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Canada



Commission du droit d'auteur  
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*Copyright Act, Section 67.2*

**Members** Michel Héту, Q.C.  
Dr. Judith Alexander  
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 in 1990, 1991, 1992, 1993, 1994 and 1995**

**Reasons for decision**

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**I. INTRODUCTION**

On September 1, 1989, the Composers, Authors and Publishers Association of Canada (CAPAC) and the Performing Rights Organization of Canada (PROCAN) filed what has come to be known as the Society of Composers, Authors and Music Publishers of Canada (SOCAN) Tariff 17. This was the first comprehensive statement of proposed royalties for the performance or communication by telecommunication of music "in connection with transmission of non-broadcast services" <sup>1</sup> to a transmitter's subscribers. This proposal, and other similar ones dealing

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<sup>1</sup> It has become inappropriate, since the new *Broadcasting Act* came in force in 1991, to call the services under examination "non-broadcast" services. These services now "broadcast" programming within the meaning of that *Act*.

with the period from 1990 to 1992, made no distinction between radio and television; the distinction was introduced in the proposal for 1993, and was carried over in the proposals for 1994 and 1995. An attempt was made in 1994 to extend the application of the tariff to the retransmission of local over-the-air signals; in a decision dated May 20, 1994, the Board found the proposed tariff to be without legal foundation.

The Board initiated the examination of Tariff 17 at a pre-hearing conference on May 23, 1990. On June 14, 1990, the Canadian Cable Television Association (CCTA) obtained from the Trial Division of the Federal Court an interlocutory order staying any consideration of Tariff 17 for 1990 and 1991 until the final disposition of CCTA's application. The Trial Division later held that the Board was competent to deal with the matter and that there was a statutory foundation for the tariff; the Federal Court of Appeal affirmed the decision. On December 23, 1993, the Supreme Court of Canada denied leave to appeal the decision of the Federal Court of Appeal.

Numerous preliminary and procedural matters were addressed between early 1994 and January 10, 1995, when the hearings on this matter began. It was agreed that the hearings would address all proposals for the period from 1990 to 1995. The hearings dealt only with cable television services: SOCAN withdrew, for the period under examination, its proposals for cable radio services.<sup>2</sup>

The hearings were held between January 10 and February 1, 1995. Reply evidence from SOCAN was heard on February 27, 1995. The filing of written argument by the participants ended on May 5, 1995.

SOCAN presented evidence and argument in support of its proposal. CCTA, Canadian Satellite Communications Inc. (CANCOM) and Regional Cablesystems, being "transmitters" and, as such, the intended licensees under the proposal, filed objections for one or more of the years under examination.

Even though they were not targeted as licensees, several service providers asked to participate in the proceedings either as objectors or as intervenors. The Board held that the tariff could result in a liability being imposed on them and allowed service providers to participate fully in the proceedings.<sup>3</sup>

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This does not, however, reduce the need to reflect the distinction, for the purposes of the SOCAN tariffs, between conventional television stations that are available over-the-air and services that are available only on cable or via satellite, MDS or LPTV.

It would have been possible to refer to the services under examination as "non-conventional"; however, it is not so much the services as their delivery that is non-conventional. The correct expression to use would have been "non-conventionally delivered", but this would unduly burden the text of the decision.

In the end, the Board opted to use the expression "cable services" for the services covered by Tariff 17, and "over-the-air signals" for television signals transmitted for free reception by the public by a terrestrial station.

<sup>2</sup> The "on again, off again" history of digital audio services need not be reviewed here. The issue might resurface in 1996: on December 20, 1995, the CRTC issued licences to four national pay audio programming undertakings, but Cabinet sent these back to the CRTC for re-examination.

<sup>3</sup> Notices to this effect were issued on February 8, 1994 and again, on June 22, 1994.

Finally, the Government of Ontario and the CTV Television Network were allowed to file written arguments on issues of interest to them.

