circumstances differently. Systems differ as to their size, their location and the number of distant signals that they carry. In particular, small systems tend to carry many distant signals. As systems become smaller, they tend to have higher average fixed and operating costs and to charge higher monthly fees. Parliament legislated preferential treatment for some small systems. Evidence confirmed the need for such special treatment.

### ii. The Subscribers

Despite their individual circumstances, all Canadian subscribers are, in a wide sense, the same, and should be treated in a similar fashion. Therefore, a fair and equitable royalty should not magnify the existing variance in cable fees. In particular, wide variations in fees resulting from accidents of geography should be minimized.

The cable industry has evolved over the years, but the objective of providing equal access to services remains. The tariff should avoid undermining this basic tenet of communications policy.

### iii. The Collecting Bodies

A fair and equitable royalty scheme will generate an appropriate compensation and distribute it fairly amongst the collecting bodies. The Canadian retransmission royalty scheme is prospective and will be based on the retransmission of signals during the year of the tariff. The allocation, on the other hand, is based on the share of programs owned, in the test year, by a collecting body. The Board should take into account differences between the test year and the year of the tariff, if these are known with reasonable certainty and are quantifiable.

## III. THE ROYALTIES TO BE PAID FOR TELEVISION RETRANSMISSION

The next four sections deal with the manner of determining the royalties to be paid by each retransmitter. The tariff for small retransmission systems will be discussed first.

## A. THE SMALL SYSTEMS

Most collectives proposed that small systems with more than 500 subscribers pay 50 per cent of the large system tariff and small systems with no more than 500 subscribers pay a yearly fee of $100. The objectors questioned whether the Board could set more than one rate within the class and proposed flat fees ranging from $66 to $100 per year.

The Board sets the royalty at $100 per annum for each small retransmission system. It may be that, under the *Act*, it is possible to set more than one rate for small systems; however it is not necessary to dispose of that issue at this time. The Board is satisfied that a single rate of $100 within the class is fair and equitable.

The Board believes that this rate structure is preferential for three reasons. Setting an annual rate for small systems reduces their administrative and reporting burden; each system qualifying as a small system on the first of January in either of the two years of the tariff will know its liability, and will have no further obligation for that year. Furthermore, for any system with more than 41 subscribers, the royalty is absolutely less per subscriber than it would be under the tariff for large systems. Finally, although this tariff is not tied to the number of subscribers or distant signals carried, it nevertheless recognizes the obligation for each small system to pay for its use of programs on distant signals.

## B. THE LARGE SYSTEMS: I – THE VALUE OF DISTANT SIGNALS

Four comparisons were advanced during the hearing for valuing copyright works. Three of them are based on the economic value of services similar to those provided on distant signals or of benefits which have been lost through the use of distant signals; the last establishes a direct comparison with conditions in the United States. They are listed and reviewed as follows:

i. the value of comparable services
ii. the value of displaced programming
iii. the value of lost licence fees
iv. comparison with the U.S. regime

### i. The Value of Comparable Services

The Board is charged with setting a price for distant signals; the price of a similar good in another market could provide useful information. If that analogous market were a competitive market, the price could be taken as a proxy for the value of distant signals.

CCC claimed that the rates charged by CANCOM, the resale carrier, were a measure of the benefit of distant signals to cable systems. The price for the first distant signal delivered by CANCOM is as high as $1.70. However this market is not one where buyers and sellers are equally powerful. Isolated cable systems buy from a carrier who is a monopoly supplier. They may well pay higher prices than average Canadian cable systems would be prepared to pay. Furthermore, CANCOM charges not one rate but many, depending on the cable operator and the number of signals carried. CANCOM's rates also include a large delivery cost. The Board does not find this market analogous to the general market for distant signals.

MLB proposed the U.S. sports service, ESPN, as a proxy for the sports programming on distant signals, and specifically, for baseball programming.

Its witness, incidentally, provided reasoned support to the whole analogous market approach. His evidence was that the best proxy price is one established in a market with willing buyers and willing sellers, though even then the price might require adjustment to reflect different costs, levels of risk or other factors. He also pointed out that if the price set for distant signals is not appropriate there may be responses leading to inefficiencies in the distant signal market. These could be the dropping of signals or subscriptions, with no cost saving and no concomitant benefit to anyone else in the market.

The price paid by ESPN for major league baseball programming is approximately 33¢ per subscriber per month during the baseball season. MLB compared this to its proposed royalty of 15¢ per month, per subscriber, per signal and characterized it as reasonable. In final argument, CBRRA noted that MLB might be measuring the value of the product at the wrong level, given that the average monthly rate paid by U.S. retransmitters for the entire ESPN service is no more than 35¢ per subscriber.

Similarly, FWS pointed to the amounts paid by ESPN, the Turner Network, Sports Channel America and other U.S. specialty services for packages of football, hockey and basketball games.

These range from 19¢ to 83¢ per month during their respective seasons. FWS characterized a flat royalty, irrespective of the number of signals, as fair and equitable. The approaches of both sports collectives addressed only the value of a part of all programming and were of limited help to the Board in estimating the value of a whole distant signal.

CRC collected data in 1989 on the monthly wholesale rates charged to Canadian cable systems for specialty services. Prices ranged from highs of $1.05 and 88¢ for the *Réseau des sports* (RDS) and The Sports Network (TSN) to lows of 8¢ for MuchMusic and nothing for Vision TV. The unweighted average of these fees was 34¢. Both CCC and CRC claimed that among the services listed, YTV and Arts and Entertainment Network (A&E) are those whose content most resembles that of distant signals. It was argued that their wholesale rates of 31¢ and 25¢ respectively should be treated as a measure of the minimum value of distant signals. The rate for A&E is a market price, and that for YTV is regulated; hence, the price of A&E might be a better proxy for the value of distant signals.

A functioning market is only one requirement for a service to be a good proxy for a comparable service. A&E has a price that is determined in a functioning market, but it suffers from other deficiencies as a proxy.

First, the Board has accepted that different signals do not carry the same number of hours of programming. This is the CRC argument that the number of hours of distinct programming on different distant signals differs, a difference they took into account in their attribution of DSVs.

Using CCC's numbers for distant signals and CRC's DSVs, the Board calculated that the A&E proxy must be discounted by at least 20 per cent for simulcasting. This is shown in Table VII below. This 20 per cent may be an underestimate, since it gives no extra weight to simulcasting during prime time, when audiences are largest and simulcasting more pervasive. The column on the extreme right shows the DSV levels for all the distant signals retransmitted in Canada. This suggests that a reasonable discount for simulcasting and substitution is 20 per cent.

**TABLE VII: THE CALCULATION OF THE INCIDENCE OF SIMULCASTING**
**TABLEAU VII: CALCUL DE LA FRÉQUENCE DE LA DIFFUSION SIMULTANÉE**

| Station<br>Station | Number of Subscribers (Millions)<br>Nombre d'abonnés (millions) | DSV<br>VSE | Weighted DSV<br>VSE pondérée |
|---|---|---|---|
| CBC | 1.328[8] | .52[9] | .0240[10] |
| CTV | 1.039 | .73 | .0263 |
| Can. | 1.251 | .90 | .0391 |
| TVO | 0.867 | .89 | .0268 |
| SRC | 0.429 | .59 | .0088 |
| TVA | 1.127 | .59 | .0231 |

[8] These numbers are taken from CCC-46, Tab 5.
[9] From CRC-1, p. 36, Distant Signal Value Table.
[10] These are the DSV values times the proportion of total reach of the signal. Thus in the first row, 0.0240 = 0.52 × 1.328/28.798.

| | | | |
|---|---|---|---|
| QS | 0.351 | .71 | .0087 |
| RQ | 0.179 | .68 | .0042 |
| ABC | 6.444 | .74 | .1656 |
| CBS | 4.535 | .82 | .1291 |
| NBC | 4.604 | .83 | .1326 |
| U.S. Ind. | 2.189 | .97 | .0737 |
| PBS | 4.305 | .92 | .1375 |
| **TOTAL** | **28.798**[11] | | **.7997** |

In addition, other programs are duplicated on signals originating in different time zones. For example, where the distant signal contains a program that is broadcast one or two hours before it is shown on a local station, some of the value of the earlier broadcast may be lost for the convenience of watching it later on the local station. A similar reduction in the value of a distant signal may be caused by the pre-release on a local station of a program carried on a distant signal later in the day or week.

In contrast, a specialty service rarely transmits a program at the same time as another service or signal. The Board notes CRC's contention that distant signals carry more first run dramas than does A&E, but simulcasting of these dramas on local signals would reduce the importance of this difference. No evidence was presented on whether A&E repeats programs; if it does this could, by the same logic, make A&E a less valuable signal. On the other hand, repeated programs may make the signal more valuable because subscribers have more opportunities to watch a particular program. The evidence gives no guidance on the net effect of repetition of programs on the relative values of specialty services and distant signals.

Secondly, the best proxy market is one with willing buyers and sellers, and with a product similar to that in the subject market. A&E and distant signals were said to be similar. Furthermore, for both specialty services and distant signals already transmitted, the cost to a seller of another person using them is essentially zero. All arguments about the strategic behaviour of a seller and about recovery of total costs aside, any price above zero more than covers the seller's incremental costs and generates incremental revenues.

The market for specialty services does have one distinct attribute, which is the ability of the seller to prevent individuals not prepared to pay the asking price from using the product. This gives the seller some degree of market power, which allows A&E, for example, to charge 25¢ to all its subscribers. This is not the case for the owner of a distant signal, who cannot prevent by technical means the use of a signal by a person not willing to pay the asking price.

Without digressing too much, it is worth noting that the owners of both types of signals enjoy revenues in another market – that for advertising time – but that these are supplemented by subscription fees to meet the total costs of a specialty service.

[11] There appears to be an error somewhere in CCC-46, Tab 5. This column, in fact, sums to 28.648. The number 28.798 is also given in Table IV, and the difference is slight enough to make no material difference to the numbers in the last column. The Board has ignored the discrepancy.

Thus the Board concludes that there are differences in the willingness of both the buyers and sellers in these two markets which must be taken into account when using the price of A&E as a proxy for the value of distant signals.

It is the Board's role to determine what the price for distant signals should be, keeping in mind that a high price would perhaps restrict their use, deprive many people of enjoyment, and perhaps reduce total royalty payments, without reducing the cost of supply. Indeed, it was suggested at the hearing that the zero price of distant signals fostered their distribution throughout Canada.

Almost all of the 6.6 million cable subscribers in Canada receive at least one of the three commercial U.S. networks (ABC, CBS, NBC) as a distant signal. About 25 per cent, or 1.6 million households receive A&E, although it is not available on "enhanced" basic service in all Canadian markets. To achieve the almost universal penetration enjoyed by those distant signals, its price would have to fall. Indeed, the Board notes that the price of MuchMusic, TSN, *MusiquePlus* and RDS fell, and their penetration rates rose, after they were moved to the basic tier.

Thirdly, no evidence was presented on the differences between the packaging of distant signals and specialty services for subscribers and the effect that this might have on a cable operator's willingness to pay for distant signals. They are offered on different tiers and under different market structures. A&E is a well-defined service offered at a well-defined price, whereas distant signals are not.

The Board is not convinced that the price of A&E would remain the same under such different packaging combinations. It is difficult to know what the price of an individual signal or service might be, if it were sold separately. A&E cannot be simultaneously a good proxy for the one distant signal received in Toronto and for each of the six distant signals received in Vancouver. Even if the A&E price is an acceptable proxy for a first distant signal, it may well be too high for other signals in the same package. This view is quite consistent with the proposals of CANCOM, CRC and CRRA for a declining rate; it also reflects CCC's and CCTA's multiple signal discounts.

**ii. The Value of Displaced Programming**

CRC proposed the value of programming services displaced by programs on distant signals as a measure of the harm to the collecting bodies. CRC estimated that the presence of distant signals prevents the creation of at least one more national broadcast service.

The program expenditure budgets for the fiscal year of 1990 of six independent Canadian stations were totalled, to yield an estimate of $105.6 million for the program budget of such a broadcast service. This was discounted by twenty per cent to account for local news whose retransmission would not cause harm to program owners. CRC estimated the value of harm to be approximately $80 million.

The Board does not believe that, in the absence of distant signals, an additional national broadcast service would have emerged in Canada. It seems unlikely that either English or French

Canada, each with an economic base only a fraction of that of the United States, could support more national networks or groups of stations than the United States does. Virtually all urban centres in Canada with populations of 200,000 or more are served by at least three discrete Canadian commercial television stations in the primary language of the community. Moreover, the proliferation of Canadian television stations in the Toronto area seems to contradict the theory that the availability of U.S. signals has inhibited the introduction of new Canadian stations.

If the Board were to accept that a programming service has been displaced, the value of the programs that could have been produced by or for that service would provide an estimate of the harm, but to assert that current industry prices would be stable in the face of such structural changes seems unreasonable. The introduction of a new network, and an increase of over $100 million in the revenues of the industry would surely bring price changes in its train. Estimating the budget of such a new broadcast service, and the harm to the owners of existing programs by such a grand extrapolation seems unwarranted.

**iii. The Value of Lost Licence Fees**

CRC also suggested that the value of a program is reduced with each opportunity to watch it. As already discussed, no harm results to copyright owners where programs are simultaneously substituted, but other duplication may reduce licence fees and even prevent an additional sale. CRC used a figure of $4,000 per broadcast hour as a conservative estimate of that harm.

CRC then used its distant signal value concept to estimate the value of the licences generated by the retransmission of one DSV. Each DSV consists of 6,570 hours of programming each year. If a DSV were made up entirely of network or syndicated programs, the total harm caused by retransmission would be about $26.3 million. Ten per cent of that amount was deducted to account for local news programs the owners of which CRC claimed are not harmed by their retransmission into distant markets. The net harm for each DSV would then be $23.7 million.

CRC then asserted that subscribers receive an average of 2.8 DSVs[12] and thus the total harm is $66.2 million.

This theory suffers from two drawbacks. The estimate of four thousand dollars per hour was based primarily on evidence from independent Canadian producers whose programs represent a small portion of the programs retransmitted and which tend to be retransmitted mostly on Canadian distant signals; extrapolations from such small samples have large errors of prediction.

Secondly, at least some of the harm to copyright owners results from the existence of U.S. stations which are received as local signals in key Canadian markets. For example, the Buffalo PBS signal is local in most areas of metropolitan Toronto, which is a pivotal market for network

[12] The figure 2.8 appears to be incorrect. Because of the discounts built into CRC's tariff, the average number of signals received is more that what can be bought with the average expenditure. We know that 28.8 million distant signals are received in Canada by 6.3 million households. This gives an average of 4.56 distant signals received or, using CRC's formula, about 3.64 DSVs.

sales. A sale lost in Toronto may well cause lost sales throughout Canada. The Board does not wish to attribute lost sales to distant signals where some of that loss is caused by local U.S. signals. Yet the CRC theory does not appear to take this phenomenon into account.

In spite of the efforts of certain parties to quantify the value of the harm suffered by copyright owners, the Board finds too many problems with both theories, and the evidence presented in support of them, to attach great weight to them.

**iv. Comparison with the U.S. Regime**

The projected retransmission royalties in the United States for 1990 are in the order of U.S. $200 million. CCTA proposed the "rule of ten": given that the U.S. population is approximately ten times that of Canada, the royalties in Canada should be ten per cent of those generated in the United States. This is about Can. $24 million.

The royalties set by the Board apply only to retransmitters in Canada, although they are paid to copyright owners in other countries. Intercountry comparisons of any kind are fraught with difficulties: industry structure, relative prices, income levels and cultures are different. At least four quantifiable differences exist between the markets in the two countries.

Firstly, cable penetration is higher in Canada. Although Canada has ten per cent of the U.S. population, it has twelve per cent of the number of U.S. cable subscribers.

Secondly, cable systems in Canada carry more distant signals. The average number of distant signals received by Canadian cable subscribers is 4.56, and the average number of distant signals retransmitted by a cable system is 6.04. In the United States, the large cable systems carry an average of 3.5 distant signals.[13]

Thirdly, distant signals in Canada carry less duplicated programming than those in the United States. Indeed, the U.S. statutory rates assign a "distant signal equivalent" value of one-quarter to affiliates of ABC, CBS and NBC, on the assumption that much of the programming on any two affiliates of the same network is duplicated. None of the parties suggested that the programs on the three U.S. networks duplicate as many programs on Canadian stations as they do of their own affiliates.

Fourthly, the viewing of programs on distant signals is greater in Canada. Twenty-two per cent of all the programs watched in Canada are on distant signals, in the United States, only 15 per cent are.

Although royalties in Canada need not be in lock-step with those paid in the United States, these differences suggest that a rate in Canada should be no lower than in the United States. In 1988, the average monthly rate per cable subscriber in the United States was U.S. 43¢.

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[13] The evidence of CCC compared the numbers 4.56 and 3.5. The appropriate comparison would seem to be between 6.04 and 3.5. This does, however, simply reinforce the point that cable systems in Canada carry more distant signals.

In its submission that the Canadian royalty regime should reflect that in the United States, CCTA relied heavily on the SECOR study, commissioned in 1985 by the Sub- committee on Copyright of the Standing Committee of Communications and Culture of the House of Commons. That study attempted to apply U.S. rates to the existing Canadian cable industry, although some of the applications seem inappropriate. CCTA argued that, in creating the retransmission right, Parliament intended a scheme that would result in an overall liability in the range of $9 million to $11.2 million per year, the range calculated in the SECOR study. The $18 million that CCTA's proposed alternative tariff generates is based on the SECOR estimate, adjusted for inflation.

The legislation does not limit the royalty to any particular figure and empowers the Board to establish the formula that generates the royalty payments. The Board's task is to adopt a royalty scheme that is fair and equitable for Canada while acknowledging the obligations of the FTA. The Board called for a hearing in order to have before it all the relevant factors it might consider.

### v. The Board's Conclusions

The Board concludes that the comparable services approach is sound and that the wholesale price charged for A&E is a useful starting point, so long as the differences between A&E and distant signals are recognized.

Programs on distant signals are simultaneously substituted while those on A&E are not; accordingly, the Board considers that the value of a distant signal should be discounted by 20 per cent.

The market in which a signal is distant calls for different cost recovery considerations than the subscription market of specialty services. It follows that the distant signal seller would be prepared to accept a lower price for the product in that market.

The level of penetration of distant signals is higher than that of A&E. To achieve the same level of penetration, A&E's price would have to be lower.

Distant signals are packaged in many combinations and this may have an impact on their value. Even if the price of A&E is an appropriate proxy for the price of a first distant signal, it may be too high for one of many signals in the same package.

Considering all the differences, the Board finds that an average price of 15¢ per distant signal is reasonable. That price would be consistent with any number of pricing strategies reflecting lower prices for successive signals in a package of, say, four signals; for example, 25¢, 20¢, 10¢, 5¢ or 35¢, 15¢, 10¢ and 0¢. However, the structure of the tariffs, as will be discussed in the next section, makes it unnecessary for the Board to determine exactly what those different prices might be.

## C. THE LARGE SYSTEMS: II – THE ROYALTIES TO BE PAID

It is not sufficient that retransmitters pay fair compensation to the copyright owners for the use of distant signals. The distribution of that burden amongst retransmitters must also be fair. This

section reviews the evidence of the parties and sets out the Board's conclusion on this issue.

**i. The Parties' Proposed Tariff Formulae**

The tariff could be based on any of: the revenues of a retransmitter, the number of distant signals it carries, or the number of its subscribers.

