

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**Date** 1996-12-20

**Citation** FILES: 1992-EM/PM-1, Public Performance of Music 1994, 1995, 1996, 1997, 1998

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

**Members** Michel Héту, Q.C.  
Ms. Adrian Burns  
Mr. Andrew E. Fenus

**Statement of Royalties to be collected for the performance or communication by telecommunication, in Canada, of musical or dramatico-musical works for the period from september 1, 1993, to december 31, 1998**

**Reasons for decision**

More than thirty years ago, CAPAC filed a tariff for the public performance of musical or dramatico-musical works on the CTV Television Network Ltd. It related to the year 1963. The Copyright Appeal Board certified the tariff for that year and, subsequently, annually, until 1971, at 1.5 per cent of the Network's revenues.

CAPAC never collected any royalties pursuant to this tariff. From the outset, CTV challenged the legal foundation of the tariff in courts. In the end, the Supreme Court of Canada ruled that CTV, in supplying programs for broadcasting by its affiliate stations, did not communicate "musical works", but a performance of the works, e.g. an acoustic representation made by radio communication. The Court also ruled that since CTV's affiliated stations already had a licence authorizing them to perform all of the music in all of their programming through television broadcasts, that authorization could not "be said to proceed from CTV", which merely "provided the means of doing that which CAPAC had authorized".<sup>1</sup>

In 1988, paragraph 3(1)(f) of the Copyright Act was amended to replace the phrase "to communicate the work by radio communication" with "to communicate the work to the public by telecommunication".<sup>2</sup> On this basis PROCAN and CAPAC filed, on September 1, 1989,

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<sup>1</sup> *CAPAC v. CTV*, [1968] S.C.R. 676.

<sup>2</sup> *An Act to implement the Free Trade Agreement between Canada and the United States of America*, S.C. 1988, c.

proposed Tariff 2.A.2, pertaining to Private Television Networks for the years 1990 to 1994. Similar tariffs were filed by SOCAN (successor to CAPAC and PROCAN) for the years 1991, 1992 and 1993. CTV objected to all these proposals.<sup>3</sup>

On November 16, 1989, CTV sought to prohibit the Board from considering Tariff 2.A.2. Eventually, the Federal Court of Appeal ruled that the 1988 amendments did not affect the ruling made by the Supreme Court of Canada two decades earlier and that the principles set out in that decision still applied to any dealings CTV might have with respect to SOCAN's protected works.<sup>4</sup>

On September 1, 1993, further amendments to the Act came into force.<sup>5</sup> The definition of musical work was changed, apparently to move away from the earlier court rulings which implied that a work existed only in the form that it was fixed. The provisions dealing with the SOCAN regime were also modified in order to allow SOCAN to manage both public performance and public telecommunication rights.

Also on September 1, 1993, SOCAN filed for the year 1994 a proposed statement which reproduced in their essence the proposed statements for the years 1990 to 1993. The proposal also contained "alternative" tariff formulas, aimed at ensuring that CTV's advertising income would be accounted for in setting royalties for CTV or its affiliates, whether or not CTV was ultimately liable for the payment of such royalties. Similar proposals were filed for the years 1995 and 1996. CTV and others filed timely objections to all these proposals.

After lengthy discussions with the participants, the Board identified a series of questions which it wished to be addressed at the outset. These dealt with the effect of the prohibition order against the original, five-year proposed statement filed in September 1989, with the legality of a tariff targeting television networks separately from its affiliates, and with the legality of a proposed statement offering alternative tariff formulas. The questions were set out in a notice dated June 30, 1995.

On December 6, 1995, after participants had filed their arguments on the preliminary issues, an agreement dated November 27, between SOCAN and CTV, was filed with the Board. On January 5, 1996, the Board notified other participants of the agreement, with a request for any comments. The Canadian Association of Broadcasters and the CTV affiliates notified the Board that in view of the agreement, they would withdraw their objections; CBC, who had been granted intervenor status in this file, did not reply.

The agreement filed with the Board dealt with the period from September 1, 1993, to December

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65, s. 62(1).

<sup>3</sup> PROCAN and CAPAC also made an additional and alternative filing of the proposed Tariffs under sections 70.1 and 70.2 of the Act. These filings, which the Federal Court of Appeal ruled as having no legal standing, are of no concern for the purposes of these proceedings.

<sup>4</sup> *CTV Television Network Ltd. v. Canada (Copyright Board)*, (C.A.) [1993] 2 F.C. 115, application for leave to appeal to the Supreme Court of Canada denied (December 23, 1993).

<sup>5</sup> S.C. 1993, ch. 23.

31, 1998. Since no proposed tariff had ever been filed for 1997 or 1998, the Board could not deal with the issue until such a proposal was filed. The requirement was fulfilled on September 1, 1996, when SOCAN included proposed Tariff 2.E, reflecting the agreement, in its proposed statement of royalties for the year 1997.

The proposed tariff provides for the payment of royalties totalling \$7,500,000 for the 64-month period under examination. A first sum of \$2,900,000, bearing interest at 7.75 per cent from November 1, 1995, is payable in twelve quarterly instalments of \$241,667, starting on November 1, 1995. The balance of \$4,600,000 is to be paid in quarterly instalments of \$365,500 in 1996, of \$387,500 in 1997 and of \$400,000 in 1998. Late payments on these instalments would be subject to a 7.75 per cent interest charge.

The proposed tariff is the result of lengthy negotiations between SOCAN and CTV. The tariff is aimed at a single user. It reflects the terms of an agreement which no one is challenging. Under the circumstances, the Board certifies Tariff 2.E, as set out in SOCAN's proposed statement of royalties published in the Canada Gazette on October 19, 1996.

A handwritten signature in black ink that reads "Claude Majeau". The signature is written in a cursive, flowing style.

Claude Majeau  
Secretary to the Board