## II. LEGISLATIVE EVOLUTION

Early attempts at collecting royalties for the use of works on cable television proved unsuccessful. In *Canadian Admiral Corp. Ltd. v. Rediffusion, Inc.*,<sup>4</sup> the Exchequer Court concluded that a performance taking place in a person's house through cable transmission did not constitute a public performance.

Notwithstanding this decision, SOCAN's predecessors asked the Copyright Appeal Board to set tariffs for the "transmission of music to domestic establishments" starting in the 1950s in the case of CAPAC and in 1981 in the case of PROCAN; these tariffs were certified as filed until 1989.<sup>5</sup> According to the record of these proceedings, these tariffs were not enforced by the music societies. A separate tariff was in place from 1985 to 1989 for MuchMusic (and, in 1988 and 1989, for *MusiquePlus*), who complied with the tariff.

The *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c.65, (the *FTA*) changed the rules of the game. The Agreement required copyright protection to be extended to any form of transmission or retransmission of programming services to the public. Two significant amendments to the *Copyright Act* (the *Act*) were made to meet these requirements.

Paragraph 3(1)(f) was broadened to include "the right to communicate the work to the public by telecommunication". A definition of "telecommunication" as "*any transmission of signs, signals, writings, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system*" was added to section 2. As a result, liability for copyright was extended to the use of either cable or satellite technology. The *FTA* also introduced a compulsory licensing scheme for retransmission rights, whose implementation is left to this Board.<sup>6</sup>

These amendments did not meet all Parliament's objectives. In *Canadian Cable Television Association v. Canada (Copyright Board)*,<sup>7</sup> the Federal Court of Appeal determined that the transmission of music by cable operators did not constitute a communication of a work by telecommunication. This conclusion flowed from the definition of musical work as "*any combination of melody and harmony, or either of them, printed, reduced to writing or otherwise graphically produced or reproduced*". The Court interpreted the definition as meaning that the

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Appendix 1 lists most of the cable services targeted by SOCAN. Alphanumeric and Barker services are not included in the list. An asterisk is next to the name of those service providers who participated in the proceedings.

<sup>4</sup> [1954] Ex. C.R. 382.

<sup>5</sup> This was done despite doubts about the legal foundation for the tariffs. The former Board held that, as a result of the decision in *Posen v. Minister of Consumer and Corporate Affairs*, [1980] 2 F.C. 259 (C.A.), it did not have the power to comment on the legality of a tariff: see, for example, the former Board's decisions for the years 1981, 1982 and 1983.

<sup>6</sup> Subsection 3(1.4) was also added to the *Act*. Further comments on this provision can be found at page 36.

<sup>7</sup> [1993] 2 F.C. 138 (C.A.) [hereafter *CCTA*]. The companion case of *CTV Television Network v. Canada (Copyright Board)*, [1993] 2 F.C. 115 [hereafter *CTV*] was decided at the same time.

musical work exists in the form in which it is fixed. Therefore, a communication to the public by telecommunication of musical works, as opposed to the communication of a performance thereof, occurred only if sheet music was shown in front of a camera.

Nevertheless, a statutory foundation existed for Tariff 17: the Court determined that such a transmission constituted a performance in public.<sup>8</sup>

Subsequent to the *CCTA* decision, Parliament amended the *Act* as of September 1, 1993. The definition of musical work was changed to "*any work of music or musical composition*". As a result, the transmission of music by cable operators (and others) was transformed from a public performance to a public telecommunication.<sup>9</sup>

### **III. CABLE TELEVISION SERVICES IN THE CANADIAN MARKET**

#### **A. DESCRIPTION OF THE SERVICES**

The Canadian cable industry started delivering cable television services to their subscribers as early as the 1960's. However, these services assumed their full significance only with the appearance of pay and specialty services.

The first Canadian pay services were licensed by the Canadian Radio-television and Telecommunications Commission (CRTC) in 1982 and started broadcasting in 1983. The Caplan-Sauvageau Report (September 1986) termed their launch "a disaster". Out of seven licensees, two failed and four had to reorganize. One service (Family Channel), was added in 1987. By early 1990, there were five such services: three English-language services (First Choice, SuperChannel and Family Channel) one French-language service (*Super Écran*) and Cathay, a multilingual service. By 1995, two English-language services (MovieMax! and MOVIEPIX) had been added, while Cathay became a specialty service in 1993. Most pay services operating today offer primarily movies.