***a. A Tariff Based on Revenues***

Only CRRA proposed a formula based on a retransmitter's revenue. In the Board's view, this approach fails to meet some of its principles and is inferior to any formula based on the number of subscribers or the number of signals carried. Monthly cable fees have a wide dispersion; this dispersion is largest amongst the small systems. This can be seen in **TABLE V: MONTHLY CABLE FEES IN CANADA**. Furthermore, the evidence showed that, as a result of the higher average cost of operating cable services in small communities, smaller cable systems also tend to charge higher cable fees than large ones.

In general, a tariff based on revenues would exacerbate the disparities in cable fees already seen in different parts of the country. Furthermore, any change in revenue, not only those generated by a change in use of copyright material, would be reflected in the royalty liability. For example, any change in subscriber fees authorized by the CRTC would change a retransmitter's liability. In sum, retransmitters could find their liability varying while the number of subscribers and the number of distant signals carried remained constant.

***b. A Tariff Based on the Number of Distant Signals Carried***

With the exception of FWS, all the proposed formulas depended on both the number of subscribers to the system and the number or type of distant signals or DSVs carried.

BBC, CAPAC and PROCAN and MLB proposed a constant rate per distant signal carried. A system carrying twice as many distant signals as another would pay twice the royalty. All other parties felt that a declining rate per signal or DSV reflected both the retransmitters' and subscribers' valuations of distant signals.

CCC assigned a DSV of 1 to each distant signal, so long as it was not a duplicate of another signal (local or distant) from a station affiliated with the same network. Each of these second and subsequent duplicate signals had a DSV of .5, reflecting that about one-half of the programming on a network affiliate is supplied by the network and is normally simulcast by all the affiliates carried by the retransmitter. There was also a discount for any DSV beyond the sixth.

CRC's original tariff included such a duplicate network signal discount, but, as mentioned earlier, its amended tariff incorporated the feature as a simulcasting reduction in its DSV assignments.

Table VIII sets forth the parties' multiple signal discount approaches. It is based on a table prepared by CRC, with CANCOM's multiple signal discount added. For every column but CRC's, the DSV of a signal is one. For CRC, the first DSV represents about 1.2 signals.

**TABLE VIII – MULTIPLE SIGNAL DISCOUNT APPROACHES**
**TABLEAU VIII – RÉDUCTIONS POUR LES SIGNAUX MULTIPLES**

| Royalty per Subscriber as per cent of Royalty for First DSV<br>Droits par abonné exprimés en pourcentage des droits pour la première VSE | | | | | |
|---|---|---|---|---|---|
| VSV or Part Thereof<br>VSE même incomplète | CRC-CBRRA<br>SCR-ADRRC | CCC<br>SPDAC | CRRA<br>ADRC | CCTA<br>ACTC | CANCOM |
| First/Première | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| Second/Deuxième | 91.4 | 100.0 | 75.0 | 100.0 | 80.0 |
| Third/Troisième | 68.6 | 100.0 | 50.0 | 100.0 | 60.0 |
| Fourth/Quatrième | 27.0 | 100.0 | 50.0 | 100.0 | 40.0 |
| Fifth/Cinquième | 13.5 | 100.0 | 25.0 | 50.0 | 0.0 |
| Sixth/Sixième | 13.5 | 100.0 | 5.0 | 50.0 | 0.0 |
| Seventh/Septième | 13.5 | 25.0 | 5.0 | 50.0 | 0.0 |
| Eighth/Huitième | 13.5 | 25.0 | 5.0 | 50.0 | 0.0 |

Obviously, declining rates benefit systems using many distant signals. There is another rationale for declining rates, explained by CRC in final argument; that the benefits of distant signals do not increase in direct proportion to the number of signals received by a subscriber, and perhaps the pricing structure should reflect the disproportionate importance of the first few signals. CRC also noted CCTA's observation that as the number of distant signals increases their individual value decreases.

The Board is concerned with equalizing the liability of retransmitters in different parts of the country. A fixed liability for the carriage of distant signals, irrespective of their number, is one way to achieve this. In contrast, a tariff based on the number of distant signals carried creates disparities between systems of comparable size. For instance, the retransmitter in Thompson, Manitoba, carrying 14 distant signals, would pay $1.89 per subscriber under CCC's tariff, and $1.39 under CRC's. The retransmitter in Cowansville, Québec, carrying only one distant signal, would pay 25¢ and 24¢ respectively. A similar comparison between systems in Hamilton and London shows a difference of about $1 per subscriber in their liabilities, and this can be traced directly to the number of distant signals carried – two in Hamilton and nine in London. The Board prefers an approach consistent with the well-established practice of allowing performing rights societies to issue blanket licences for the use of music, irrespective of the amount used.

While the tariff is not dependent on the number of signals carried, if the only distant signal carried is a duplicate network signal there would be an incentive to drop that one signal to avoid the royalty liability. The Board has built in a duplicate network signal discount so as not discourage retransmitters from continuing to carry a single distant signal.

The test year data shows no system carrying only one distant signal that is a duplicate network signal. There were two systems (in Hamilton and Grimsby, Ontario) carrying only two distant signals both of which were duplicate network signals. There were also three systems in Southern Ontario carrying three distant signals, all of which were duplicate network signals.

The Board rejects outright CCTA's submission that the retransmission of distant signals carrying CBC, Radio- Canada, Radio-Québec or TVOntario in the territories which they serve should receive no compensation. CCTA asserted that these signals have no value, whether or not there is

a local station of the same network, because the retransmitters merely enable these services to reach their target audiences. This argument confounds the benefit of the retransmitter with the goal of the broadcaster who is not, furthermore, always the owner of the programs broadcast.

***c. A Tariff Based on the Number of Subscribers***

All parties proposed a tariff which takes into account the number of subscribers to the large systems. The Board also feels that a tariff linked to the number of subscribers is fair and equitable.

Parliament expressly provided that small retransmission systems be treated preferentially under this regime. This has been accomplished, in part, by designing a tariff for them that is not based on their number of subscribers. However, witnesses called on behalf of CANCOM and C1 demonstrated that the special concerns of small systems do not suddenly disappear at the boundary between small and large systems.

**ii. Distribution of the Liability Among the Retransmitters**

The Board does not believe that the provisions of the *Act* prevent it from setting different rates within the class of large systems, provided that such rates are fair and equitable. Consequently, it has created subclasses of retransmitters between 1,001 and 6,000 subscribers. Six thousand subscribers coincides with the upper limit for Class 2 cable systems. There were, in 1989, 248 systems in Canada with between 1,001 and 6,000 subscribers. Subscribers in those systems received an average of 6.34 distant signals.

The Board sets a tariff which depends only on the number of subscribers to a system. The per subscriber rate increases as the number of subscribers increases. The maximum monthly liability is 70¢ per subscriber which, for the average subscriber in Canada receiving 4.56 distant signals, corresponds to just over 15¢ per signal.

In order to provide a phase-in for systems with between 1001 and 6000 subscribers, rates rise from 20¢ to 65¢ per subscriber.

These rates and the liabilities for different systems are set out in Table IX. The rates for large systems would have imposed, in 1989, the following monthly liabilities:

**TABLE IX: DISTRIBUTION OF MONTHLY ROYALTY PAYMENTS**
**TABLEAU IX: RÉPARTITION DES DROITS MENSUELS**

| System Size (Number of Subscribers) Taille du système (Nombre d'abonnés) | Monthly Royalty Rate in $ Taux mensuel en $ | Number of Subscribers Nombre d'abonnés | Percentage of all Subscribers Pourcentage de tous les abonnés | Royalty Payment in $ Droits à verser en $ |
|---|---|---|---|---|
| 1,001 – 1,500 | .20 | 79,291 | 1.20 | 15,858.20 |
| 1,501 – 2,000 | .25 | 81,306 | 1.23 | 20,326.50 |
| 2,001 – 2,500 | .30 | 61,273 | 0.93 | 18,381.00 |
| 2,501 – 3,000 | .35 | 75,934 | 1.15 | 26,576.90 |
| 3,001 – 3,500 | .40 | 54,830 | 0.83 | 21,932.00 |

| | | | | |
|---|---|---|---|---|
| 3,501 – 4,000 | .45 | 63,576 | 0.97 | 28,609.20 |
| 4,001 – 4,500 | .50 | 50,768 | 0.77 | 25,384.00 |
| 4,501 – 5,000 | .55 | 61,456 | 0.93 | 33,800.80 |
| 5,001 – 5,500 | .60 | 57,726 | 0.88 | 34,635.60 |
| 5,501 – 6,000 | .65 | 56,967 | 0.82 | 37,028.60 |
| 6,001 + | .70 | 5,675,496 | 86.17 | 3,972,847.20 |
| **TOTAL** | | **6,318,623** | **95.88** | **4,235,380.90** |

This monthly royalty would have generated from large systems $50.82 million in 1989, with an average royalty per subscriber of 67¢. The declining rate per subscriber has little effect on the total generated by the tariff because 90 per cent of subscribers to large systems belong to systems with more than 6,000 subscribers. If retransmitters in systems with no more than 6,000 subscribers had paid 70¢ per subscriber, rather than an average of about 45¢, the difference in the royalty would have been $2.25 million.

Together with the royalty payable by small systems, the grand total payable in 1989 would have been $50.93 million.

**iii. Tariff Formula Issues**

***a. Work-Based versus Signal- Based Rates***

Those collecting bodies not proposing an overall scenario (BBC, FWS, MLB, PROCAN and CAPAC) sought payment from a cable company only where at least one of the works represented by the collective is carried during a given month on a retransmitted distant signal.

Counsel for BBC, PROCAN and CAPAC explained his interpretation of the legal basis for this "work- based" approach. Retransmission royalties are claimed by rights holders and fixed by the Board. Unless royalties are paid, the retransmitter of a distant signal may be subject to statutory sanctions, including dam- ages and injunctions at the instance of the owner of the copyrighted work carried on the distant signal. Counsel traced a direct link between the royalties paid and the work that triggers the sanction.

Counsel then inverted this syllogism to say that if no work of a particular collective is carried then no retransmission royalty is owed to that collective. Thus he interpreted the statement "A retransmitter ... may be subject to infringement remedies ... unless royalties are paid" to imply "The retransmitter can only be required to pay the royalties for the works carried on the signals which it retransmits." The Board sees no logic in this argument.

CRC replied that only collecting bodies, not the owners of works, are entitled to file statements of royalties, and that nowhere in the Copyright *Act* is a direct link between the royalties and a particular work established. Thus the payment of the statutory royalty is not for a particular work but for all works carried.

The Board agrees with CRC's argument. The *Act* is silent on the consequences of not carrying the work of a particular collective, but the royalty payment does provide protection for the

carriage of any work of any collective. The payment of the royalties fixed by the Board does shield retransmitters from infringement actions. Collecting bodies are also given the statutory right to collect the royalties specified in their approved statement "without prejudice to any other remedies available" to them under s. 70.65.

For example, none of BBC's works is carried on Canadian stations. Accordingly, BBC may not sue a cable system distributing only Canadian distant signals for copyright infringement but would have a statutory right to collect the royalties allocated to it under the tariff. That is the limit of its remedies. Under the Board's tariff, BBC's share of the royalty is the same from every retransmitter in Canada, although certain retransmitters carry no U.S. distant signals and therefore no BBC works.

Furthermore, the Governor in Council would find it very difficult to vary a "work-based" tariff since varying the formula would also vary the apportionments to the collectives. Such a power can be exercised effectively only if the Board first fixes the formula for the retransmis- sion royalty and then defines the share of each collecting body.

***b. The Gaps***

A number of the parties pointed out that any formula that provides for rates to apply to every subscriber within systems beyond various thresholds will cause discontinuities or gaps. For example, in the approved tariff, a system with 1,000 subscribers pays a total retransmission royalty of $100 per year. If it had just one more subscriber it would pay $2,402.40. These gaps can be removed only with a tariff that imposes the same liability for the first 1,000 subscribers on all retransmitters, regardless of their size.

From the evidence, it seems that thresholds were not considered undesirable in themselves, but their magnitude was offensive. The gap at 1,000 subscribers was not large enough to concern the Board about the overall fairness of the tariff, since small systems are shielded for a year from liability for the large system tariff, even if they grow.

***c. Partially Distant Signals***

A signal is distant only to those cable subscribers located outside a radius from the station transmitter equal to its Grade B contour plus an additional 32 kilometres. Some systems carry signals that are distant only in some areas. Such signals are called "partially distant signals".

All the parties agreed that retransmitters should not be liable for areas where a signal is local. The parties were satisfied that they could estimate the number of subscribers to whom a signal is distant by using maps showing the service area of such a signal by postal code. In each postal code area where the signal is distant to some premises and local to others, the signal is deemed to be distant to one half of the subscribers in that area.

The tariff formula adopted by the Board minimizes the number of retransmitters who must make such calculations. The number of partially distant signals and the extent to which they are distant is immaterial for any system that carries at least one fully distant signal. In 1989, three systems carried only partially distant signals.

### *d. Indirect Subscribers*

By the end of the hearing, the question of the treatment of "indirect subscribers" was reduced to one issue: how to structure a discount for hotel and hospital rooms.

It had already been agreed by all parties that each unit within a multiple unit dwelling would be treated separately. In addition, there was no dispute over the treatment of each room in a commercial or institutional building as a single subscriber.

The objectors offered a solution that would have involved each cable system's reporting, confidentially, the average bulk rate discount offered to hotels and hospitals in its service area. The Board believes that a more objective measure will diminish the need for audits and ensure the confidentiality of bulk rate contracts.

Accordingly, the Board has incorporated into the tariff a discount structure that reflects the use of cable television in hotels and hospitals.

The average occupancy rate of hotel and motel rooms was estimated to be 65 per cent and the Board sets the discount at 35 per cent. The collecting bodies indicated that they would be satisfied with 25 per cent of the amount that each room in hospitals, nursing homes and other health care facilities would generate at full rates. Accordingly, the Board sets the discount for rooms in such institutions at 75 per cent.

### *e. Inflation Adjustments*

The approved tariff contains no adjustment for inflation. Inflation adjustment clauses are customarily introduced to protect the real value of contracts denominated in monetary terms. They become more important the more volatile the environment and the longer the period of the contract. Beyond the level of the individual contract, they tend to be pernicious since they may fuel the inflation that they hedge against. An alternative strategy is to shorten the life of the contract, as was suggested by CCTA.

The Board wishes to produce a simple tariff, especially as it is prospective for only fifteen months and it prefers to avoid providing its own predictions, explicitly or even implicitly, in its construction of the tariff.

## D. THE EFFECT OF THE APPROVED ROYALTY ON THE INDUSTRY

The effect of the imposition of the retransmission royalty on the industry depends both on its profitability and on its ability to shift that liability forward to consumers or backward to suppliers of signals. This discussion is broken up into three parts:

i. the ability of the industry as a whole to absorb the liability;
ii. the possibility of retransmitters avoiding liability by dropping signals or of consumers avoiding any liability passed through to them by dropping their subscriptions; and
iii. whether certain subsectors of the industry are less able than others to absorb the liability.

**i. The Industry's Ability to Pay**

The ability of the industry to absorb the new royalty liability rests in its cost and revenue structure. The evidence of CCC was that the retransmission industry is in a stronger financial position than most regulated industries. Its analysis concluded that the industry should be able to absorb at least part of the royalties since even after paying royalties its profits will still be above those of other regulated industries. CCC said that the industry could pay the larger portion of the $80 million which CCC proposed.

Industry revenue from basic services grew from $273 million in 1978 to $990 million in 1988, with an average rate of increase of 5.4 per cent in nominal income. Increases in the total number of cable subscriptions were sustained even as the price of cable services went up by more than the increase in the Consumer Price Index.

The imposition of royalty payments represents a fundamental change in the industry which will result in changes in costs and revenues. PROJECT 94, the cable industry's projection on its future evolution, makes no mention of retransmission royalties. This suggests that the industry expected them to be passed through to subscribers, with little effect on the cost structure of the industry. Even if pass-through is not possible, the Board believes that the industry is able to absorb the liability, and that after a period of adjustment, the retransmitters will continue to earn "fair" (though possibly diminished) returns.

The second part of CCC's evidence concerned the price elasticity of demand for cable service by subscribers. This evidence was very general and relied on empirical studies done in the sixties and seventies. The Board has concluded, however, that the nature of cable service as a consumer good has not changed essentially over the last ten to twenty years. Even the C.E.O. of CCTA, who felt that the study on elasticity was badly done, admitted that he had no reason to believe that demand for cable service was not inelastic.

The Board accepts that the demand for cable services is price inelastic. However, it does not attribute all the increase in cable subscriptions over the decade to inelastic demand. For example, incomes have also gone up and there have been changes in the quality of the product (more channels, more and better programs) and increases in the number of homes able to receive cable. All of these factors could have contributed to an increase in the number of subscribers even in the face of price increases.

**ii. Avoidance of Liability by Retransmitters or Subscribers**

To the extent that retransmitters drop signals or subscribers drop subscriptions following the imposition of the royalty there will be a loss to the community. The approved tariff structure ensures that the response of retransmitters will be minimal since it is insensitive to the number of signals.

CRTC's recent decision allows the automatic pass-through of the royalty in systems with no more than 2,000 subscribers. However, because these systems pay the lowest royalty rates for large systems under the tariff, the scope of any pass-through is reduced. This is discussed in the next section.

### iii. Ability of Certain Subsectors of the Industry to Pay

CCC's case on the industry's profitability and the elasticity of demand focuses on the industry as a whole. Smaller retransmitters, and their subscribers, however, may be hit very hard by price increases. This was established in the evidence of C1. Furthermore, systems supplied by CANCOM differ from other retransmitters in that they already pay for distant signals. They may be able to pass back some of their liability to CANCOM. It was clear from CANCOM's evidence that it is concerned about this possibility.

The approved tariff minimizes the possibility of pass back by imposing lower rates on CANCOM's smaller systems, and by ensuring that royalty liability can be avoided only by dropping all distant signals. More importantly, the lower royalty for systems with 6,000 or fewer subscribers minimizes the impact of the liability on subscribers in the event it is passed forward to them.

## IV. THE ALLOCATION OF THE ROYALTY AMONG THE COLLECTING BODIES

The Board's second task is to allocate the royalty among the collecting bodies. The two main approaches to allocation were based on the proportion of programs supplied and on the extent to which programs are watched. Before reviewing these and other approaches, the Board will address preliminary legal issues.

## A. THE LEGAL ISSUES

The Board asked the parties to comment on three legal issues which it had to resolve before determining the allocation of royalties. These issues were:

- whether copyright protection extends to the broadcast day compilation;
- whether broadcasters control the retransmission rights in programs for which they have exclusive territorial licences;
- whether copyright protection extends to sports programs, and if so, who is entitled to the royalties.

CCC and CBRRA raised a further legal issue:

- whether copyright protection extends to the retransmission of musical works.

Both CBRRA and FWS questioned the jurisdiction of the Board to determine any such questions of law. The jurisdictional issue is whether, in allocating the royalties among the collecting bodies, the Board is restricted to valuing and quantifying the competing claims without considering their underlying justifications. They relied on *CTV Television Network Ltd.* v. *(Canada) Copyright Board*, 1990 (30) CPR (3d) 262 (FCTD), in which Cullen, J. said (at p. 267) "The *Act* is clear that Parliament never intended the Board to adjudicate questions of law, but rather set it up as a regulatory agency to set rates." The decision, it was submitted, reaffirmed the views expressed in *Curly Posen* v. *Minister of Consumer and Corporate Affairs* (1980) 2 FC 259 (FCA).

Those cases considered the Board's, and its predecessor's, jurisdiction to approve tariffs for the public performance of musical works; they did not address the retransmission scheme. To apportion the retransmission royalties, the Board must assess competing claims. As the legal issues involve questions of entitlement under that apportionment process, the Board cannot properly discharge its rate fixing and allocation obligations without first determining those legal issues. These determinations of law are necessarily incidental to the Board's determination of the portion to be paid to each collecting body, and every administrative agency is empowered to dispose of such legal issues, subject of course to review by the courts.

**i. The Broadcast Day Compilation**

Both CBRRA and BBC submitted extensive evidence to support their claim for a share of the royalties based on the compilations of the videotaped broadcast day. CRRA and CRC, who also represent broadcasters, submitted in argument that, if a compilation right is recognized, they too should be entitled to royalties.

The compilation of programs requires considerable skill and effort. The selection and arrangement of programs into a schedule and the interpolation of advertisements, public service announcements and promotions require judgment, expertise, knowledge of the market, creativity and originality.

Three legal arguments were advanced in favour of the recognition of the broadcast day as a protected work:

a. the broadcast day comes within the meaning of "literary work" because that term includes compilations;
b. it comes within the meaning of "dramatic work" because it constitutes a cinematographic production;
c. it comes within the meaning of "artistic work" because it is a photograph.

Before analyzing those legal arguments, the Board first examined whether the *Act* contemplates granting protection to broadcasts.

Section 63 of the *Act* provides that copyright protection extends only to literary, dramatic, musical and artistic works. The *Act* has accommodated new rights and new works as technology has evolved, but always within the bounds of those traditional categories. For example, photographs were included under artistic works; cinematographic productions containing a dramatic element were included under dramatic works; sound recordings were treated as literary, dramatic or musical works; and computer programs were included under literary works.

On the other hand, television and radio broadcasts are not works specified, either separately or inclusively, in the *Act*. Other common law jurisdictions, such as Great Britain, Australia and New Zealand, do specify broadcasts as separately protected works and accord them special rights different from those accorded to traditional works. In Canada, the recognition of the broadcast day as a traditional work would automatically attach to it the full set of rights normally associated with that traditional work.

The protection accorded to sound recordings provides a useful comparison. A sound recording of a television or radio broadcast day is protected only against unauthorized reproduction; the protection afforded to the public performance or communication by radio communication of sound recordings was withdrawn in 1971. Not surprisingly, under the 1989 amendments to the *Act*, retransmission rights were not granted to sound recordings. If the Board were to conclude that the video recording of a broadcast day has greater protection than the sound recording of the same broadcast day, the result would be patently contrary to what Parliament intended. If, on the other hand, both the video and sound recording of a broadcast day were protected as compilations, the recording of a radio broadcast day would enjoy greater protection than the many sound recordings of musical works contained in it.

The issue of whether broadcasting organizations should enjoy separate copyright protection for their broadcasts is not new to Canada. It was examined by the Ilsley Commission in 1957, the Economic Council of Canada in 1971, the Keyes- Brunet Report in 1977, the Government White Paper on Copyright Revision in 1984 and the Parliamentary Sub- committee on the Revision of Copyright in 1985; each study acknowledged that the *Act* does not protect broadcasts. The Canadian Association of Broadcasters, in its submission to Parliament in 1985, noted that, at that time, broadcasts were not protected in Canada. Parliament has not yet implemented any of the recommendations made in favour of recognizing a broadcast as a separate subject of copyright.

An analysis of the legislative context is therefore sufficient to allow the Board to reject any claim for an allocation based on the broadcast day being one of the traditional copyright works. BBC and CBRRA, however, have urged the Board to interpret the *Act* broadly and to recognize the broadcast day compilation as falling within the boundaries of those traditional works. The Board's comments on their rationales follow.

***a. The Broadcast Day as a "Literary Work"***

BBC and CBRRA argue that a compilation must by definition be a literary work, irrespective of the nature of the works compiled. The word "compilation" is not defined in the *Act* and appears only as an example of a "literary work." All the relevant Canadian and British cases deal with compilations of protected literary works or of unprotected written data. The broadcast day is made up of a variety of dramatic and other copyright works whose compilation does not result in the creation of a literary work within the ordinary meaning of that term.

CBRRA contends that, if Canada is to fulfil its obligations under the FTA, it must follow the CRT's finding that the broadcast day qualifies as a compilation. The FTA, however, requires only that Canada protect all forms of transmission and retransmission of television and radio programs, not that it amend its legislation to conform with that of the United States. Indeed, the following differences in Canadian and U.S. copyright legislation may explain why the CRT was able to conclude that the broadcast day is a compilation: the U.S. Act protects "works of authorship" whereas the Canadian Act extends only to literary, dramatic, musical and artistic works; and the U.S. Act defines compilation whereas the Canadian Act does not.

Both BBC and CBRRA claim that the broadcast schedule is itself a literary work and the retransmission of the programs it lists constitutes the retransmission of the literary work. A broadcaster's program schedule is a literary work; however, the retransmission of the programs

listed in the schedule does not constitute the retransmission of the schedule.

***b. The Broadcast Day as a "Dramatic Work"***

Alternatively, BBC and CBRRA argue that the broadcast day is a cinematographic production, which falls under the definition of "dramatic work." In order to be a dramatic work, a cinematographic production must contain a scenic arrangement, acting form or a combination of incidents. Scenic arrangement and acting form are clearly absent from the compilation; and the combination of works or programs cannot be characterized as a combination of "incidents."

Furthermore, if the videotape of a broadcast day can be assimilated into a protected work, it would be to a sound recording, not a dramatic work. The videotape made by the broadcaster is a recording of all the programs broadcast during the day, some of which have been produced by the broadcaster.

Where a program is broadcast live, the videotape becomes the means of fixation for copyright purposes, resulting in protection either as a dramatic work or as a photograph. CBRRA and BBC are already making a claim for the programs produced by their members.

Since most of the programs they broadcast have already been fixed, the making of a videotape of them as they are being broadcast merely constitutes a reproduction of those pre-existing works. This activity is covered by paragraph 3(1)(d) of the Act as the right "to make any record, perforated roll, cinematographic film or other contrivance by means of which the work may be mechanically performed or delivered." As we know, the result is only protected against reproduction. It does not enjoy retransmission rights.

***c. The Broadcast Day as an "Artistic Work"***

The Board has concluded that the broadcast day does not constitute a distinct cinematographic production protectable as a dramatic work, hence it cannot be protected as a distinct photograph or series of photographs.

***d. The Broadcast Day as a Collective Work***

BBC argues that the broadcast day is a collective work in which works of different authors are incorporated. Collective works, however, are not a separate category of works. The collective nature of a work reflects only the way in which it is put together. Determining that the broadcast day is a collective work does not resolve the issue of whether it falls under one of the traditional copyright works.

**ii. CBRRA's Exclusive Licence Claim**

CBRRA claims a portion of the royalties to compensate its member stations for the harm caused by the importation on distant signals of programs for which they have been granted exclusive territorial licences. CBRRA contends that such licences implicitly grant broadcasters the exclusive right to retransmit programs within their markets; hence, retransmitters cannot do so

without their permission.

The *Act* is clear, however, that the retransmission right belongs to the copyright owner unless it is expressly assigned to another person. The evidence showed that broadcasters generally do not acquire any copyright interest in the programs they are licensed to broadcast.

**iii. Sports Programming**

Before the hearings started, the Board asked the parties concerned to address in their presentations the copyright nature of a sports program. Unless the sporting event itself, or its televised production, is a protected work, its retransmission does not entitle its owner to a share of the royalties.

FWS submitted extensive evidence to characterize the sporting event as a protected work. Football and hockey games were used as models. The play books and game plans or ready lists were characterized as literary works while the game play sequence was likened to a dramatic, and specifically a choreographic, work. Team crests and uniform designs were said to be artistic works. The Board heard no evidence on the copyright nature of other types of sports.

Both FWS and MLB minimized the contribution of the television producer of sporting events, claiming that what production adds to a game is of little importance compared to the contributions of the teams themselves.

In contrast, BBC and CRRA argued that sporting events themselves are not entitled to copyright protection. Although there is copyright in a team's play books and game plans as well as in the team crests and uniform designs, BBC contended that they are of no value to cable operators and that cable operators make no use of them. The game play sequence is not a choreographic work because, unlike a dance, a sporting event is for the most part a random series of events. The unpredictability of the action is inconsistent with the concept of choreography.

The Board accepts the arguments of BBC and finds that a sports game itself is not a copyright work.

On the other hand, the television production of a sports game constitutes a cinematographic production, which is a dramatic work under the *Act*, and is therefore entitled to copyright protection. The Board heard a great deal of evidence on how sports programs are produced. The work of the producers, directors, switchers and camera operators showed sufficient originality to attract copyright protection. The combination of incidents that the players' actions represent are sufficient to give the work the original character required of a cinematographic production. The Board also finds that the simultaneous videotaping constitutes fixation by a process analogous to cinematography.

In the absence of an agreement to the contrary between the sports team and the television producer, the Board concludes that it is the television producer who owns the copyright in the work.

### iv. Musical Works

CCC and CBRRA argued that, since musical works are defined by their means of fixation, PROCAN and CAPAC cannot claim a portion of the royalties. In their submission, what is retransmitted is a performance of a musical work and not the musical work itself. The argument is based on *CAPAC* v. *CTV* [1968] SCR 676, a decision of the Supreme Court of Canada recently relied upon in another context by Cullen J. in *CTV Television Network* v. *(Canada) Copyright Board* cited above.

Both cases apply to the circumstances of the CTV Television Network and should not be interpreted to extend to the sections of the *Act* dealing with retransmission. Those sections constitute a comprehensive scheme covering the communication of works through the retransmission of signals first transmitted by over-the-air radio and television stations. Yet television and radio stations themselves do not communicate the physical literary, dramatic, musical or artistic works, but rather representations or performances of them. It is only in this manner that the works can be communicated to the public. Nothing in the relevant provision would justify treating musical works differently. Yet section 28.01(1) speaks of the carriage in a signal of a literary, dramatic, musical or artistic work.

Accordingly, the Board concludes that PROCAN and CAPAC are entitled to a share of the retransmission royalties.

## B. THE THEORIES OF ALLOCATION

The parties suggested various ways of measuring the value of programs for the purpose of allocating the royalties among themselves – the number of subscribers to whom a program is made available, the number of subscribers who watch it, the enjoyment that a program provides, or even its costs of production. These approaches are reviewed below.

### i. The Supply Approach

CRC, CBRRA, CRRA and BBC proposed supply theories of allocation. As its name suggests, the claim to a share of the royalty results from making a program available to a subscriber. Each program is weighted by its subscriber reach, that is the number of households to which the program is available. Theoretically the owner of a program which no-one watches can claim the same share of the royalty as the owner of a very popular program.

CRC and CBRRA presented an estimate for an allocation based on a sample of programs on stations in fifteen representative cable markets during fourteen days in the year ending on March 31, 1989. The television stations sampled represented all types of distant signals available in Canada.

The subscriber reach of the station on which the program was broadcast was weighted by the subscriber reach of the station's signal type and of that signal in the sample. This gave the share of that program of the total supply of all programs, which represented the allocation to the collecting body owning the program.

This allocation was not based strictly on supply since two adjustments were made; the programs shown between midnight and 6:00 a.m. were not included in the sample, and programming of purely local interest was discounted by 50 per cent, although CBRRA did not agree with the discount.

CRRA also adopted a supply approach to allocation, but only in support of its own claim. CRRA was able to identify virtually all the programs for the year ending August 31, 1989 (March 1989 for Radio-Québec) broadcast on its members' stations and affiliates, and to which its members claimed ownership. An additional claim was made for programs that were supplied through syndication rather than fed through the network; however, this claim was not as well documented.

CRRA, unlike CRC, assigned the same value to each signal. As a result, an hour on a signal with a short broadcast day was worth more than an hour on a signal with a long broadcast day. CRRA also counted programs which, under the simultaneous substitution rule, were not actually retransmitted.

BBC presented its own version of a supply-based allocation but, like CRRA, used it only to establish its own share of royalties.

CRC's data was derived from log books for a sample period and a sample of systems that were criticized for being unrepresentative. CCC's and CRC's reach-weighted supply data, given the limitations of their respective supply samples, seem close enough for the Board to conclude that they both present a reasonable picture of the supply of programs and subscriber reach in Canada.

**ii. The Viewing Approach**

CCC's theory of viewing asserts that the share of the royalty a collective receives should be proportional to the share of viewing of programs on distant signals that its members' programs capture.

CCC's estimate of that viewing was based on an analysis of Bureau of Broadcast Measurement (BBM) surveys of viewing across Canada during a three-week period in November 1988 (the "sweep weeks"). Using the Statistics Canada program classification system, the viewing shares of various types or genres of programs were calculated. Because the genres do not correspond to the claims of the collectives, the Board directed CCC to reorganize its viewing data by ownership. All parties were directed to identify the programs in the sample period to which their members claimed ownership.

CCC's scheme is not based solely on viewing. Before applying its viewing data, CCC weighted each of three types of signals by its subscriber reach, or supply. The supply weighting of the three types of signals was: U.S. commercial stations (59.6 per cent of supply), PBS stations (16.6 per cent of supply), and Canadian stations (24.3 per cent of supply).

The raw viewing statistics are shown in CCC-72 where, for instance, CRC is shown as having 12.6 per cent of total viewing. When the supply weighting of signals is applied, CRC'S royalty share is over 20 per cent. This and the other statistics are quite sensitive to the weighting system

employed for the signals.

For example, PBS has 9.5 per cent of the viewing of programs on distant signals in Canada, yet accounts for 16.6 per cent of the supply on distant signals. Under CCC's scheme, programs on PBS receive 16.6 per cent of retransmission royalties, or almost twice as much as they would receive under a scheme based solely on viewing.

Notwithstanding the agreement between CCC and CRC, the Board has decided to put all distant signals originating in the United States into a single category. Under this scheme, Canadian stations carried as distant signals are given a larger weight than if they had been merged with U.S. signals. The reasons are discussed below in Section 4C – "Adjustments to the Viewing Data".

The viewing approach is the one approach that recognizes and quantifies the different values of different programs. Retransmitters and subscribers value programs differently. The primary use of viewing surveys is to set prices for advertising time. The size and structure of a program's audience generally dictate its value to an advertiser. The Board accordingly accepts that BBM's viewing numbers are an appropriate measure of the popularity of programs among cable subscribers and can be used in establishing the value of those programs.

Much of CRC's support of the supply theory is based on its rejection of the viewing theory. CRC claims that the viewing theory is not consistent with how cable service is sold, the same monthly fee is paid whether a subscriber's total monthly viewing is one hour or one hundred hours. However, it does not follow that the programs carried on distant signals that form part of that cable service should be given equal values, that would be to ignore that close to 50 per cent of the viewing of programs on distant signals that occurs in the three-hour "prime time" period. This may not hold at the individual subscriber level, but it certainly holds at the levels of aggregation represented by viewing surveys.

CRC objects to this approach because it does not measure the value of programs to the cable operator. The cable industry itself insists that its business is to offer variety and choice of programming. There is, however, no measure of the value of individual programs to a cable operator; it is not possible to determine, for example, how much a cable operator would pay for a program that has twice the number of viewers as another. But a cable operator, wishing to attract and keep subscribers, would make choices consistent with the preferences of those subscribers. Accordingly, the Board finds that the next best method of determining the value of programs to a cable operator is the extent to which subscribers watch the programs that are available.

CRC challenged the viewing approach on a number of other grounds. Some subscribers watch programs that do not get high ratings. CRC's supply approach tends to overcompensate for this by attributing to certain programs much more credit than they reasonably deserve for broadening the subscriber base. CCC's approach is more likely than CRC's to give the appropriate credit to those programs primarily responsible for attracting or keeping subscribers.

CRC also suggested that viewing data reveal little about viewer satisfaction. The Board finds, however, that this is also true of supply data. Commercial stations and networks, and even non-commercial broadcasters, regularly drop programs that are not watched. As much as some

subscribers may enjoy a program, it may still be dropped if not enough watch it. Over the long term, there may well be some correlation between programs that are watched and programs that are enjoyed.

The BBM survey relied on by CCC is not without its problems. The most obvious is that the period it covers, in November, contains no baseball games. This leads the Board to question whether there are other distortions in the data. The diary method itself may not reliably reflect behaviour.

Whatever its imperfections, the Board concludes that the viewing approach is the best means available for establishing the different values of different programs. For its current task, the only method for tallying viewing that has been presented to the Board is the BBM survey method.

Accordingly, the Board has used the results of the viewing surveys, arranged by program ownership, as a starting point in its allocation of the royalty among the collecting bodies.

BBM does carry out national surveys each year, as well as more frequent surveys of the major metropolitan areas. The information from the two national sweeps might have provided the Board with a more comprehensive picture of the programs available throughout the year and of their viewing patterns; the metropolitan surveys might have corroborated the national sweep data.

**iii. The Cost of Programs and the Revenue Generated by Them**

FWS and MLB preferred the viewing approach over the supply approach; however, both collecting bodies relied on the extraordinary cost of their programming and the extraordinary revenues accruing to broadcasters of their programming to argue that viewing shares understate the value of sports programs. They submitted these approaches to establish the value of their own programming, but did not provide information that would have allowed the Board to devise a universal scheme for allocation.

The Board had ordered certain collecting bodies to obtain information on the cost of programs from broadcasters. That information was not provided in a consistent format. In any case it would have been unusable for allocation on the basis of ownership since it was sorted by type of program.

Broadcasters' revenues from programs are generally correlated with audience levels. The Board questions the utility of constructing an allocation scheme based on revenues, given that viewing data are more readily available and are likely to reflect the same relative values of programs. Viewing statistics are available for each program on each station received as a distant signal, whereas revenue statistics in many cases require the aggregation of revenues at the network and local levels and, at either level, may not be complete.

**iv. The Opinions of Cable Operators and Subscribers**

In its attempt to establish that sports programming is much more valuable to cable operators than viewing statistics suggest, FWS commissioned two surveys. The first one was conducted among

cable operators; the second, a survey of subscribers, was presented as validation of the cable operator survey.

Besides several methodological problems, these studies were difficult to use for determining the allocation. The questionnaires asked about types of programs rather than programs belonging to specific collectives. Furthermore, the subscriber survey did not appear to be restricted to programming on distant signals.

## C. ADJUSTMENTS TO THE VIEWING DATA

Data from a viewing sample taken in 1988 was proposed as the basis for determining the shares of the collectives. No evidence was presented on how actual viewing in the tariff years might differ from that sample. Superstations may well be introduced into Canada after the retransmission tariff comes into effect, but the Board cannot predict their impact.

The Board sees some shortcomings in the viewing data and has made the following adjustments.

### i. The Distinction Between Canadian and U.S. Signals

CCC had classified signals as Canadian, U.S. commercial and PBS. The Board can see no useful distinction between U.S. signals, but is prepared to distinguish Canadian and U.S. signals. Viewing statistics do not reflect all the value of programs carried on Canadian signals since, for good or ill, Canadian society demands a certain minimum of Canadian programming. By keeping Canadian signals in a separate category, any program carried on them receives a higher weighting than its absolute viewing share would have generated.