In 1992, the CRTC issued licences for pay-per-view services: Home Theatre and Viewers' Choice. These pay services allow the viewer to purchase single programs (mostly movies, shows and sports events).

Pay services are not allowed to carry advertising; their only revenues are affiliation payments. They are purely discretionary and their price is unregulated. Very few are offered on the basic<sup>10</sup>

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<sup>8</sup> This set aside the *Canadian Admiral* decision.

<sup>9</sup> The provisions dealing with the SOCAN regime were also modified to allow SOCAN to manage both public performance and public telecommunication rights: see ss. 67(1) and 68.

The addition, four months later, of subsection 3(4) confirmed the act of the cable operator as a communication and not a performance. The provision reads as follows: "*For the purposes of subsection (1), the act of communicating a work to the public by telecommunication does not constitute the act of performing or delivering the work in public, nor does it constitute an authorization to do the act of performing or delivering the work in public.*"

<sup>10</sup> Everyone who subscribes to cable must purchase the basic tier. The price for that tier is fully regulated by the CRTC in systems serving 6,000 subscribers or more.

or extended basic<sup>11</sup> tiers in any system.<sup>12</sup>

The CRTC licensed the first five Canadian specialty services in 1984. Four are still in operation: MuchMusic, The Sports Network (TSN), Telelatino and Chinavision.<sup>13</sup> Nine services were added in 1987, five French-language (*MusiquePlus*, *Réseau des Sports "RDS"*, TV5, *Canal Famille* and *MétéoMédia*) and four English-language (Vision TV, CBC-NewsWorld, The Weather Network and YTV). Eight other services were licensed in 1994 and started broadcasting in 1995: six were English-language (Bravo!, The Life Network, Showcase, Women's TV Network, The Discovery Channel and New Country Network "NCN") and two French-language (*Réseau de l'information "RDI"* and *Canal D*).

Specialty services provide niche programming (music, sports, public affairs) or target a specialized audience (children, specific cultural groups, etc.). These are not "must-carry" services.<sup>14</sup> They have, however, managed to reach a substantial portion of their intended market. In January 1994, 75.2 per cent of Canadian specialty services' signal-contacts were on the basic tier: the services were therefore sold to all potential subscribers in the relevant markets. Almost all the rest (24.6 per cent) were on the extended basic tier;<sup>15</sup> that tier achieved penetration rates in the order of 80 to 90 per cent, making it a "*de facto* basic tier".<sup>16</sup> In other words, in January 1994, Canadian specialty services, when offered on basic or extended basic tiers, achieved close to 97.5 per cent of their potential sales.<sup>17</sup>

The year 1995 may be a watershed for the marketing of specialty services. In Canada, except Quebec, the attempt to use a refurbished negative option marketing strategy to sell the services licensed in 1994 generated confusion and resentment among cable subscribers. The extent of the backlash has yet to be measured.<sup>18</sup> Even today, data on how successful the marketing of these services has been remains sketchy; the record of these proceedings certainly does not contain sufficient data to allow us to measure the effect that these difficult beginnings will have on the future of the new cable services. By contrast, it appears that the launch of the new services in the province of Quebec took place without serious difficulties, even though this was the first time

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<sup>11</sup> Strictly speaking, the extended basic tier is a discretionary tier. It is offered through negative option marketing: all subscribers who do not specifically ask for the "true" basic tier receive it. Signals are unencrypted; access is controlled through a negative trap. Neither its wholesale nor retail rates are regulated.

<sup>12</sup> In January 1994, only four systems serving more than 2,000 subscribers offered a pay service on the basic or extended basic tier.

<sup>13</sup> The Life Channel ceased operating in December 1986.