### ii. The Shares of PROCAN and CAPAC

Music is an integral part of all programs and viewing shares shed no light on the appropriate royalty. PROCAN and CAPAC argued that the current rate of 2.1 per cent of gross revenues paid by the commercial television industry in Canada is an appropriate proxy price for the rate in the cable industry. They estimated that about 53 per cent of the cable industry's basic service revenue was generated by distant signals, and suggested that a reasonable claim would be 2.1 per cent of that amount, or $10 million. Their actual claim was for $6.6 million.

CRC suggested that the ratio of the payment for music and the retransmission royalties should be the same as the ratio between the cost of music and the cost of programs to the industry. This ratio was 3.3 per cent in 1988, arrived at by using, for all stations, the ratios of the Canadian commercial and non-commercial stations, weighted by the number of distant signal subscribers. This ratio would have generated a total of $1.66 million in 1989.

The Board finds this ratio more appropriate since the royalties represent the costs to the retransmitters of all programming on distant signals. Accordingly, the Board sets the music societies' share at 3.3 per cent. The tariff originally filed with the Board split the royalties in a 60:40 ratio between the two collectives. No further evidence was heard on the division between the two.

### iii. The Share of MLB

No baseball games were recorded in the sample, and indeed only two days out of the fourteen in CRC's sample fell during the baseball season. Thus both the viewing and supply samples seemed to understate the frequency with which baseball appears on television. The Board believes that the viewing of sports during the November sweep understates the viewing of sports over the entire year and sought some other way to determine MLB's share. The Board does not accept that the FWS viewing share can be treated as a proxy for all sports and has awarded a separate share to MLB, which is equal to the share of all other major league sports programs.

## D. OWNERSHIP DISPUTES

The programs still in dispute were those with ownership or contract disagreements, those where there had been insufficient time to settle claims and those where programs were owned jointly but there had been no agreement on the split. The Board followed the principle that the author or first owner of a program is the copyright owner unless the retransmission rights have been assigned to a third party. The Board did not expect to settle all disputes in this way, and divided the approximately two per cent of the remaining royalty evenly amongst the disputants. There were two types of disputes that the Board did settle.

### i. Disputes over the Ownership of Sports Programs

The Board is satisfied that MLB owns the retransmission rights to all baseball games broadcast on SRC's stations. Having read the relevant sections of the contracts between the NFL and NBC, CBS and ABC, the Board concludes that FWS holds the retransmission rights to the NFL games broadcast on the first two networks, and that CRRA holds the rights to the games broadcast on the ABC network. CRRA also claimed the rights for the CFL and NHL games broadcast on CBC and SRC stations. It was not established that either of those leagues owned the rights; consequently the Board awards their share to CRRA.

### ii. The Dispute over Syndicated Comedy and Drama Programs

The largest group whose ownership was disputed is that of programs originally produced by the three U.S. commercial networks, represented by CRRA, but now distributed by syndicators, represented by CCC. The parties did not present any contracts in which the retransmission rights in these programs were assigned by the networks to the syndicators. The Board concludes that the retransmission rights rest with the original copyright owners and allocates their share to CRRA.

## E. THE FINAL ALLOCATION

The Board allocated the disputed shares, to produce new viewing shares. MLB was assigned a share equal to that for all other major league sports. The unclaimed portion was dropped from the calculation, which has the effect of allocating that percentage in the same proportion as the total,

net of what is paid to PROCAN and CAPAC.[14]

These viewing shares were then adjusted by supply, weighting each collective's programs on Canadian signals by 1.637, and those on U.S. signals by .889, yielding:

| | |
|---|---|
| CCC | 60.971 (per cent) |
| CRC | 13.677 |
| CRRA | 12.552 |
| CBRRA | 6.210 |
| BBC | 3.138 |
| FWS | 2.895 |
| MLB | 3.832 |
| **TOTAL:** | **103.275** |

From the 100 per cent of royalties available, PROCAN and CAPAC receive 3.3 per cent, leaving 96.7 per cent to be distributed among the remaining collectives. Thus each share in the above table must be rescaled by 96.7/103.275, or .936. The share for CAPAC and PROCAN was to be divided between them on a 60:40 ratio; these shares have been included, to bring the sum back to 100. These figures are rounded to two decimal places to give the following, which will appear in the tariff in the *Canada Gazette*:

| | |
|---|---|
| CCC | 57.160* (per cent) |
| CRC | 12.822* |
| CRRA | 11.668* |
| CBRRA | 5.821* |
| BBC | 2.942* |
| FWS | 2.814* |
| MLB | 3.479* |
| CAPAC | 1.980 |
| PROCAN | 1.320 |
| **TOTAL:** | **100.006*** |

** Revised figures, Board's notice of correction, January 2, 1991*

## V. THE ROYALTIES TO BE PAID FOR RADIO ET RANSMISSION

Only PROCAN, CAPAC and CBRRA filed proposed radio retransmission tariffs. Early in the proceedings, the Board agreed to schedule a separate segment at the end of the hearing to deal with them. However, by March 30, 1990, the three collecting bodies had reached an agreement with CCTA, which subsequently was endorsed by CANCOM and C1.

The Board hereby approves a consolidated radio transmission tariff. It reflects in essence the terms of the agreement between the relevant collecting bodies and the opponents. As the parties requested, the administrative provisions of the radio tariff mirror those of the television tariff.

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[14] Detailed calculations are contained in the Appendix.

Large retransmitters will pay a total of 4¢ per subscriber per year irrespective of the number of distant radio signals carried. Small retransmission systems will pay a flat royalty of $10 per year. PROCAN and CAPAC will each receive 25 per cent of the total royalties generated and CBRRA will receive the remaining 50 per cent.

No evidence was submitted on the number of subscribers who actually receive distant radio signals. The parties did estimate that approximately five per cent of subscribers connect a radio receiver to their cable outlets. In the absence of information on the number of distant radio signals carried by each retransmission system in Canada, the parties opted for a formula that would be independent of the number of distant signals retransmitted.

All parties agreed to a flat, nominal annual fee for small systems and a flat fee per subscriber for large systems, which conforms to the structure of the Board's television tariff. The Board is satisfied that the structure of the radio tariff is fair to both retransmitters and copyright owners and, since the parties agreed, finds that the level of royalties is also fair for the initial term.

If all retransmission systems carried at least one distant radio signal in 1989, the formula would have generated $252,000 from the large systems and $10,800 from the small systems.

## VI. THE TARIFFS

The adoption of the retransmission tariffs is a watershed for the Board. This is the first decision rendered by the new Board after extensive hearings. Furthermore, the decision concerns a newly granted area of jurisdiction. For these reasons, the Board decided to pay particular attention to the drafting of the tariffs, and to elaborate the reasons for its approach.

This chapter is divided into four sections. Section A explores the reasons for, and consequences of, consolidating the tariffs. Section B states the principles the Board followed in drafting the tariffs. Section C comments on various aspects of a more technical nature. Finally, Section D discusses certain distinctions between the television and radio tariffs.

### A. CONSOLIDATION OF THE TARIFFS

The Board adopted a single tariff for television retransmission, and one for radio retransmission. Each collecting body's entitlement is expressed as a percentage of the royalty a retransmitter is required to pay. Furthermore, the tariffs are structured so as to allow any collecting body to enforce them.

In the Board's opinion, this offers several advantages. It ensures greater transparency and ease of administration. The payment a retransmitter has to make is subject to one set of rules and one method of calculation; the only figure most retransmitters need to establish their liability is the number of premises they serve at the end of a given month.

It is unnecessary to describe in the tariffs either the collecting bodies themselves or their repertoires, because each collecting body receives a fixed percentage of the royalty payments. Any collecting body wishing to sue for infringement of its copyright can certainly do so even though the tariff makes no mention of its works. A description of the repertoires can be found in

section 1.D of this decision.

## B. DRAFTING PRINCIPLES

The tariffs the Board certifies differ from those submitted for two reasons.

First, the way in which the Board approached several substantive issues resulted in the excision of much of the text from the tariffs proposed by the parties. The decisions to consolidate the tariffs and to fix a single rate are cases in point.

However, not all the differences can be explained by the nature of the formula the Board has adopted or by the decision to consolidate the tariffs. The Board decided to follow certain principles in the drafting of the tariffs, the most important of which are outlined in the following paragraphs.

i. The tariffs are regulations. A tariff is not a contract. Indeed, tariffs such as these are "regulations" within the meaning of section 2 of the *Interpretation Act*. This allowed the Board to drop a number of clauses or provisos, such as the transferability of entitlements, time being of the essence and the waiver of rights. These clauses have no place in a regulation.

ii. The tariffs should be self-contained. The Board strove to make it unnecessary to refer to various statutes and regulations when reading the tariffs. This is why section 2 in both tariffs reproduces the definitions of distant signal, signal premises, and small retransmission system. For the same reason, the Board chose to reproduce in subsection 19(4) of the television tariff the applicable Bank rates for the period in 1990 before the publication of the tariff. This also explains the wording of the provisions requiring an MATV small system to provide a statement confirming this status. [Television tariff, s. 13(2)b); radio tariff s. 8(3)]

iii. The tariffs should be as easy to read and understand as possible. This is all the more important in view of their targeted readers, who include the operators of the smaller retransmission systems. This is why, in the definition of local signal, for example, the Board opted for paraphrasing the essence of the *Local Signal and Distant Signal Regulations*, rather than reproducing their technical jargon. For the same reason, the Board attempted to shed some light on the practical meaning of the statutory definition of retransmitter, without modifying in any way its contents (something the Board does not have the power to do in any event).

iv. The tariffs should be concise.

v. The tariffs should balance the rights and obligations of all those whom it binds. Many of the provisions of the tariffs reflect this search for balance: having royalty overpayments, as well as payment deficiencies bear interest is a case in point. [Television tariff, s.16(2); radio tariff, s.11(2)]

The Board hopes that it has succeeded, in some small measure, in meeting these objectives, and that the collecting bodies involved in the drafting of other tariffs the Board may be called upon to certify will take note of them.

## C. EXPLANATORY COMMENTS

This section reviews various aspects of the tariffs which deserve additional comment.

### i. Definitions of Terms

Several definitions contained in the parties' proposals are not included in the tariff. Some have been built into the provisions where the concept is used, such as the definition of the Bank rate. Other words, such as "month" and "person", are already defined in the *Interpretation Act* and require no further definition.

### ii. The Concept of Subscriber

Throughout the hearings, the parties used the subscriber as the unit to determine both the rate to be paid by a retransmitter and the total amount of royalties owed. Instead, the Board used the concept of premises, for two reasons.

First, the *Definition of Small Retransmission Systems Regulations* already defines "premises" in a way that almost coincides with the parties' concept of subscriber. Importing that definition without any change avoids the risk of distinctions being drawn between the two concepts. It also avoids a retransmitter having to make two counts: one for determining whether it is a small retransmission system, and a second to calculate the royalties it owes.

Secondly, this approach avoids the awkwardness of defining subscribers (a word which, to most, intuitively means natural persons) as "rooms," "dwelling houses" or "TVROs."

### iii. Incorporation of other Statutory Provisions by Reference

In the parties' proposals, references to a statute or a regulation were generally to the provision "as amended." The Board finds it unnecessary to follow this approach. This drafting technique may be common in contracts, but should be avoided in legislative drafting. Furthermore, this is used to resolve an issue of statutory interpretation that does not arise with federal instruments. Paragraph 44(h) of the *Interpretation Act* states that the reference in the tariffs to a provision in a statute or a regulation that is replaced by another shall be read as a reference to the new statute or regulation. Finally, since the power to amend these statutes or regulations does not rest with the Board, it is improper to add wording which implies that the Board might otherwise be able to freeze these provisions and thereby prevent their amendment.

Of course, amendments to provisions defining a concept to which the tariffs refer may result in "a material change in the circumstances pertaining to the decision". It would then be open to the parties to ask the Board to vary the decision, pursuant to section 66.52 of the *Act*.

**iv. Small Systems [Television tariff, s. 4; radio tariff, s. 4]**

***a. The Time at Which to Determine the Status of Small Retransmission System***

The *Definition of Small Retransmission System Regulations* do not state when, during the effective period of the tariffs, a retransmitter is determined to be a small retransmission system, or how premises are to be counted; for example whether at a certain date or averaged over a period. This is necessary in any tariff where the payment dates for small systems are different from the others.

Paragraph 70.63(1)(a)(ii) of the *Act* grants the Board the power to fix the "terms and conditions" of the tariffs; in the Board's opinion, this allows it to determine the matter. Given that the royalties for small systems are paid on a yearly basis, it made sense to allow small system status to be determined for the same period. Also, the Board was aware of the benefits a retransmitter derives from being a small system. Allowing some flexibility in the manner of determining this status has virtually no impact on the overall compensation the collecting bodies receive.

For these reasons, the Board decided to allow a retransmitter to qualify as a small system for a given year either when it begins operating in that year or if on the average, it was such a system throughout the previous year.

***b. Prorating the Small System Royalties***

The royalties for a small system that begins retransmitting a distant signal after January of a given year has not been prorated. In the Board's opinion, this would have unduly complicated the administration of the tariffs. Furthermore, the small system television tariff represents a discount for any system serving more than 500 premises, if it served these premises for a single month and paid the lowest rate for large systems.

***c. The Existence of Large Systems Serving No More than 1,000 Premises***

Certain systems serving no more than 1,000 premises nevertheless constitute large systems and as such, will pay the large system royalties for television. The first example is a MATV system operating within the area of a large cable retransmission system; the second is the case of direct-to-home services. Finally, systems that are large systems at the beginning of a given year remain large even if the number of their subscribers drops below 1,000 during that period.

**v. Satellite DTH Systems**

The provisions of the television tariff, and especially section 6, dealing with DTH retransmitters are structured quite differently from those dealing with large retransmitters because DTH retransmitters are neither cable systems nor *terrestrial* systems utilizing Hertzian waves. This has two consequences.

First, the wording of section 3 of the *Local Signal and Distant Signal Regulations* makes it clear that all the signals they retransmit are distant to all the TVROs they serve. Therefore, the

distinction made in section 7 of the television tariff between the number of premises for determining the royalty rate (the total number of premises served by the system, whether or not they receive any distant signals) and the number of premises on which the royalties are owed (only those premises served by the system that receive at least one distant signal) becomes unnecessary in the case of DTH retransmitters.

Secondly, the wording of subsection 3(1) of the *Definition of Small Retransmission System Regulations* makes it impossible for a DTH retransmitter to qualify as a small system. This makes it unnecessary to state that such a retransmitter always pays royalties as a large system.

Because of the approach the Board has chosen to follow in the radio tariff, it was not necessary to draw these distinctions; DTH systems are among the "other" systems referred to in section 6 of that tariff.

**vi. The Determination of the Liability**

Section 7 of the television tariff establishes two important principles:

a. the royalties for the retransmission of distant television signals are owed only on premises that receive a distant signal; these premises are outside the area of transmission of at least one station.
b. the rate charged for these premises is a function of the size of the system; this is determined by the total number of premises served by the system, whether or not they receive a distant signal.

Furthermore, section 9 establishes that premises are to be counted as soon as they receive one distant signal, even though the signal that "triggers" the liability may vary from premises to premises within the same system. [see also s.13(1)g)]

Section 7 also establishes that the liability for the month is determined by the situation at the end of the month.

**vii. Indirect Subscribers**

Section 11 of the television tariff provides for a discounted tariff for rooms in hotels and certain other institutional buildings. It should be noted, however, that discounted premises count as a full unit for the purposes of determining the rate of royalties that is charged for each premises in the system.

**viii. A Collecting Body's Entitlement [Television tariff, s. 12; radio tariff, s. 7].**

These provisions, in combination with section 3 of both tariffs, establish the principle, stated earlier in the decision, that a collecting body is entitled to its share of the royalties, whether or not a work it controls was retransmitted on a distant signal in a given month.

**ix. Reporting Requirements [Television tariff, s. 13; radio tariff, s. 8]**

These provisions impose only such reporting requirements as are necessary for the implementation of the tariffs, while ensuring that the collecting bodies obtain all the information they need. Accordingly:

- reports are to be submitted when a royalty payment is due. A small system only has to report changes once a year.
- retransmitters are required to report only changes in the information. They do not have to resubmit information which has already been provided.
- retransmitters are to report only such information as is needed for the calculation of their royalty payments. This explains the less stringent requirements imposed on small systems.

The following paragraphs state the reasons why information will be required to be reported in the manner chosen by the Board.

Paragraph 13(1)a) of the television tariff requires a retransmitter to file a map of its licensed service area only if one was filed with the CRTC. The Board considered it unnecessary to require one to be made for the sole purpose of this tariff.

Paragraphs 13(1)b) of the television tariff and 8(1)a) of the radio tariff require that a retransmitter report all of the premises or TVROs it serves, whether or not they receive a distant signal. This information is necessary for the purposes of determining the rate applicable to the retransmitter.

Paragraphs 13(1)d) and f) of the television tariff require that a retransmitter report information which the Board considers may be necessary for those collecting bodies who base their distribution system on subscriber reach of specific programs. It should be noted that TVROs are not mentioned in paragraph d); this is because, as was stated earlier in this Chapter, the numbers to be reported in paragraphs 13(1)b) and 13(1)d) of the television tariff are identical for a DTH system.

It should be noted that the reporting requirements are not quite the same under the radio tariff as under the television tariff. Some of the information required for the purposes of the television tariff is simply not necessary for the purposes of the radio tariff.

Two of the reporting requests contained in the parties' proposals which the Board opted not to retain deserve further comment.

Most collecting bodies requested that the retransmitters be required to provide a copy of any decision of the CRTC which might affect the conditions of licence of the retransmitter. The Board decided not to require this, for two reasons. It is sufficient to require that the retransmitter provide the substance of any relevant information; the presumption ought to be that the retransmitter is taken at his word. Furthermore, it makes more sense for the collecting bodies to subscribe to CRTC decisions, if they want to examine them, than for retransmitters to mail all the decisions affecting them to a multitude of collecting bodies.

Most collecting bodies also requested that they be allowed to design a form for the purposes of the tariffs. The Board opted not to require this, for three reasons. First, a form established outside the tariffs could not require a retransmitter to provide more information than is mandated in the tariffs. Second, while the Board expects that retransmitters would gladly use a well- designed form, they should not be compelled to fill out a form that has not been approved by the Board, especially since retransmitters do not have to resubmit information that has not changed since the last reporting. Finally, retransmitters should not have to provide information in more than one format.

Therefore, as a matter of policy, and unless persuaded to do otherwise, the Board would consider providing for the compulsory use of forms only if they are incorporated in a tariff.

**x. Errors [Television tariff, s. 14; radio tariff, s. 9]**

These provisions deal with the correction of mistakes of all kinds, including those discovered during an audit.

**xi. Refund of Excess Payments [Television tariff, s. 14(2); radio tariff, s. 9(2)]**

Some of the parties' proposals would have credited excess payments against future royalties. This would not have allowed the parties to deal satisfactorily with excess payments that are large in proportion to future royalties. Furthermore, it would have treated collecting bodies and retransmitters differently, since collecting bodies are allowed to collect monies owed as a result of understated royalties. Consequently, excess royalty payments are to be refunded to the retransmitter.