<sup>14</sup> Until 1995, all Canadian specialty cable services, except TSN and MuchMusic, had to be included on the basic tier, if they were carried at all. TSN and MuchMusic, if carried, had to be included on the basic tier unless they consented in writing to the services being offered on a discretionary tier.

As of 1995, all of the cable services licensed before 1994, as well as RDI and NCN, can be carried on a discretionary tier only with the consent of the service. The other six services licensed in 1994 must be offered on a discretionary tier unless the cable licensee and the programming service agree to offer it on the basic tier.

<sup>15</sup> See Table 1A.

<sup>16</sup> Dr. Ellis, testifying for SOCAN, used the expression to describe the American situation; it is nevertheless appropriate in the Canadian context.

<sup>17</sup> See Table 1B.

<sup>18</sup> Some provincial legislators are even considering the possibility of regulating negative option marketing.

cable operators in the province resorted to the negative option to sell specialty services.

The CRTC first authorized the carriage of American specialty services in 1984, as a means of making Canadian cable services more attractive. It has set out, and reviewed on several occasions, detailed rules dealing with the offering of American cable services. These rules ensure that American services do not compete directly with Canadian services, establish a set of discretionary tiers for the carriage of the eligible services, and require that the offering of American services be linked to that of Canadian pay and specialty services. Currently, some twelve American services can be offered in Canada.<sup>19</sup> Those most commonly distributed in English Canada during the period under examination were Arts & Entertainment (A&E), Cable News Network (CNN), The Nashville Network (TNN), The Learning Channel (TLC), Headline News (CNN-2) and Country Music Television (CMT).

Canadian and American pay and specialty services were the main focus of attention throughout these proceedings. However, the tariff also aims at several others, including community channels, some educational services, the Parliamentary channels, alphanumeric and Barker services, as well as one commercial television service, Atlantic Satellite Network (ASN).

It appears that educational services such as Access Network, Knowledge Network and Saskatchewan Community Network (SCN) closely resemble *Radio-Québec* or TVOntario; the only difference is in how they are delivered to the public.<sup>20</sup> The same holds true when ASN is compared to over-the-air commercial television stations. All of these are free to the cable operators, who generally offer them on the basic tier.

The Parliamentary channels' first objective is to broadcast the activities of the House of Commons and of provincial legislatures. They are offered on the basic tier.

Alphanumeric services (also known as non-programming services) do not provide programming as this is commonly understood. They supply mostly data, background music and advertising. Included in this category is the Canadian Home Shopping Network (CHSN). Barker services are services used by cable operators to promote discretionary services. Both types of services, some of which are cable originated, are offered on the basic or extended basic tiers.

For more than twenty years, the CRTC has required larger cable operators to provide a community channel on the basic tier. The cable operator is the broadcaster of that service. The channel offers alternative programming that is produced locally by volunteers to address local issues and concerns; it is a service provided by the community to the community. The obligation to provide the service currently exists for operators with more than 2,000 subscribers, who are expected to spend 5 per cent of their subscription revenues from the basic tier on it. Traditional advertising is not allowed on the channel, although some forms of sponsorship are.

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<sup>19</sup> See Appendix 1.

<sup>20</sup> Indeed, music used on *La Chaîne*, the French-language service of TVOntario, is covered in the licence issued by SOCAN under Tariff 2.B; yet, that service is offered mostly, if not solely, through a satellite-cable link. Conversely, MuchMusic states, at page 5 of its argument, that Access Alberta is licensed for over-the-air transmissions in Calgary and Edmonton.



## **B. THE EVOLUTION OF THE CANADIAN CABLE DISTRIBUTION INDUSTRY**

SOCAN and CCTA filed a joint study prepared by Mediastats early in these proceedings.<sup>21</sup> The study aimed at reflecting the state and evolution of the Canadian cable distribution industry. Complete data was provided for September 1989 and January 1994; summary data was provided for intervening years.

Tables 2, 3 and 4 show that from 1989 to 1994, the growth in importance of cable television services to the cable industry was nothing less than spectacular. The number of subscribers to cable increased by about 16 per cent, and the number of systems by about 20 per cent.<sup>22</sup> The increase in the number of subscribers occurred even though the cost of subscribing to cable went up.<sup>23</sup> During the same period, the average number of services received by subscribers in systems with more than 6,000 subscribers went up by 33 per cent,<sup>24</sup> with the result that in larger Canadian centres, cable subscribers now receive a score or more services. That increase is 49 per cent if one excludes cable originated services,<sup>25</sup> and 30 per cent if one looks only at pay and specialty services.<sup>26</sup> These increases were even larger in smaller systems.

## **C. FINANCIAL, MUSIC USE AND VIEWING DATA**

Participants in these proceedings supplied a wealth of financial, music use and viewing data on the cable and the pay and specialty services industries.<sup>27</sup> This data yields the following results.

According to the report prepared for SOCAN by Mr. Taylor,<sup>28</sup> the revenues of publicly traded cable systems grew at an annual rate of 13 per cent between 1988 and 1993, going from \$985 million to \$1.7 billion. During the same period, the average basic revenue per subscriber for this sector of the market increased from \$12.55 to \$18.34. The operating margin of the industry was in the neighbourhood of 40 per cent.

In 1993, revenues for the cable industry exceeded \$2 billion.<sup>29</sup> Some \$386 million were derived from pay and specialty television services distributed on the discretionary tier. It is not possible to determine the revenues attributable to the distribution of these services when they are offered

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<sup>21</sup> This study was filed as SOCAN-2. Unless otherwise stated, all data provided in the decision are derived from this study.

<sup>22</sup> See Table 3.

<sup>23</sup> See *infra*, footnote 28 and accompanying text. The first retransmission decision confirms that this trend has a long history: *Royalties for Retransmission Rights of Distant Radio and Television Signals (Re)* (1990), 32 C.P.R. (3d) 97 (Cop. Bd.), at 103-107.

<sup>24</sup> See Table 4.

<sup>25</sup> See Table 4. Cable originated services correspond more or less to what Mediastats calls "CATV".

This corresponds to a yearly growth rate of over 8 per cent.

<sup>26</sup> See Table 5.

<sup>27</sup> See Exhibits SOCAN-3, SOCAN-4, SOCAN-5, SOCAN-8, CCTA-11 and CCTA-12, to name but a few.

<sup>28</sup> Exhibit SOCAN-5. Figures advanced by Dr. Ellis for the period 1987 to 1992 were more or less to the same effect: see Exhibit SOCAN-3, p. 52.

<sup>29</sup> See the Statistics Canada report of Cable Television, Catalogue 56-205 for 1993, filed as part of Exhibit SOCAN-8, Tab A.

on the basic tier. Cable operators paid \$372.8 million for the right to distribute these services: \$135 million for services offered on the basic tier, and \$237.8 million for services offered on a discretionary basis.

By comparison, total revenues of pay and specialty service providers (including advertising revenues) were \$488.3 million. Of that amount, \$438.5 million went to Canadian services,<sup>30</sup> and \$49.8 million (all of which were affiliation payments) to American services.

Mr. Taylor made a few observations on the consolidation the industry is undergoing and on the status of cable operators as "quasi-utilities". No one raised any further issue about the financial health of the cable or services industries.

According to the record of these proceedings, the use of music by pay and specialty services, as a group, is quite similar to that of over-the-air signals: 42 per cent of airtime for the former, compared to 45 per cent for the latter.<sup>31</sup>

Music use varies widely among cable services; it can represent as little as 10 per cent and as much as 90 per cent of air time. However, it appears that it is mainly highly specialized Canadian specialty and cable originated services that lie at the extremes of the distribution. On the other hand, the use of music by American specialty<sup>32</sup> and Canadian pay services tends to the industry average.<sup>33</sup>

Viewing data was provided from two sources: BBM and Nielsen.<sup>34</sup> These differed in their detail. Thus, according to BBM data, the ratio of viewing of pay and specialty services to Canadian over-the-air signals in 1993 is 14 per cent; the equivalent Nielsen data yields a ratio of 22 per cent.