**xii. Audits [Television tariff, s. 15; radio tariff, s. 10]**

The Board strove for simplicity and minimum disruption to the daily affairs of retransmitters, while providing collecting bodies with the necessary tools to ensure that they receive what they are owed and to deal with any defaults. Several measures reflect this concern. Thus, the time during which a retransmitter must keep the relevant books now corresponds with the time during which an audit can be conducted. [Subsections (1) and (2) of the relevant sections]

The Board is aware of the disruption that multiple audits may cause. For this reason, subsection 3 of the relevant sections provides that audit reports will be shared among all collecting bodies. Presumably, a collecting body will not go to the expense of an audit if another audit tells it everything it needs to know. The Board decided against limiting each retransmitter to one audit per year. It expects that collecting bodies will use these provisions with restraint and will resort to multiple audits only with the most recalcitrant of retransmitters. During the next retransmission hearings, the collecting bodies will be expected to provide information on their use of the audit provisions.

Most of the collecting bodies requested that, when royalties are understated by more than 10 per cent in any given month, the retransmitter be required to pay the cost of the audit. The Board considers this onerous, since a 10 per cent understatement in any given month could represent an

understatement of less than one per cent for the year. Therefore, subsection 4 of the provisions provides for this measure to be triggered by an understatement of 20 per cent.

**xiii. Interest on monies owed [Television tariff, s. 16; radio tariff, s. 11]**

For several reasons, the Board selected the Bank of Canada rate for this purpose. It is readily ascertainable, was suggested by the parties, is determined by an independent party, follows general fluctuations in interest rates, and is generally recognized as a good measure of what interest can be earned.

A few technical matters deserve further comment.

First, the rate to be paid is pegged at one per cent above the Bank rate so as to offer some incentive to the parties to settle their accounts promptly.

Second, the rate to be used is the one for the last fixing in the previous month. This allows a person to ascertain at the moment an amount is owed how much interest will be due if it does not meet its obligations.

Third, there is no mention in the tariffs of interest payments or, for that matter, any other additional amounts which may be owed under the tariff, being treated as additional royalties. Paragraph 28.01(2)(d) of the *Act* clearly provides for liability if a retransmitter does not meet the terms and conditions of the tariffs. In the Board's opinion, the requirement to pay interest on overdue royalties constitutes "terms and conditions of a tariff."

The tariffs provide for the payment of interest on any amount owed. There is only one exception to this rule: a payment that is returned because the address was incorrect shall not incur interest so long as the addressee fails to provide the correct address. The Board hopes that, in practice, the non-receipt of a payment will be sufficient to prompt an enquiry into the reasons for this non payment.

**xiv. Delivery of notices [Television tariff, s. 18; radio tariff, s. 13]**

The parties' proposals all stated that the delivery of a notice would be "deemed" to be delivered after a certain time had elapsed. The Board finds the use of a non- rebuttable presumption Draconian, and prefers instead to use the word "presumed". This allows parties to assume that a communication has been received by a certain date, unless the recipient proves that it was not received at that time.

**xv. Transitional provisions [Television tariff, s. 19; radio tariff, s. 14]**

The transitional provisions are necessary because the *Act* provides that the tariffs will take effect on January 1, 1990 while they were, in fact, approved much later. Two main principles inform these provisions.

First, the provisions are meant to account for the opportunity cost associated with the late payment of royalties. An interest factor has been added, starting on the date an amount would

have become due had a retransmitter known the provisions of the tariffs. This interest is equal to the Bank of Canada rate; retransmitters are not responsible for the delay in certifying the tariffs. This provides collecting bodies with fair compensation and does not penalize retransmitters.

Second, the Board wanted to avoid each retransmitter having to calculate the interest factors for the retroactive period. This would have imposed an unnecessary burden on the retransmitters, and would have entailed errors. For these reasons, the Board has calculated in advance an interest factor by which the amount owed must be increased. This factor is suitable for most retransmitters; only those that are not small systems and did not retransmit a distant television signal for the whole period will have to calculate the interest. Even these retransmitters will find that the television tariff states the interest rates to be applied for the relevant months.

The provisions containing precalculated interest ignore any fluctuations in the number of premises served by a retransmitter during the period. In the Board's opinion, the imprecision that might result from this is small.

The figures were reached in the following way.

In all cases, the rates used were those stated in subsection 19(4) of the television tariff. The last fixing of the Bank rate in January was 12.29 per cent.

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i. for small systems, the relevant interest rates for January to September were added and then divided by 12, giving the following:
   119.63 ÷ 12 = 9.97
   This was rounded up to 10 per cent.
ii. for other systems, the interest factors corresponding to how much of the total amount of royalties had become due by the time interest was due on that part of the amount (between March and October) were added, and then divided by 12. This yielded the following:

1/8 of interest rate for February: = 13.25 × 0.125 = 1.656

2/8 of interest rate for March = 13.51 × 0.25 = 3.378

3/8 of interest rate for April = 13.80 × 0.375 = 5.175

4/8 of interest rate for May = 13.92 × 0.5 = 6.960

5/8 of interest rate for June = 13.83 × 0.625 = 8.644

6/8 of interest rate for July = 13.46 × 0.75 = 10.095

7/8 of interest rate for August = 12.92 × 0.875 = 11.305

8/8 of interest rate for September = 12.65 × 1.00 = 12.650

59.863 ÷ 12 = 4.99

This was rounded up to five per cent.

FOR THE RADIO TARIFF

i. for small systems, the calculation was the same as in the television tariff.
ii. for other systems, the rate applicable remains at 4 cents per premises, regardless of the date at which the retransmitter first retransmits a distant radio signal. However, the date at which the payment is due depends on the date of that first retransmission, and the interest rate factor established in section 14 of the radio tariff varies accordingly. These rates were established by adding the interest rates applicable to the relevant months and dividing them by 12. Rates were rounded up to the first decimal point.

## D. THE RADIO TARIFF: SPECIAL CONSIDERATIONS

Only a few remarks are required on the special considerations relating to the radio tariff.

At first, the Board considered merging the radio and television tariffs, but rejected this for two reasons. First, it would have been difficult to replicate all the provisions, given the differences in the structures of the two tariffs. Second, the radio tariff may develop quite differently from the television tariff. Keeping the two separate will allow this development to take place. However, the Board ensured that the provisions of the two would follow one another as closely as possible.

In the agreement filed with the Board, the parties proposed that the liability be four cents per year, established on January 1 of a year. This would have been awkward, since the liability for the tariff exists only if a retransmitter retransmits at least one distant radio signal. A retransmitter could have avoided any liability for the whole year by merely not retransmitting any distant signal on the first day of any given year. The tariff certified by the Board avoids the risk of such incidents.

Philippe Rabot
Secretary General

## VII. APPENDIX – DETAILS OF THE CALCULATION OF THE FINAL ALLOCATION

### A. VIEWING SHARES OF UNDISPUTED PROGRAMS, FOR ALL TYPES OF PROGRAMS (FROM CCC-72).

| | Viewing Shares / Cotes d'écoute | | |
|---|---|---|---|
| Collective<br>Société de perception | Canadian<br>Signals Signaux canadiens | U.S. Signals<br>Signaux américains | Total |

| | | | |
|---|---|---|---|
| CCC/SPDAC | 6.500 | 55.475 | 61.975 |
| CRC/SCR | 2.254 | 10.344 | 12.582 |
| CRRA/ADRC | 0.775 | 8.935 | 9.709 |
| CBRRA/ADRRC | 3.758 | 0.040 | 3.798 |
| BBC | | 3.391 | 3.391 |
| FWS | 0.604 | 0.003 | 0.607 |
| Unclaimed/ Non revendiquées | 0.018 | 0.566 | 0.585 |
| **TOTAL** | **13.909** | **78.754** | **92.647** |

**B. VIEWING SHARES OF DISPUTED PROGRAMS (IN THE SAME ORDER AS CCC-72).**

| | | Viewing Shares / Cotes d'écoute | | | |
|---|---|---|---|---|---|
| Collective Allocation Société de perception | Program Type Genre d'émission | Canadian Signals Signaux canadiens | U.S. Signals Signaux américains | Total | Final Répartition finale |
| CCC-CRC/ SPDAC-SCR | Misc/ Divers | 0.537 | 0.634 | 1.172 | Divided equally En parts égales |
| CCC-CRRA/ SPDAC-ADRC | Comedy drama/ Comédies et dramatiques | &0.094 | 2.052 | 2.146 | CRRA/ADRC |
| | Others/ Autres | 0.032 | 0.516 | 0.548 | Divided equally En parts égales |
| CRC-CRRA/ SCR-ADRC | Misc/ Divers | 0.049 | 0.017 | 0.066 | Divided equally En parts égales |
| CCC-BBC/ SPDAC-BBC | Misc/ Divers | | 0.083 | 0.083 | Divided equally En parts égales |
| CRC-CBRRA/ SCR-ADRRC | Misc/ Divers | 0.028 | 0.002 | 0.030 | Divided equally En parts égales |
| CRRA-FWS/ ADRC-FWS | NFL games on ABC / Matchs de la NFL sur ABC | | 1.027 | 1.027 | CRRA/ADRC |
| | CFL & NHL on CBC, SRC/ Matchs de la LCF et de la LNH sur CBC, SRC | 0.028* | | 0.028* | CRRA/ADRC |
| | All others/ Tous les autres | 0.163* | 1.960* | 2.123* | FWS |
| CRRA-CBRRA/ ADRC-ADRCC | Sports | | 0.001 | 0.001 | Divided equally En parts égales |
| CCC-CRC-CRRA/ SPDAC-SCR-ADRC | Comedy Drama/ Comédies et dramatiques | &0.047 | | 0.047 | Divided equally En parts égales |

| | | | | | |
|---|---|---|---|---|---|
| BBC-CRRA/ BBC-ADRC | Misc/ Divers | 0.007 | 0.179 | 0.186 | Divided equally En parts égales |
| BBC-CRRA-FWS/ BBC-ADRC-FWS | Other sports/ Autres sports | | 0.010 | 0.010 | Divided equally En parts égales |
| **TOTAL** | | **0.985** | **6.351** | **7.337** | |

* *Revised figures, Board's notice of correction, January 2, 1991*

* *Chiffres corrigés, avis de correction de la Commission, le 2 janvier 1991*

**C. VIEWING SHARES OF ALL PROGRAMS (TABLE A PLUS TABLE B).**

| | Viewing Shares / Cotes d'écoute | | |
|---|---|---|---|
| Collective<br>Société de perception | Canadian Signals<br>Signaux canadiens | U.S. Signals<br>Signaux américains | Total |
| CCC/SPDAC | 6.800 | 56.091 | 62.892 |
| CRC/SCR | 2.564 | 10.670 | 13.234 |
| CRRA/ADRC | 0.957* | 12.244* | 13.201* |
| CBRRA/ADRRC | 3.772 | 0.041 | 3.813 |
| BBC | 0.003 | 3.525 | 3.528 |
| FWS | 0.767* | 1.966* | 2.733* |
| Unclaimed/<br>Non revendiquées | 0.018 | 0.566 | 0.585 |
| MLB | 0.608* | 3.057* | 3.665 |
| **TOTAL** | **15.489*** | **88.160*** | **103.651** |

MLB's total share is equal to the share of viewing of all other major league sports (3.665 = .607 + 3.048 + .010). The breakdown of that share between Canadian and U.S. signals (i.e. 16.6* and 83.3* per cent, respectively) is based on the supply information on MLB in CRC-45, Table 4-2.

Table C sums to more than 100 because MLB's share has been treated as share additional to that going to all other sports. The shares cannot, of course, sum to more than 100 and these numbers are rescaled later.

** Revised figures, Board's notice of correction, January 2, 1991*

**D. VIEWING SHARES ADJUSTED BY THE SUPPLY OF CANADIAN AND U.S. SIGNALS (FROM CCC-73).**

| | Viewing Shares / Cotes d'écoute | | |
|---|---|---|---|
| Collective<br>Société de perception | Canadian Signals<br>Signaux canadiens | U.S. Signals<br>Signaux américains | Total |
| CCC/SPDAC | 11.129 | 49.842 | 60.971 |
| CRC/SCR | 4.196 | 9.481 | 13.677 |
| CRRA/ADRC | 1.566* | 10.880* | 12.446* |
| CBRRA/ADRRC | 6.174 | 0.036 | 6.210 |
| BBC | 0.006 | 3.132 | 3.138 |

| | | | |
|---|---|---|---|
| FWS | 1.255* | 1.747* | 3.002* |
| MLB | 0.995* | 2.716* | 3.711* |
| **TOTAL** | **25.321*** | **77.834*** | **103.155*** |

Each collective's viewing share on Canadian signals in Table C is weighted by the total supply share on Canadian signals. This yields a multiplier of 1.6366, or 24.377/14.894. The multiplier for U.S. signals is derived in the same way to yield 0.8886, or 75.623/85.106.

Table D does not sum to the same total as Table C because the unclaimed share has been dropped, and because of the weightings used.

** Revised figures, Board's notice of correction, January 2, 1991*

### E. THE FINAL ALLOCATION

| | |
|---|---|
| CCC | 57.160* (per cent) |
| CRC | 12.822* |
| CRRA | 11.668* |
| CBRRA | 5.821* |
| BBC | 2.942* |
| FWS | 2.814* |
| MLB | 3.479* |
| CAPAC | 1.980 |
| PROCAN | 1.320 |
| **Total** | **100.006*** |

From the 100 per cent of royalties available, PROCAN and CAPAC receive 3.3 per cent, leaving 96.7 per cent to be distributed among the remaining collectives. Thus each share in Table D must be rescaled by 96.7/103.155*, or 0.9375*.

The figures in Table E are reproduced on page 72 of the decision. (*page 63 in this volume*)

** Revised figures, Board's notice of correction, January 2, 1991*

## VIII. DISSENT OF MEMBER LATRAVERSE

### PREAMBLE

I do not agree with the guiding principles adopted by my colleagues for establishing the global amount of royalties, nor do I agree with their analysis of or conclusions on the evidence, as expressed in part 3B of the majority decision, "The Royalties to be Paid for Television Retransmission; The Large Systems: I – The Value of Distant Signals". In addition, I am of the opinion that the compilation claim should be recognized, in principle, with a nominal allocation.

The tariff formula and other parts of the decision were prepared jointly by all members of the Board and I am completely satisfied with them, except as to the amounts themselves, and certain remarks that I make regarding compilation.

**I have divided my dissent into five parts:**

A. Analysis of the guiding principles set forth in the majority decision
B. A Different Analysis
    i. Benefits accruing to the retransmitters
        1. Analysis of the average cost of programming in Canada and the hypothetical equivalent cost for the cable television industry.
        2. The payment for comparable services theory.
        3. Market Value – The MLB and FWS Claims – Analysis of some programming costs of broad- casters.
        4. The U.S. Rates.
    ii. The harm suffered by the rights holders
        1. The value of displaced programming theory.
        2. The licence fee erosion theory.
C. Comments on part 3B of the majority decision: "The formula by which the royalties may be determined; Large Systems: I – The value of distant signals"
    1. Re: the analysis of the value of comparable services.
    2. Re: the value of displaced programming and the value of licence fees theories.
    3. Re: the comparison with the U.S. regime.
    4. Re: the Board's conclusions.
D. The claim for the broadcast day compilation
E. Some different conclusions

## A. ANALYSIS OF THE GUIDING PRINCIPLES SET FORTH IN THE MAJORITY DECISION

I agree with my colleagues on three of the basic principles to be used for determining the global amount of the royalties and their allocation.

> 2. The tariff should reflect Canadian cir- cumstances;
>
> 5. The tariff should reflect the actual retransmission of programs and recognize that some programs may be more valuable than others; and
>
> 6. The tariff should be simple to administer, transparent and comprehensible.

I have some reservations about the first and fourth principles, that the tariff should:

> 1. be fair and equitable; and
>
> 4. be based on a set of statistics for a test year.

The first principle is merely a restatement of the statutory imperative and reveals nothing about the Board's interpretation of it.

My reservation about the fourth principle is that I consider it too limiting and constraining. However, I share the opinion that such a mechanism is useful for this first tariff, particularly since it is essentially the evidence that was submitted to us for purposes of allocation. I would have preferred this principle to be stated with more flexibility so that the parties, in preparing for

future hearings, would know that the Board is open to other suggestions and that the principle could be the object of further articulation.

I do not at all share their opinion on the third principle, that "given a choice of approaches that equally compensate copyright owners, (the tariff should) be the one that results in the least possible disruption to the cable services available to subscribers." It is important to note that, in effect, it will be up to the retransmitters to determine the equilibrium level sought by my colleagues; in light of that reality, the principle as expressed seems to me to establish a bias in favour of "the one that results in the least possible disruption to the cable services available to subscribers", which strikes me as being contrary to our task. It is certain that the fact that retransmitters must now pay for something that they previously received for free will cause some disruption to the cable services available to subscribers because there is a large number of diverse and different retransmitters who face equally diverse economic and financial conditions.

In adopting this principle, my colleagues are establishing that, in their minds, a fair and equitable compensation of rights holders cannot be objective and can only be related to the intrinsic value of the works retransmitted to the extent that the payment of that value causes the least possible disruption to retransmitters.

I have difficulty in accepting that what should be the end result of our work, the determination of a formula for adequate compensation of rights holders by retransmitters, should be qualified by foreseen and foreseeable disruptions that the cable industry will undergo. Indeed any reduction in service will necessarily be up to the retransmitters, since they sell a service demonstrated to be inelastic.

Furthermore, the adoption of such a principle might lead one to conclude that my colleagues reserve the right arbitrarily to adjust the amount of the royalties to that level which they expect to result in the "least possible disruption to the cable industry".

I infer from their adoption of it that my colleagues have decided that the payments to the rights holders are compensatory payments for the harm suffered but that those payments may be less than the benefit received, since the principle calls for the fixing of an amount "causing the least possible disruption" to the retransmitters. To adopt this principle is to put ourselves in the hands of one of the parties by allowing it to exercise control over the amount of the tariff; in doing so, we may be abandoning too easily our search for an objective measure for establishing the tariff formula.

Personally, I would suggest, in addition to the three principles with which I agree, the following principles which do not appear to have been adopted by my colleagues:

1. The rights holders should be compensated in an objectively fair manner.
2. The retransmitters should pay a royalty that corresponds to the objective benefit that they derive from the use of protected works.
3. As a corollary, the concept of "fair and equitable" should be interpreted as meaning "reasonable", i.e. that the rights holders as a whole should receive the reasonable compensation that the retransmitters should pay to reflect the reasonable value of the benefit that they receive from them.

4. A fair and equitable tariff formula should seek to reflect the compensation that would be received by the copyright holders if the tariff were established on the basis of a freely negotiated transaction (the "notional fair market value" suggested by the collectives).

I will now proceed to analyze the proposals of the various parties to determine the extent to which they may assist us in establishing that fair and equitable compensation.

## B. A DIFFERENT ANALYSIS

The first task that I set out for myself was to examine whether or not the parameters for the measurement of the benefit to the retransmitters and of the harm sustained by the rights holders were available to help us delineate what that global compensation should be to be "fair and equitable."

### (i) Benefits accruing to the retransmitters

#### 1. *Analysis of the average cost of programming in Canada and the hypothetical equivalent cost for the cable television industry*

It seemed to me that I should first try to find the order of magnitude of the average cost of programming in the television industry in Canada, in order to measure the benefit received by the retransmitters.

In my opinion, that information is essential for determining the benefit received by the retransmitters: what would they have to pay, in the absence of a compulsory licence regime, to generate the programming that they retransmit. The average costs incurred by program suppliers, whose programs themselves are retransmitted, are certainly an excellent benchmark of that value, which is equivalent to the benefit received by the retransmitters. This measure is the closest one possible to the "notional fair market value" of that programming.

One of the collectives, PROCAN-CAPAC, provided to us during the course of the hearing CRTC documentation on the costs of programming of the private television, pay television and cable industries [PROCAN-CAPAC-TV-8]. To obtain more complete statistics on the cable industry, I obtained from Statistics Canada the required information for the years missing from the documentation provided. It should be noted that I ignored the figures for CBC/SRC in the figures for television: otherwise, costs as a percentage of revenues would have been considerably higher but would have skewed the statistics.

These statistics cover ten years for the private television and cable industries and five years for the pay television industry which came into existence much more recently. The statistics are reproduced in table form below.

**TABLE A1: PROGRAMMING EXPENSES OF THE PRIVATE TELEVISION INDUSTRY FOR THE YEARS 1979-1988**
**TABLEAU A1: DÉPENSES DE PROGRAMMATION DE L'INDUSTRIE DE LA TÉLÉVISION PRIVÉE POUR LES ANNÉES 1979-1988**

| Year<br>Année | Operating Revenues<br>$ (millions)<br>Revenus d'opérations | Program Expenses<br><br>$ (millions)<br><br>Dépenses de programmation | % of Program Expenses vs Revenues<br><br>$ (millions)<br><br>Dépenses de programmation/ Revenus en % |
|---|---|---|---|
| 1988 | 1,188.1 | 612.5 | 51.5 |
| 1987 | 1,065.9 | 544.7 | 51.1 |
| 1986 | 1,008.3 | 488.5 | 48.4 |
| 1985 | 960.9 | 438.3 | 45.6 |
| 1984 | 899.6 | 411.1 | 45.6 |
| 1983 | 833.2 | 396.4 | 47.5 |
| 1982 | 745.9 | 320.1 | 42.9 |
| 1981 | 652.4 | 283.2 | 43.4 |
| 1980 | 562.0 | 255.2 | 45.4 |
| 1979 | 472.5 | 209.1 | 44.2 |
| 1989 | * | | |
| Average/Moyenne:<br>46.6 % – 10 years/ans<br>48.4 % – 5 years/ans | | | |
| * Non available/Non disponible | | | |

**TABLE A2: PROGRAMMING EXPENSES OF THE PAY TELEVISION INDUSTRY FOR THE YEARS 1979-1988**
**TABLEAU A2: DÉPENSES DE PROGRAMMATION DE L'INDUSTRIE DE LA TÉLÉVISION PAYANTE POUR LES ANNÉES 1979-1988**

| Year<br>Année | Operating Revenues<br>$ (millions)<br>Revenus d'opérations | Program Expenses<br>$ (millions)<br>Dépenses de programmation | % of Program Expenses vs Revenues<br>$ (millions)<br>Dépenses de programmation/ Revenus en % |
|---|---|---|---|
| 1988 | 270.0 | 128.7 | 47.6 |
| 1987 | 229.7 | 107.4 | 46.7 |
| 1986 | 201.8 | 93.1 | 46.2 |
| 1985 | 159.5 | 67.6 | 42.4 |
| 1984 | 123.8 | 54.4 | 43.9 |
| 1983 | * | | |
| 1982 | * | | |
| 1981 | * | | |
| 1980 | * | | |
| 1979 | * | | |
| 1989 | * | | |
| Average/Moyenne:<br>45.4 % – 5 years/ans | | | |
| * Non available/Non disponible | | | |

**TABLE A3: PROGRAMMING EXPENSES OF THE CABLE TELEVISION INDUSTRY**

**FOR THE YEARS 1979-1988**
**TABLEAU A3: DÉPENSES DE PROGRAMMATION DE L'INDUSTRIE DE LA CÂBLODISTRIBUTION POUR LES ANNÉES 1979-1988**

| Year<br>Année | Operating Revenues<br>$ (millions)<br>Revenus d'opérations | Program Expenses<br>$ (millions)<br>Dépenses de programmation | % of Program Expenses vs Revenues<br>$ (millions)<br>Dépenses de programmation/ Revenus en % |
|---|---|---|---|
| 1988 | 989.5 | 55.9 | 5.6 |
| 1987 | 870.2 | 51.6 | 5.9 |
| 1986 | 767.0 | 44.3 | 5.7 |
| 1985 | 672.1 | 41.6 | 6.1 |
| 1984 | 595.1 | 38.2 | 6.4 |
| 1983 | 529.0 | 36.3 | 6.8 |
| 1982 | 472.3 | 37.7 | 7.9 |
| 1981 | 405.0 | 30.5 | 7.5 |
| 1980 | 352.1 | 22.1 | 6.2 |
| 1979 | 313.7 | 20.4 | 6.5 |
| 1989 | 1,153.6 | 54.4 | 4.7 |
| Average/Moyenne:<br>6.5 % – 10 years/ans<br>5.9 % – 5 years/ans | | | |

The only programming expenses of the cable industry over the last ten years have been those related to the production of community television programs. They represent an average of 6.46 per cent of their operating revenues over the last ten years; 5.94 per cent over the last five years and most recently 4.7 per cent for 1989.

From these statistics, the relative importance of program expenses to retransmitters and broadcasters is clear: it costs retransmitters $56 million per year to produce an incomplete schedule of programming, programs of local interest that do not meet the programming criteria of the two other industries.

The program expenses of the private television industry have been an average of 46.56 per cent of its revenues over the last ten years and 48.44 per cent of its revenues over the last five years. These expenses also increased over the last five years.

For the pay television industry, the program expenses (affiliation payments) represent 45.36 per cent of its revenues over the last five years and have also been increasing from year to year.

The disparity between the five-year statistics of the private television industry and those of the pay television industry is not wide, 48.44 per cent versus 45.36 per cent. Their combined average is 46.9 per cent.

If we were to apply the cost to revenues ratio prevailing in these two industries, 46.9 per cent, to the cable industry, its cost being for the retransmission of programs, the figure for 1989 would have been $541,032,035.60.

However, as only an average of 22 per cent of the services and signals available on cable are distant signals, the program expenses attributable to them would have been $119,027,047.

As 20 per cent of those signals are the subject of simultaneous substitution and of duplication, the net figure would therefore have been $95,221,637.

The production costs already incurred by the cable industry for the production of community programming are not related to distant signals; so those costs are not properly deductible from the hypothetical level that, reasonably, the cable industry should pay to compensate equitably the rights holders, without being unduly enriched, that is, without paying less than the value of the benefit they actually receive. The benefit that they received from the retransmission of programs on distant signals in 1989, therefore, seems well and truly to be in the area of $95,221,637.

**2.** ***The payment for comparable services theory***

This theory was proposed by CRC/CBRRA while both CCC and BBC commented upon it. The following is an explanation of the thesis proposed by CRC/CBRRA, followed by an examination of the comments of the other two claimants.

**The proposal of CRC/CBRRA**

Mr. Peter S. Grant explained the theory very clearly:

> "One way to measure the value of distant signals is to ask how much cable television systems are enriched by the inclusion of distant signals which they currently receive for nothing. The converse of that is to ask how much they would have to pay for equivalent services to replace distant signals if they had not been permitted to retransmit them in the first place.
>
> If cable television systems were not permitted to carry distant broadcast signals, the only way they could provide equivalent programming services to their subscribers, and maintain high levels of penetration, would be to enter into contractual arrangements with a number of cable programming networks to provide programming of equivalent value. Such networks provide a service only to basic cable subscribers, not to the general population.
>
> Such services would not be supported solely by cable revenues but would be partially supported by advertising. Such advertising would be sold by the programming service on the basis of the number of cable households to which the signal is being transmitted.
>
> ... a comparison is quite possible with a number of Canadian and U.S. advertising- supported "specialty" services.
>
> ... the particular programming genres represented on these services are also somewhat less expensive to produce than the network or syndication programming transmitted in distant broadcast signals.
>
> ... it is still relevant to use these numbers to estimate the value of distant broadcast signals to Canadian television systems." [CRC-1 p. 16-17].

Table 1 of Mr. Grant's report is reproduced below; it is the final version as it appeared in the written argument of CRC: [CRC, written argument, p. 7-8].

**TABLE 1: WHOLESALE RATES CHARGED TO CANADIAN CABLE SYSTEMS FOR SELECTED CABLE PROGRAM SERVICES**
**TABLEAU 1: PRIX DE GROS PAYÉS PAR LES SYSTÈMES CANADIENS DE TÉLÉDISTRIBUTION POUR CERTAINS SERVICES DE PROGRAMMATION PAR CÂBLE**

| | Programming Genre<br>Genre de programmation | Monthly Rate per Subscriber on Basic or "Enhanced Basic" Service<br>Tarif mensuel par abonné – Service de base ou service de base élargi |
|---|---|---|
| **Canadian Services/Services canadiens** | | **($ Can.)** |
| CBC Newsworld | News/ Actualités | 0.275 à 0.425 |
| YTV Canada | Youth/Jeunes | 0.31 |
| The Sports Network (TSN) | Sports | 0.88 |
| MuchMusic | Music Video/<br>Vidéos musicaux | 0.08 |
| Weather Now | Weather/Météo | 0.22 |
| Canal Famille | Youth/General<br>Jeunes/Général | 0.55 |
| Réseau des Sports | Sports | 1.05 |
| MusiquePlus | Music Video/<br>Vidéos musicaux | 0.10 |
| Vision TV | Devotional/Religieux | 0.00 |
| TV-5* | European/French<br>Européen/Français | 0.28 |
| **U.S. Services/Services américains** | | |
| Arts & Entertainment (A&E) | Arts/General Arts/Général | 0.25 |
| Nashville Network | Country Music/<br>Musique country | 0.19 |
| Cable News Network (CNN) | News/Actualités | 0.16 |

**NOTE:**

Canadian service rates reflect CRTC Decisions 87- 895 to 87-906 November 30, 1987, as applicable to the period from Sept. 1, 1989 to Aug. 31, 1990, and as updated by Decisions CRTC 88-776 (TSN) and 88-777 (MuchMusic), October 27, 1988. U.S. service rates reflect current rates paid by Canadian cable television systems as of Oct. 1, 1989, for distribution of these services on basic cable service or negative option "enhanced-basic" service. Rates are generally higher when such services are offered on a premium basis, i.e. in a package with pay television services.

* The above Table includes the rate for TV-5, which was added to the list during Mr. Grant's oral evidence as a result of a question from the Vice-Chairman.

and he concludes by saying:

> "Taking all these circumstances into account, I consider that the appropriate rate that would represent the 'undue enrichment' earned by cable systems in Canada from the carriage of distant broadcast signals is at least $0.30 per month per basic subscriber for each DSV." [CRC-1, p. 19].

In his written argument, counsel for CRC stresses that:

> "... those most comparable to distant signals are YTV and A&E. However, CRC submits that the evidence also makes it clear that YTV and A&E are *considerably less valuable* to cable operators than distant signals. YTV, A&E and even services with higher wholesale rates such as *Canal Famille*, generally do not run first-run drama programs, but focus on much older syndication product... This assessment was confirmed by Ms. Whittaker, the witness for CANCOM.
>
> Consequently, CRC submits that the wholesale rates for services such as *A&E and YTV should be used as a minimum level. If royalties for distant signals were set below those levels* (on an average per signal basis) *then retransmitters would clearly be unjustly enriched at the expense of copyright owners*. The retransmitters would obtain demonstrably more valuable services at a rate below what they willingly pay for inferior services.
>
> In this regard, it is relevant to note that cable operators are not required to carry any of the programming services listed on Table 1. Moreover, while the rates for the Canadian specialty services listed on Table 1 are subject to regulation by the CRTC, those for the U.S. such as A&E are not. As Mr. Michael Hind-Smith for CCTA readily agreed, the rates for U.S. specialty services like A&E are freely negotiated between Canadian cable operators and service suppliers, without the intervention of the CRTC. Obviously, the level of the wholesale rates for the services have not prevented cable operators from carrying and successfully reselling such services." [CRC, written argument, p. 6. (My emphasis)].

Mr. Grant puts "extended basic services" in the same category as optional services offered by the retransmitters on the basic service by way of "negative option." He chooses A&E as a benchmark service for several reasons: it is one of the optional American services that enjoys a relatively high penetration, 1.5 million subscribers; its programming is not really specialized, like Cable News Network or The Nashville Network, but rather more diversified; finally, A&E is partly financed through advertising revenue.

Moreover, the evidence reveals the following:

> 1. That A&E is sold at 65¢, when it is a purely optional service, and at 25¢ when it is offered on "extended basic". [Transcript, Vol. 14, p. 2643].
>
> > "This 25 cent-rate was specially negotiated, for the very reason you have indicated, that those cable systems that are offering it on extended basic are virtually getting into all of the cable homes, or over 80 per cent of the cable homes. That's why the rate came down." [Transcript, p. 2643].

> "It was based on a negotiation industry- wide by the cable industry, specifically in respect to the carriage of these services on extended basic." [Transcript, p. 2639].
>
> "It is now going into 27 per cent of the 6.8 million cable households in Canada. Eighty per cent of households choose to pay for the unscrambled tier." [Transcript, p. 2645].

He explains that a penetration level of 80 per cent is reached in markets where A&E is offered on that basis, just as the other services listed on Table 1. [Transcript, p. 1867].

He characterizes the A&E market as "a unique niche" that "has its own value". [Transcript, p. 2642].

Thus, A&E is a specialty service but not a narrow interest service, being more generalized, and offering a particular type of general programming ("a unique niche") distributed voluntarily by retransmitters at a price of 25¢ per month per subscriber where it is distributed by way of negative option basic service, but at a rate of 65¢ per month where it is distributed on a purely optional basis. The rates were negotiated nationally by the cable industry.

I have been able to determine that a very substantial percentage of its programming is repeated several times during the same month; this information was not established in evidence. Another percentage of its programmming, also not established in evidence, is "blacked-out" because the Canadian broadcast rights could not be cleared by A&E. Moreover, A&E offers syndicated programs, and *no news or sports*.

At the time of the hearing, only 111 of the 1,469 retransmitters in Canada carried this service. [Transcript, p. 2644].

> 2. That the rates for the Canadian specialty services are set by the CRTC. Some of them are distributed on the basic service, including all those appearing on Table 1, and the others remain purely optional. The specialty services that are part of the basic service remain optional to the retransmitter, who has the choice to retransmit them, but once he decides to do so, the service becomes part of the basic service for the subscriber.

A review of CRTC policy in this area and of the CRTC decisions on these services [*More Canadian Programming Choices*, CRTC, November 1987 (hereafter "Choices")] reveals that these tariffs were more approved than imposed. Indeed, for the most part, the rates proposed by the applicants were the ones approved. The applicants in those cases wanted to be included on the basic service in order to obtain improved access to the cable systems, which would generate much higher subscription revenues; in certain cases, it would also generate much higher advertising revenues.

A&E is one of the twenty-four non-Canadian specialty services authorized for distribution as a discretionary service pursuant to the *Cable Television Regulations, 1986* or to a condition of its licence. [*Choices*, p. 83-84, and the list of these services, Appendix 2]. In its policy statement, the CRTC also confirms: "the Commission maintains the position expressed... that it would not be in the interest of the Canadian broadcasting system to allow the carriage, at this time, of non-Canadian specialty or pay television programming services which, in the Commission's opinion

could be considered either totally or partially competitive with Canadian specialty or pay services.... Moreover, should the Commission license, in the future, a Canadian service in a format competitive to an authorized non-Canadian specialty service, the authority for the cable carriage of the non-Canadian service could be terminated." [*Choices,* p. 85]. Referring to the list of Part III eligible non-Canadian satellite services, the CRTC specified that that list "will be subject to periodic review in light of the criteria outlined above in this section". [*Choices,* p. 86].

These comments allow us to better understand the value that the CRTC attaches to A&E as a service. It is a marginal service for which authority to carry might very well be terminated, in the right circumstances, and it is not in the same league, from the point of view of Canadian telecommunication policy, as the services that are part of the basic service.

The rates for Canadian specialty services are referred to by my colleagues as regulated; in the context described, I believe it would be fairer to characterize them as controlled, since they in fact reflect the judgment of the service operators of the price the Canadian market can bear at the levels of penetration and advertising revenues they set for themselves.

The big difference between these controlled rates and the A&E rate negotiated on a national basis with the cable systems to be included on the negative option basic service is that the former must be approved by the CRTC.

It is therefore understandable that Mr. Grant often treats them all the same in his analysis.

> 3. That a specialty service is not a "service" in the sense of the contents of a typical distant signal.

The above-mentioned CRTC policy on these specialty services leads me to believe that the services referred to by the parties are very different from normal distant signals; by their very nature, specialty services are "for specialty audiences." Also,

> "(the commission) has therefore devised a regulatory framework that is designed to ensure that the potential rate increases associated with the introduction of new services on the basic service *will fall below what studies have indicated subscribers are willing to pay for new, attractive viewing choices*." [*Choices,* p. 48 (my emphasis)].
>
> "In fact, in the Commission's opinion, the impact of the specialty services licensed today in terms of audience fragmentation and advertising revenue diversion will amount to the equivalent of adding one new service in the anglophone market and one new service in the francophone market." [*Choices,* p. 63].
>
> 4. That the audience reached by A&E, in those places where it is distributed on the "enhanced basic service" does not even come close to the audience reached by the vast majority of distant signals. Table B below compares the various audience shares, based on BBM statistics for the fall 1988: [CCC-12]

**TABLE B: BBM RATINGS FOR SELECTED SIGNALS IN SELECTED CITIES**
**TABLEAU B: COTES D'ÉCOUTE BBM DE CERTAINS SIGNAUX POUR DES VILLES**

**CHOISIES**

| City / Ville | % A&E | % ABC | % NBC | % CBS | % PBS |
|---|---|---|---|---|---|
| Vancouver | 0.1 | 4.6 | 4.7 | 3.6 | 3.9 |
| Edmonton | 0.3 | 7.6 | 8.3 | 6.9 | 3.0 |
| Ottawa | 0.3 | 5.3 | 7.5 | 4.9 | 3.4 |
| Toronto | 0.3 | 3.7 | N/A | N/A | N/A |
| Halifax | 0.2 | 5.7 | 14.0 | 2.8 | 2.8 |

**NOTES:**

There are no statistics for Montreal or Quebec City, as A&E is not offered in those communities.

In Toronto, only the ABC signal is distant for all systems. It is therefore the only signal that I believe can be used for comparison purposes.

I believe that these statistics demonstrate that the CRTC is correct in its view of the role of the complementary specialty services and their relative importance compared to the wide audience services.

**BBC's comments**

In his argument, Mr. Hynna, counsel to BBC, commented on Mr. Grant's presentation on this issue: [BBC, written argument, p. 4 to 10 (my emphasis)].