Comparisons between these two sets of data are difficult since they do not use the same methodology. One thing clearly comes out of both. The viewing of pay and specialty television, although growing in importance, remains at a fraction of viewing of over-the-air television.

## **IV. PROPOSALS**

### **A. SOCAN**

SOCAN's proposal is articulated around two distinct notions. The first is the use being targeted. The second is the person whom SOCAN intends to license.

On the first point, SOCAN is seeking payment for the use of music on television services "other than such services carried in signals originally transmitted for free reception by the public by a

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<sup>30</sup> See Exhibit CCTA-12.

<sup>31</sup> See Exhibits SOCAN-7, SOCAN-7A, SOCAN-7B and CCTA-4.

<sup>32</sup> Except for CMT and TNN.

<sup>33</sup> See, e.g., Exhibit Family-12.

<sup>34</sup> See Exhibits SOCAN-6 (revised) and CCTA-6.

terrestrial ... station". Use of music on over-the-air signals is addressed either by SOCAN Tariff 2 or by the retransmission tariff.

On the second point, while SOCAN is asking that the royalties paid under the tariff cover music used on all services targeted in its definition, it proposes that the licence for those uses of music be issued to only one of the participants in the communication chain, the "transmitter". This includes cable television systems and all other distribution undertakings performing similar functions: master antenna systems, DTH systems and low power television transmitters.

Originally, SOCAN asked for 20¢ per subscriber per month for 1990, rising to 30¢ in 1995, no matter how many services are carried. Its final proposal is substantially different. The tariff wording would follow the retransmission tariff. Systems with more than 100,000 subscribers would pay 17¢ per month per subscriber, climbing to 22¢ in 1994. Smaller systems would pay according to the same structure, but at a lower rate. Discounts would apply to certain types of non-residential premises. Cable operators in the province of Quebec would also pay a lower rate.

SOCAN's main witness on the appropriate tariff level and structure was Professor Liebowitz. His report relied on two main assumptions. First, he assumed that Tariff 2.A, which sets the royalties paid by over-the-air television broadcasters at 2.1 per cent of their advertising revenues, was appropriate. Second, he postulated that an analogy should be made between the cable industry's affiliation payments to service providers and the programming expenditures of over-the-air broadcasters. He noted that the royalties paid by over-the-air broadcasters are 3.49 per cent of their programming expenditures. Relying on this analogy, Professor Liebowitz concluded that cable systems would be treated in the same way as over-the-air broadcasters subject to Tariff 2.A if Tariff 17 were set at 3.49 per cent of the cable operators' affiliation payments.

Professor Liebowitz rejected the use of the cable operators' subscription revenues as an appropriate base for the tariff because this sum reflects the value to subscribers of all channels received by them (including local and distant signals), and not only of the services targeted in this tariff.

Professor Liebowitz suggested two adjustments to the royalty calculation. First, he added 2.1 per cent of the service providers' advertising revenues. Second, in order to account for music use on community channels, he applied 3.49 per cent to the cable operators' programming costs for that channel, corrected to account for the lower viewing of these channels.

Professor Liebowitz provided calculations for two years and generated the following royalties:

Income Source/Source de revenu	Amount (in \$M) / Montant (M de dollars)	
	1990	1993
3.49 per cent of affiliation payments (discretionary)	4.9	8.3
3,49 pour cent des paiements d'affiliation (volet facultatif)		
3.49 per cent of affiliation payments (basic) <i>plus</i> 3.49 per cent of community channel programming costs (adjusted)	6.7	6.6
3,49 pour cent des paiements d'affiliation (volet de base) <i>plus</i> 3,49 pour cent des coûts de programmation du canal communautaire (montant ajusté)		
2.1 per cent of service providers' advertising income	1.3	2.0

2,1 pour cent des revenus de publicité des exploitants de services

TOTAL

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12.9

16.9

Using these results, Professor Liebowitz interpolated the calculations for 1991 and 1992, and extrapolated them for 1994 and 1995.