> "The only comprehensive valuation evidence to establish the total royalty 'pot' is that adduced by CRC through its witness Mr. Grant...
>
> On the basis of wholesale prices paid by cable systems for the four non-broadcast services Mr. Grant found *most comparable, but inferior,* to retransmitted signals (YTV, TSN, *Canal Famille* and A&E), Mr. Grant established a *minimum value* of 30¢ per month per cable subscriber for each Distant Signal Value (DSV)...
>
> Mr. Grant's 30¢ per month per cable subscriber figure was established on *a conservative approach and represents a minimum royalty amount*. He agreed in cross-examination that while he took the 30¢ as a minimum, the comparables he used supported a range of 30¢ to 37¢ per cable subscriber. On that basis and using the updated DSV average of 2.8, the higher end of the range would produce total royalties of $82 million.
>
> It is submitted that an analysis of *the comparables used by Mr. Grant suggests a minimum royalty well in excess of 30¢ per subscriber,* and a correspondingly higher number at the top of the range, for the following reasons:
>
> a. for the cable system, choice and variety of programming in the signals offered are the main consideration. (Cable industry panel, Tr. p. 7697 to 7699). Not one of the non-broadcast services looked at by Mr. Grant offers the programming equivalent of retransmitted signals (Grant, Tr. pp. 1862-1864). Mr. Grant considered A&E and YTV to

be the two services offering a mix of programming most comparable to that of retransmitted signals. Both those services lack diversity and generally consist of second-run programming. Despite acknowledging that neither one of these is an equivalent, he nevertheless decided on a 30¢ per subscriber rate as the rate for retransmitted signals even though that number is less than the 31¢ rate for YTV, one of the services looked at. The average rate for the four services Mr. Grant thought would produce the mix of programming most comparable was 50¢ (Tr. p. 2404). It is suggested that the logic of Mr. Grant's considerations dictate *a rate for distant signals in excess of 31¢ and closer to the average of 50¢*. A&E is of much lesser value than retransmitted commercial television signals and people would pay a much higher price for CBS or CTV signals than for A&E (Liebowitz, Tr. pp. 6717-8). A subscriber would have to receive and pay for more than one of the non-broadcast services to get the choice and variety of programming available on a retransmitted signal.

b. In considering the wholesale rates paid for various non-broadcast services, the figures used were 1988 and 1989 rates and did not take into account the increases to the wholesale rates that would be experienced during the 1990 and 1991 years of the retransmission royalties for which values were sought to be established. (Grant, Tr. p. 2686-7).
c. To the degree that sports programming on distant signals is considered valuable, the rate per subscriber would increase commensurately in that TSN has the highest rate of 88¢ per subscriber. Given that the 30¢ minimum chosen by Mr. Grant is closest to the rates for the non-sport services of A&E and YTV, *the 30¢ tends to ignore any sports component for the distant signal valuation*.

It is submitted that the 30¢ per subscriber per DSV adopted by Mr. Grant undervalues retransmitted signals in relation to his comparables. *The comparables approach taken by Mr. Grant supports a rate of at least 40¢ per cable subscriber* and therefore a total royalty (excluding music) of approximately $80 million (40¢ 2.8 DSV × 12 million × 6.6 million cable subscribers).

It is therefore proposed that a total royalty of $89 million be generated from large systems for all collectives other than music.

The royalties so determined would represent less than 10 per cent of the total cable subscriber revenue for basic services. Inasmuch as the royalties represent the only programming cost to be paid by cable for retransmitted signals, it remains low in comparison to the 60 per cent of revenues paid by the cable industry as a whole for non-broadcast services. (See BBC-11, StatsCan Tables 2-6, years 1984 to 1988). Similarly, it is low in comparison to the approximately 5 per cent of revenues representing the costs of the industry for the community channel on cable systems."

**CCC's comments**

In keeping with Mr. Grant's comments, counsel for CCC made the following comments in their written argument: [CCC, written argument, p. 30-31 (my emphasis)]

> "It is submitted that the rates that are charged to cable systems by specialty services, particularly the rates charged by U.S. specialty services which are not regulated by the

> CRTC, provide a useful guide as to the fair market value to cable systems of distant signals. It is submitted that the most comparable U.S. specialty service is the Arts and Entertainment Network (A&E) which charges cable systems a monthly rate of 25¢ per subscriber for carriage on the extended basic tier and which carries a relatively wide range of general interest pro- gramming ... However ... it is clear that *A&E does not enjoy as high viewing shares in Canada as the U.S. commercial signals*. It is submitted that this suggests that *A&E is less valuable to cable systems than any of the U.S. commercial signals* notwithstanding that cable systems pay 25¢ per month per subscriber to carry it ... this would suggest that *a significantly higher monthly royalty rate than 25¢ per subscriber would be justified for the U.S. commercial signals*."

I have a great deal of difficulty in grasping the comparability of the service offered by A&E and the programming broadcast by the large Canadian and American networks, who offer, at enormous cost, a constant diet of new programs, continuous news services and sports broadcasts for which they pay a king's ransom.

I prefer as a benchmark, although only slightly, the 31¢ rate for YTV. It too is a specialty service, for young people. It is offered on the basic service and enjoys for that reason an equivalent market penetration, as do the other Canadian specialty services listed in Mr. Grant's table.

Furthermore, I should point out that I agree with Mr. Hynna's analysis to the effect that the specialty services aiming at specialized audiences, offer neither the choice nor the variety of programming that distant signals on the basic service offer. He makes the observation that "a subscriber would have to receive and pay for more than one of the non- broadcast services to get the choice and variety of programming available on a retransmitted signal". This is consistent with the remarks of the CRTC, that "in the Commission's opinion, the impact of the specialty services licensed today in terms of audience fragmentation and advertising revenue diversion will amount to the equivalent of adding one new service in the anglophone market and one new service in the francophone market." [*Choices*, p. 63].

Accordingly, I do not believe that the choice of one of the prices charged to retransmitters for the carriage of the specialty services authorized by the CRTC is valid nor that any of them is even a representative price. It is at best a minimum rate.

Notwithstanding my reluctance to use them, the rates proposed, taking into account a deduction of 20 per cent for simultaneous substitution and duplication, would yield the following results, without the discounts contemplated for systems between 0 and 6,000 subscribers:

28,798,431 × 12 × 0.25 (A&E)

= $86,395,293 × 0.80

= $69,116,234

28,798,431 × 12 × 0.31 (YTV)

= $138,232,468 × 0.80

= $85,704,130

28,798,431 × 12 × 0.40 (BBC)

= $138,232,468 × 0.80

= $110,585,975

**3. *Market Value – The MLB and FWS Claims and Analysis of Certain Programming Costs of Broadcasters***

a) *MLB's Position*

The evidence of MLB can be summarized as follows:

a. Using as an analogous market the contract between itself and the U.S. service, ESPN, MLB arrives at a market value of 33¢ per month per subscriber, for the six months of the year during which baseball games are retransmitted. That amount in no way corresponds to the cost of the ESPN service, but only to the retransmission of baseball games.
b. MLB then reduces that amount to 15¢, no doubt to account for the lower number of games retransmitted.
c. Its main witness, Mr. Bryan Burns, explained clearly the extent to which the constraints of a compulsory licence prevent the league from extracting from the Canadian market the full benefit that it might otherwise extract in the absence of the regime. It emerges from his evidence that the prices demanded and paid are higher if there is freedom to negotiate with the highest bidder.
d. MLB's tariff would generate $7.3 million for MLB alone; however, its share of program supply represents only .77 per cent of the supply of all retransmitted programming in Canada, net of simultaneous substitution and duplication. [CRC- 45, Table 4-2, p. 54; Transcript, p. 5961].

b) *The Position of FWS*

The evidence of FWS can be summarized as follows:

a. FWS submits that certain types of programs are more valuable than others, independent of the broadcast time they occupy.

The evidence established the mind-boggling annual amounts paid by the various media for the broadcast and retransmission rights to sports programs:

- For the NFL, $925 million for 1990, an increase of $425 million over 1989. [FWS-48].
- For the NBA, $150 million from NBC and $68 million from Turner Network Television for 1990, or 19¢ per month per subscriber for the seven months of the basketball season. [FWS-46].
- For the NHL, its contract with Sports Channel America represents 22¢ per month per

subscriber; moreover, non- network broadcasts generate 83¢ per month per subscriber in New York City and 42¢ per month per subscriber in Buffalo, the two typical markets to which reference was made. [FWS-45].

b. In addition to this direct evidence, FWS put into evidence two surveys prepared by Professor Roger M. Heeler, which tend to establish the relative value of sports programming compared to other types of programming.

The cable operator survey concluded that 20.3 per cent of the value of all programming was attributable to "live professional and amateur sports" and the subscriber survey concluded that its share was 17.3 per cent.

The surveys were vigorously challenged during the hearing by counsel for the other parties. Notwithstanding these challenges, the results appear to me to help support the position taken by FWS, namely that sports are important to the television broadcasting industry and that it is public tastes that drive up the objective value of certain types of programming.

FWS claims 26.4 per cent of the global amount of royalties established by the Board as compensation for the retransmission of sporting events under its control, or 30.5¢ per month per subscriber.

c) *Analysis of certain programming costs of broadcasters*

During the hearing, summary evidence was presented by the broadcasters, at the request of the Board, to attempt to establish the relative value of various types of programming, on the basis of their costs.[1]

Using this data, I prepared the following table to reflect the considerable expenses incurred by broadcasters for live programming:

**TABLE C: RATIOS OF NEWS AND SPORTS PROGRAMMING COSTS VERSUS TOTAL PROGRAMMING COSTS**
**TABLEAU C: DÉPENSES DE PROGRAMMATION DES NOUVELLES ET DES SPORTS, EN RAPPORT AVEC L'ENSEMBLE DES COÛTS DE PROGRAMMATION**

| | CBRRA<br>ADRRC | BBC<br>BBC | CBC<br>SRC | American<br>Commercial<br>Networks<br>Réseaux<br>commerciaux<br>américains | PBS<br>PBS |
|---|---|---|---|---|---|
| News/Nouvelles | 29.8% | 38.3% | 24.3% | 14.9% | 37.7% |
| Sports | 13.8% | 7.4% | 20.1% | 32.9% | 0.7% |
| * | 43.6% | 45.7% | 44.4% | 47.8% | 38.4% |

* Percentage of total programming costs. Pourcentage des coûts totaux de programmation.

From these brief analyses, the following can be deduced:

- The free market value of certain types of programming, independent of their quantity, can reach a very high level, which cannot be ignored when it comes to establishing a scale of compensation payable by retransmitters to rights holders.
- The concept of "notional fair market value" suggested by all the collecting bodies as the basis for a fair and equitable compensation is most directly expressed in the evidence submitted by MLB and FWS; the compensation paid to the rights holders is much higher for those categories of programming that are in great demand and continues to rise year after year.
- The costs of live broadcasts are considerable and cannot be ignored.

**4. *The U.S. Rates***

An analysis of the U.S. context may help us find the parameters that should apply in Canada.

a) *The U.S. Rates Were Largely Determined by the U.S. Congress in 1976*

The testimony of Arthur Scheiner for CCC and W.R. Heppler for CCTA revealed that:

> "The compulsory licensing royalty fees provided by the Copyright Act were extremely low; were based, in large part, on the claims of the industry on what they were willing and able to pay; and effected a major reduction in the level of fees proposed in earlier bills. ... The modest nature of the fees was acknowledged by Congress.
>
> The 'modest' nature of the royalty fees – which represented approximately one per cent of the total gross revenues of the cable industry – may be compared with the estimated 30 per cent of gross revenues that U.S. broadcasters pay annually for programming." [CCC-19, p. 9-10].

Moreover, as counsel for CCC indicate in their argument,

> "the U.S. royalty rate which was set in 1976 ... was designed to subsidize the cable industry in that country which at the time was still in its infancy, ... Accordingly, the liability imposed under the U.S. system is significantly below fair market value. It is submitted that such a subsidy is neither warranted nor appropriate in Canada given the extent to which the cable industry here is developed, mature and profitable and given that until January 1, 1990, copyright owners subsidized the development of the Canadian cable industry since retransmission royalties were not payable at all." [CCC, written argument, p. 36].

If the U.S. rates were strictly adopted in Canada, the following would result:

> U.S. 43¢ (at U.S. $1 = Can. 87¢) = Can. 49.45¢ for 3.5 signals in the U.S.
>
> Therefore, for the average of 6.04 signals retransmitted by cable systems in Canada, 85.33¢.

That figure would have to be adjusted to take into account the statutory discount of 75 per cent that applies in the United States to ABC, CBS, NBC and PBS signals, a discount not contemplated under the Canadian Act. As the signals of these four networks represent 69 per

cent of the distant signals received by subscribers in Canada, the equivalent adjusted cost per month per subscriber would be $2.60 Can.

b) *The Only Rate Established by the U.S. Copyright Royalty Tribunal (CRT)*

The U.S. rate subsequently determined by the CRT in 1980 to apply to distant signals made available to retransmitters after 1976 was 3.75 per cent of the retransmitters' operating revenues, per distant signal retransmitted.

I find particularly interesting the following comments, taken from the CRT decision:

> "The Tribunal judged that the current statutory rates could not be considered those that would result from full market place conditions if the compulsory licence did not exist. *The rates were established as a legislative compromise. They are arbitrary, and they were intended to require only a minimum payment on the part of the cable operators.*" [Cited by Mr. A. Scheiner, Transcript, p. 916 (my emphasis)].
>
> "The insistence by the cable industry operators on retaining the compulsory licence is, in the Tribunal's judgment, an indication that its cost to them is lower than what they would have to pay in the free market. The Tribunal also considers that the cable operators enjoy a substantial benefit in not having to negotiate for each program they carry on a separate basis." [Cited by Mr. A. Scheiner, Transcript, p. 918].
>
> *There is "no public policy justification for establishing royalty rates below reasonable market place expectations of the copyright owners."* [CCC-19, p. 18 (my emphasis)].

Applying this rate to Canada, where the average number of distant signals is 4.54 results in the following amount:

- based on 1988 revenues:
  $989,508,932 × 3.75 × 4.54
  = $168,463,895
- based on 1989 revenues:
  $1,092,515,991 × 3.75 × 4.54
  = $186,000,847.

The following conclusions may be drawn from the U.S. comparison:

- That the application to Canada of the current equivalent U.S. rates, adjusted to eliminate the statutory discount provided by the U.S. Congress and absent from the Canadian Act, would yield a global amount of royalties much higher than that claimed by the collecting bodies.
- That the non-statutory rate, determined by the U.S. Tribunal equivalent to this Board, based on the fair market value of the benefit received by retransmitters, is 3.75 per cent of the operating revenues of the cable systems, per signal. Once again, this yardstick would generate a global amount of royalties much higher than that claimed by the collectives.
- That while the Board should take into account the different national and cultural

circumstances of Canada, it must bear in mind that 76 per cent of the distant signals retransmitted in Canada originate in the United States, where that "market value" has already been estimated at 3.75 per cent of the revenues of cable systems, per signal, in a "notional fair market value" context.

**(ii) The Harm Suffered by the Rights Holders**

Two scenarios were proposed by CRC, in an attempt to estimate the harm sustained by rights holders as a result of the retransmission of distant signals in Canada.

**1. *The Value of Displaced Programming Theory***

I am convinced that, in presenting the so-called value of displaced programming theory [CRC- 1, p. 19 to 22], Mr. Peter S. Grant, CRC's expert witness, was performing a hypothetical exercise; the thesis is nevertheless illustrative of the harm caused to creators, and its merits reside in the fact that it uses current figures from Canadian sources.

There is no doubt that the importation of signals considerably increases the number of programs available to the subscriber.

Unless the government of Canada changes its telecommunications policy, were these signals suddenly taken away, the demand for programs would increase very substantially and would have to be met by indigenous programming services.

Therefore, as a result of the importation of these signals, the program creators, because of low demand on the part of the Canadian broadcasters, see their opportunity to create more programs as diminished.

I believe that 22 per cent of the complete programming of ABC, NBC, CBS and PBS certainly represents, hypothetically, the programming of at least one national Canadian television network.

In particular, the figure of $100 million suggested by Mr. Grant as the value of displaced programming seems very reasonable and tangible to me, based as it is on real Canadian costs of production; I would even characterize it as an underestimate, since it ignores the programming costs of stations in Quebec and in the Maritime provinces and takes no account of the bicultural character of Canada. I do not share Mr. Grant's opinion on the lesser value of local news, particularly for the purposes of this exercise, which only involves estimating a replacement cost.

Accordingly, I find the estimate a reasonable measure of the harm sustained by rights holders as a result of the retransmission of distant signals.

**2. *The Licence Fee Erosion Theory***

The evidence given by the independent producers panel, all members of CRC, fully supports Mr. Grant's well-documented argument on the subject of the erosion in broadcast licence fees for producers. [CRC-1, p. 22 to 30].

In particular, I note the marked difference in the prices of initial licences expressed as a

proportion of their costs of production between American and Canadian broadcasters; the small size of the Canadian market, which makes it absolutely essential, in order to attempt to obtain a return on investment, to capture all possible revenues from every possible broadcast, the first one being particularly important in establishing the market value of a program; the pervasiveness of the American market in Canada which very substantially reduces for Canadian distributors the resale potential of non-North American products, and finally the same pervasiveness that greatly limits the possibilities of exploiting Canadian productions in the United States.

The estimate of $70.9 million proposed by Mr. Grant seems conservative to me, based as it is on a rate of $4,000 per hour, even though the evidence indicates rather a rate of $5,000 per hour, which would have come to $88.2 million.

## C. COMMENTS ON PART 3B OF THE MAJORITY DECISION: THE FORMULA BY WHICH THE ROYALTY MAY BE DETERMINED; THE LARGE SYSTEMS: I – THE VALUE OF DISTANT SIGNALS

### 1. *Re: The Analysis of the Value of Comparable Services*

I agree with my colleagues that, in establishing the value of a distant signal, it is appropriate to take into account the incidence of simultaneous substitution and duplication of programs.

I also accept the percentage of 20 per cent they propose; however, in the majority decision, that figure is characterized as an underestimate. I do not share that opinion. Indeed, it must be borne in mind that we had, in support of that assertion, only the undocumented remarks of some witnesses. It should also be borne in mind that Table VII is based on an eighteen-hour broadcast day and ignores programming between midnight and 6:00 a.m., during which time, according to other witnesses, there is little or no simultaneous substitution; moreover, I understand from Mr. Paul Audley's analysis that the figures submitted also take into account duplicate network signals, whether or not they are in different time zones. The only type of program duplication that theoretically would not have been taken into account is that between independent stations, an occurrence that is possible but likely minimal.

I understand that my colleagues deem it appropriate to impose a second discount of 20 per cent on the value of A&E for the following reasons:

1. A&E, by nature, would not be inclined to discount the price of its service in order to reach a larger audience. This is the logical conclusion that must be drawn from their statements that:

> "The market for specialty services does have one distinct attribute, which is the ability of the seller to prevent individuals not prepared to pay the asking price from using the product. This gives the seller some degree of market power, which allows A&E, for example, to charge 25¢ to all its subscribers. This is not the case for the owner of a distant signal who cannot prevent by technical means the use of a signal by a person not willing to pay the asking price.

> The market in which a signal is distant calls for different cost recovery considerations than the subscription market of specialty services. It follows that the distant signal seller would be prepared to accept a lower price for his product in that market."

My colleagues are referring to the scrambling by the specialty services of their signals as something that gives value to their programming services. This technological process is not available to distant signals because the law provides for a compulsory licensing regime, not because of technical reasons. I do not believe that distant signals should be penalized simply because they are subject to a compulsory licence.

These statements (by my colleagues) would also seem to be contradicted by the evidence which shows that A&E charges 65¢ per month per subscriber when it is offered on a strictly optional basis and 25¢ when it is offered on enhanced basic.

Finally, I do not believe that the evidence supports the conclusion that broadcasters on the basic service would have a greater tendency to discount their signals. The direct evidence on the market value of their programming suggests quite the contrary.

This economic analysis in the majority decision seems also to suggest that the more a signal is received and enjoyed, the less is its value. Consequently, and I refer here to my review of the CRTC policies in this area, one could be lead to the conclusion that in the opinion of my colleagues, the less value the CRTC attaches to it, the greater is its market value.

> 2. The price of A&E might very well be a good proxy for a first signal but it might be too high for the other signals in the same package that contains the usual mix of distant signals. Once again, this analysis seems to me to be speculative and unsubstantiated by the evidence.
>
> 3. It is here that my colleagues seem to bring into play the "flexibility factor" that they had reserved under their third guiding principle to bring the value of a signal down to the level that they find appropriate. I can only repeat that I do not agree with that principle.

**2.** ***Re: The Value of Displaced Programming and The Value of Lost Licence Fees Theories***

I have already commented on this subject. I would just add a few remarks. My colleagues reject the value of displaced programming theory on the grounds of the improbability of the creation of a new national television network in Canada. I do not believe that Mr. Peter Grant was trying to convince them of the merits of such a proposition, but rather used the notion as a theoretical construct.

Similarly, I do not share the opinion of my colleagues as to the merits of the licence fee erosion theory. The independent producers panel seemed to me to be very representative of all programs produced or distributed in Canada. As to the second ground for rejecting the theory, that part of the harm suffered results from the broadcast of American programs transmitted via local signals, the difficulty was raised at the hearing. In cross-examination, in response to a question from counsel for CRC, Mr. Ralph Ellis stated:

> "The over-air signals existed even before there was television in Canada. That never really was perceived as a major problem. From my earlier days in the business we would sell programs after they had played on Buffalo, for example.
>
> It is only with the proliferation of services and the distant signals and cable that it has become a problem." [Transcript, p. 2185].

His testimony was neither contradicted or challenged.

Mr. Grant's two theories seem to me to be attempts to measure the effect that the free and unrestricted retransmission by retransmitters of the works of others causes to creators: first it limits their opportunities to produce programs and then, it diminishes the value that they can obtain for their programs.

**3.** ***Re: The Comparison with the U.S. Regime***

The data presented for the United States is not used by my colleagues despite their comments to the effect that:

> "Although royalties in Canada need not be in lock-step with those paid in the U.S., *these differences suggest that a rate in Canada should be no lower than in the United States.* In 1988, the average monthly rate per cable subscriber in the U.S. was 43¢. (My emphasis)
>
> The Board's task is to adopt a royalty scheme that is fair and equitable for Canada while acknowledging the obligations of the FTA."

In fact, taking into account the differences in the regimes and the number of distant signals, the level established by the Board is substantially lower than the U.S. level, particularly considering the compensation that will actually be received by the rights holders.

The 43¢ U.S. (U.S. $1 = Can. 87¢) represents Can. 49.42¢ and cannot be compared to the 70¢ Can. For 70¢, Canadian retransmitters carry an average of 6.04 signals versus 3.50 in the United States; moreover, the Canadian regime does not contain the statutory discounts of the American regime. Once the global amount is distributed, the rights holder will receive less under the tariff approved by this Board than under the existing tariff in the United States.

**4.** ***Re: The Board's Conclusions***

My colleagues rely solely on the rate of an optional American service, A&E, as the unit of measure. It is a marginal service whose content is not typical; therefore it is not an appropriate benchmark for establishing the value of distant signals generally retransmitted in Canada.

I agree that it is appropriate to discount the unit of measurement selected, whatever it might be, to take into account simultaneous substitution and program duplication.

The other reasons for discounting seem speculative to me.

In accepting A&E as an analogous market, my colleagues appear to ignore the value of the

programming itself, so important for achieving higher audience shares; paradoxically, it is audience shares that were used to determine the allocations to the collectives.

To conclude my remarks on the majority decision, I would highlight the following:

a. It is unclear to me, in the majority decision, how my colleagues apply their guiding principles 2 and 5, in establishing the global amount of royalties, taking as they do an American discretionary service as their only yardstick and completely ignoring the different nature of first-run and live programming and their value, which programming characterizes the vast majority of distant signals retransmitted in Canada and which, on a cost basis, represents a large part of their value.
b. I find that the concern of the majority to ensure the least possible disruption to the cable services available to subscribers, their third guiding principle, served as a backdrop to their appreciation of the evidence submitted by the parties.

## D. THE CLAIM FOR THE BROADCAST DAY COMPILATION

Two societies, CBRRA and BBC, under the heading "compilation" or "broadcast day compilation", claim a portion of the retransmission royalties as compensation for the effort, skill, creativity and originality required to organize the contents of a signal.

My colleagues recognize the reality of these characteristics which the evidence clearly established during the hearing.

The apparent difficulty lies in deciding whether the result of these efforts represents a work protected by the *Copyright Act*.

On the facts, it seems obvious to me that a mere presentation of the programs broadcast by a signal would most likely be of no interest, unless they were organized along the lines of the audience's requirements or demand; it is that very organization that gives each signal its profile, its identity; this work, very demanding for broadcasters, adds to the value of the programs retransmitted, by ensuring that they have the optimal exposure; this organizational work is a "value added" to the programs taken in isolation, and obviously benefits retransmitters, for whom the product arrives "pre-cooked and ready to eat", without their having to invest time or money.

The purpose of the *Act* is to compensate the rights holders for the works retransmitted on distant signals by cable systems.

Is the work of intellectual and technical creation and organization carried out by the creators of distant signals itself a protected work and should it be compensated as such?

### 1. *The Compilation of the Broadcast Day*

The evidence shows that the physical results of the compilation carried out by a broadcaster are the following:

- a detailed written schedule of the programs for each day;

- the corresponding organized broadcast of the programs each day;
- a videotape produced simultaneously with the broadcast of the entirety of the programming for that day. That daily videotape recording meets the fixation requirement for copyright protection.

**2. *Unjust Enrichment of the Retransmitters?***

It was under Bill C-2, 1988, Chap. 65 that Parliament amended the *Copyright Act* to require expressly that retransmitters compensate the creators of works retransmitted on distant signals for their creative work, which works were being retransmitted without cost prior to the amendment.

There is no doubt that the organizational work involved in the broadcasting of programs produced by others contributes to the value of those programs for retransmitters. That net benefit received by them would constitute unjust enrichment if that work is protected under the *Act*.

**3. *Is the Compilation that the "Broadcast Day" Represents an Original Work?***

The cases cited by counsel for CBRRA and BBC establish that the test of originality is made up of two elements: the works must not have been copied, and must be the product of the labour, skill, judgment and creativity of its author. [CBRRA written argument, pp. 55 to 57; BBC written argument, pp. 21 to 24].

The evidence presented by the two claimants clearly established that those characteristics are present in the organization of the broadcast day and have convinced me that the compilation that the "broadcast day" represents meets the test of originality provided under the *Act* and articulated by the case law.

**4. *Is the Broadcast Day a Literary and/or Dramatic Work?***

An original work must be literary, dramatic, musical or artistic if it is to enjoy the right to be communicated to the public by telecommunication protected under paragraph 3(1)(f) of the *Copyright Act*.

a) *Does the Broadcast Day Constitute a Literary Work?*

As explained above, one of the end results of the compilation effort is a detailed written schedule. The new version of the French definition of "literary work," found in section 2 of the *Act*, reads as follows:

> *"Sont assimilés à une œuvre littéraire les tableaux, les compilations, les traductions et les programmes d'ordinateur."*

and the English version reads:

> "literary work includes tables, compilations, translations and computer programs."

I would emphasize that the new French version appears to me to clarify the legislator's intention

in translating "includes" by "*sont assimilés à.*"

Thus, all compilations, and not only literary works, given the generic use of the word "compilation", are assimilated to literary works for the purposes of statutory interpretation.

There is no doubt in my mind that the compilation represented by the "broadcast day" is protected as a literary work, independent of the fact that what is transmitted to the public is not the detailed written schedule. As counsel for BBC indicated in his argument, "it is the literary expression of the arrangement of the programming." [BBC, written argument, p. 24]. He adds the following comment:

> "The arrangement, sequence, sounds and images of the broadcast day are generated by the paper schedule which is a literary work and thereby protected in the same manner as the sounds and images of videogames are protected by reference to the underlying computer program which is a literary work." [BBC written argument, p. 21].

In fact, it seems obvious to me that the essence of compilation is the presentation of a mix of works or diverse protected elements in a certain order. The simplified expression of this will always be a list or listing which, while of no interest in itself, will represent only the table of contents, of a literary anthology, for example.

In providing protection to this kind of work, assimilated to a literary work, the *Act* necessarily makes reference to the organized contents to which the listing refers, to the extent that such listing is pre-established in writing. As in our case, it would still hold true if the listing were pre-established in another language, computer language for example.

Accordingly, I conclude that the "broadcast day" represents a compilation within the meaning of the *Act*, and is therefore protected as a literary work.

b) *Does the "Broadcast Day" Constitute a Dramatic Work?*

The broadcast day is the televised production of the compilation of various works which all enjoy copyright protection.

As that production is itself an original work, it seems logical to me to conclude from this that it also enjoys copyright protection, since it is a production fixed simultaneously on videotape which, in the context of the modern world, is a process analogous to cinematography. Mrs. Beverly Nix, Vice President of Warner Bros. gave detailed evidence on the extensive use of the medium in current "cinematographic" production, and on its characteristics. [Transcript, pp. 1196 to 1198].

A cinematographic production, being a dramatic work in which the devices of scenic arrangement, acting form or a *combination of incidents* give the work an original character, constitutes a dramatic work within the meaning of section 2 of the *Act*.

Laddie *et al*., in *The Modern Law of Copyright*, [Butterworth, 1980, p. 273-274] comment on the definition of dramatic work in the 1911 U.K. Act, which definition is identical to ours.

> "If a film has personality and style of its own and is not the mere automatic result of filming a particular subject, it should fall within the definition ...
>
> The combinations of incidents represented give the work an original character ..."

What is important is that the producer has added sufficient originality to the televised production as a whole for it to be concluded that the elements of scenic arrangement, acting form or a *combination of incidents* give some originality to the televised production.

Can the various programs represent these incidents to which the author refers?

Black's Law Dictionary defines "incident" as follows:

> "Incident: used both substantively and adjectively of a thing which, either usually or naturally, and inseparably, depends upon, appertains to, or follows another that is more worthy. Used as a noun, it denotes anything which inseparably belongs to, or is connected with, or inherent in another thing, called 'the principal'. Also, less strictly, it denotes anything which is usually connected with another, or connected for some purposes." [H.C. Black, *Black's Law Dictionary*, 5th Ed., West Publishing Co., 1979, p. 686].

In fact, this definition is comparable to the one in the Oxford English Dictionary. [Compact Edition, Oxford University Press, 1971].

There is no doubt that the goal of the efforts, skill and creativity of the broadcasters is to bring about this very combination of incidents, the combination being the production of the broadcast day and the incidents being the various programs.

It seems to me therefore that the production of the broadcast day is itself an autonomous cinematographic production, and that, independent of whether or not this type of compilation is protected under the *Act*, the production is protected under the *Act* as a dramatic work.

Accordingly, I conclude that the broadcast day is a production that enjoys copyright protection, under the compulsory licensing regime for retransmission under the *Act*, as much as a literary work as a dramatic work, and that consequently the collectives are justified in their claim for a portion of the global amount of compensation for rights holders.

**5. *Copyright Act Interpretation by the Courts***

It emerges from the various cases cited by CBRRA and BBC that the courts have, over the years, interpreted the wording of the *Act* to make room for new technologies, ideas or rights.

Does the fact that the *Copyright Act* does not expressly recognize the "broadcast day" as a copyright work preclude any recognition of the work as such?

It was only under S.C. 1988, Chap. 15 that Parliament amended the *Copyright Act* to recognize statutorily the rights inherent in the intellectual property of computer programs. However, several judgements of the Canadian courts had already expressly recognized the existence of those rights and interpreted the *Act* in order to make it fit the circumstances of the language and

the medium of this technological innovation.

Similarly, if the courts had limited themselves to a traditional and restrictive interpretation of the *Act*, several works that are not literary in any academic sense of the word could not have obtained from the courts the protection that they obtained.

In the present instance, the concept of "broadcast day" as a copyright work has been the subject of numerous academic discussions. But in fact, it was only with the passage of S.C. 1988, Chap. 66 that a retransmission right was created, thereby opening the door to the justification of a claim by broadcasters for the use of their work.

Indeed, the question might be raised about a number of types of compilations, that is, whether or not they can or should be works protected by copyright, following the same line of reasoning: the choice by a musician of musical works for a concert, the selection of paintings by a museum curator for a thematic exhibition ... etc. But, de facto, it is only where there is profitable and tangible use of the work of others that there is reason or need to analyze whether or not that work is protected, and whether its author, especially in a compulsory licence situation, as we have here, should receive fair compensation for its use.

The law in general and copyright law in particular should be adaptable and I believe that we must therefore examine the elements of the broadcast compilation day claim to decide whether or not this kind of intellectual and technical work is protected under the *Act*, as interpreted by the courts, rather than rejecting it, a priori, on the grounds that the concept is not specifically recognized in the wording of the *Act*.

**6.** ***Allocation to the Broadcasters for the Broadcast Day Compilation***

Four broadcasters claim a share of any allocation made based on the compilation of the "broadcast day": CBRRA, BBC, CRRA and CRC.

According to CBRRA and BBC, the major part of the costs of doing business, excluding financing costs and program acquisition costs, are attributable to the cost of organizing the compilation. Having said this, the evidence that was presented suffers from weak, unconvincing methodology. For example, the evidence clearly reveals that no uniform control over the accounting methods used was exercised; moreover, the reasons given for including in the calculation certain costs and excluding others seem to me rather tenuous.

For these reasons, I would limit the allocation to a nominal amount, namely 2 per cent of the global amount of royalties, to be deducted "off the top" of the global amount, together with the PROCAN-CAPAC allocation of 3.3 per cent, the balance of 94.7 per cent to be distributed among the other collectives in accordance with program ownership.

None of the evidence allows us to break down the actual shares among each of the four collectives claiming compilation: I would therefore divide the allocation for compilation into four equal parts of 0.5 per cent.

## E. SOME DIFFERENT CONCLUSIONS

In making this decision, I think it is necessary to take into consideration first the guiding principles and then the proposals of the parties.

The tariff should therefore:

- Reflect Canadian circumstances;
- Be transparent and simple to understand and administer;
- Reflect only actual retransmission and recognize the different values of different programs;
- Compensate the rights holders in an objectively fair way;
- Ensure that that fair compensation is, to the extent possible, equal to the benefit received by the retransmitters.

The tariff formula approved by the Board in my opinion meets the criteria of transparency and ease of comprehension and administration.

From my comments emerge the following parameters for determining the global amount of royalties, before building in the discounts for systems between 0 and 6,000 subscribers.

1. Based on the equivalent costs of Canadian programming, the estimated royalties would be $95,221,637.
2. According to the proposals of the parties for comparable services,

   $69,116,234 using A&E as a proxy;

   $85,704,130 using YTV as a proxy;

   $110,585,975 according to BBC's assessment;

   after taking a reduction of 20 per cent to account for simultaneous substitution and duplication.

3. According to Mr. Grant's estimates, amounts of $100 million for the value of displaced programming and $70.9 million for licence fee erosion would be due.

Out of the guiding principles adopted emerges the major difficulty with this tariff: maintaining a balance between the fair compensation of the rights holders and the benefit received by the retransmitters of protected works.

Using the rates for comparable services as benchmarks may allow us to recognize the different values of programs and still allow us to take into account the Canadian context of this tariff, even if the rates for foreign services are included, if we take an average rate for all the services listed in Table 1. Indeed, the rates for CBC Newsworld, TSN and RDS reflect those different values. It seems to me that taking such an average is consistent with the spirit of the CRTC's comments on the specialty services to the effect that the services as a whole represent the equivalent of one

national broadcast service.

The average of those rates is 33.4¢ per signal per subscriber, from which 20 per cent should be deducted for simultaneous substitution and duplication, for a net average rate of 26.7¢ per signal per subscriber, or, for 4.56 signals, $1.20 (rounded) per month, per subscriber.

On this basis, the tariff would be the following:

**TABLE D: DISTRIBUTION OF MONTHLY ROYALTY PAYMENTS AND ESTIMATE OF THE GLOBAL AMOUNT GENERATED**
**TABLEAU D: DISTRIBUTION DES PAIEMENTS MENSUELS DE DROITS ET ESTIMÉ DU MONTANT GLOBAL AINSI GÉNÉRÉ**

| System Size (Number of Subscribers) Taille du système (Nombre d'abonnés) | Monthly Royalty Rate ($) Droits par mois ($) | Number of Subscribers Nombre d'abonnés | Percentage of all Subscribers in Large Systems Pourcentage de tous les abonnés aux grands systèmes | Royalty Payment ($) Droits ($) |
|---|---|---|---|---|
| 1,001 - 1,500 | 0.34 | 79,291 | 1.20 | 26,958.94 |
| 1,501 - 2,000 | 0.43 | 81,306 | 1.23 | 34,961.58 |
| 2,001 - 2,500 | 0.51 | 61,273 | 0.93 | 31,249.23 |
| 2,501 - 3,000 | 0.60 | 75,934 | 1.15 | 45,560.40 |
| 3,001 - 3,500 | 0.69 | 54,830 | 0.83 | 37,832.70 |
| 3,501 - 4,000 | 0.77 | 63,576 | 0.97 | 48,953.52 |
| 4,001 - 4,500 | 0.86 | 50,768 | 0.77 | 43,660.48 |
| 4,501 - 5,000 | 0.94 | 61,456 | 0.93 | 57,768.64 |
| 5,001 - 5,500 | 1.03 | 57,726 | 0.88 | 59,457.78 |
| 5,501 - 6,000 | 1.11 | 56,967 | 0.82 | 63,233.37 |
| 6,001 + | 1.20 | 5,675,496 | 86.17 | 6,810,595.20 |
| | | 6,318,623 | 95.88 | 7,260,237.78 |
| x 12 = | | | | 87,122,853.36 |
| 1,082/$100 = | | 267,738 | | 108,200.00 |
| | | 6,586,631 | | 87,231,053.36 |

In short, I come to the conclusion that the above rates would be fair and equitable, reasonable, for the following reasons:

a. The analogous markets are the same ones proposed by the claimants and they reflect Canadian rates.
b. The global amount generated represents approximately 7.5 per cent of the cable systems' revenues, which is a level that will no doubt cause some change for the cable industry, but which is well below the corresponding percentages of revenues of similar industries, and taking into account the fact that the retransmitters have no capital investment to make to enjoy the benefit of the programming. I believe that Mrs. Maureen Farrow's analysis of the ability of the retransmitters to absorb all or part of this amount still applies, particularly in light of the level of revenues reached in 1989.
c. The global amount equitably takes into account the large costs incurred by the

broadcasters for the transmission of live programming, particularly news and sports.

d. The amount reflects the notional fair market value sought by all the claimants.

## IX. NOTE – DISSENT

The data appears in the following documents:

CRRA-35: CBC Programming Expenses, Year Ending March 31, 1989.

CRRA-37: Three Network Data for the Copyright Board, for 1988.

BBC-24: BBC Members Programming Expenses for 1989.

CBRRA-22: Analysis of Costs of Programs Telecast of the Privately Owned Television Industry, Canada, 1988.

CRC-54: Rough Estimates of the Share of PBS Programming Expenses.