He then went on to describe how an ideal tariff would apportion this quantum among cable companies to reflect accurately their use of cable services, both discretionary and non-discretionary. Such a tariff would apportion the burden to each system according to the different tiers on which services are carried. It would involve no cross-subsidy between different levels of use on the various tiers. Cable operators would pay the least for subscribers on the basic tier, more for those who receive services on the extended basic tier, and most for those receiving pay services. Cable operators would also pay according to the number of services received by each subscriber on each tier.

Professor Liebowitz acknowledged the practical difficulties of setting such a tariff and conceded that his ideal tariff was probably not implementable. He then described several other tariffs that approximate the ideal tariff in effect but have other more useful practical properties. He recommended a tariff that charges the operator a fixed rate for each subscriber, with the rate depending on the size of the cable system. He felt that the deviation from the ideal tariff was more than balanced by the increased practicality and ease of administration.

## **B. OBJECTORS**

Other participants approached the tariff from a variety of perspectives. CCTA challenged the amount sought by SOCAN, but not the tariff structure. Without putting forward a specific proposal, it offered the testimony of witnesses who outlined several methods of calculating the appropriate royalties. All these resulted in royalties at least 75 per cent lower than those proposed by SOCAN. CCTA, relying on subsection 3(1.4) of the *Act*, also asked that the Board apportion the liability for the tariff between the transmitters and the service providers, and suggested that cable operators should bear 30 per cent of the burden.

CCTA offered testimony by two panels to establish the appropriate amount for the tariff. Professors Donner and Lazar also assumed that the commercial television tariff was the proper starting point. However, in establishing the appropriate aggregate quantum, they favoured correlating the audience share for all Canadian over-the-air broadcasters (commercial and non-commercial) with the audience share of all cable services (Canadian and American). This would have generated royalties of approximately \$4.7 million in 1993. Professors Donner and Lazar assumed that the total tariff would be paid by cable operators, who would then recover part of the royalties from the service providers, according to a distribution formula based on the revenues earned by the cable industry and by each service provider.

For their part, Mr. Temple and Dr. Pezarro suggested starting from the share of retransmission royalties paid for music, and correlating the audience share for all distant over-the-air signals with that of all cable services. They also performed a calculation similar to that of professors Donner and Lazar, using only the royalties paid by over-the-air commercial broadcasters under Tariff 2.A. These approaches would have generated, in 1993, royalties of \$2 million and \$3.4

million, respectively.

For the years 1994 and 1995, CCTA projected increases in the rate on the basis of the rate increases incurred during the period from 1990 to 1993, for which data was available.

In their argument, the Pay Services looked at three approaches to developing an overall quantum. The first compared the program expenses of over-the-air signals and cable services. The second compared the viewing of cable services to various groups of over-the-air signals, both distant and local. The third compared the revenues of cable services to those of signals subject to Tariff 2.A. The calculations generated royalties of between \$1.66 million and \$7.71 million for 1993. They suggested that the aggregate royalty be set at somewhere between the average (\$5.9 million) and the median (\$6.4 million) for these figures.

For its part, MuchMusic proposed a tariff set as a percentage of the service providers' revenues, with an additional amount to account for cable-originated services. In support of this proposal, MuchMusic offered the testimony of Messrs. Rubinstein and Kirkwood. They used as a starting point the rate of 2.1 per cent currently applied to over-the-air commercial signals, adjusting it downwards to reflect what they perceived as certain structural differences between these two industries. This approach would have generated royalties of \$6.9 million in 1993.<sup>35</sup> MuchMusic also proposed that the burden of the tariff be split equally between cable operators and service providers.

Most other objectors endorsed the approach put forward by CCTA for the calculation of the quantum.

## **V. ANALYSIS**

### **A. SELECTING AN APPROACH TO SETTING THE TARIFF**

#### **i. The Rate Structure**

Three tariff formulas can be used in this case.

The rate could be a set amount of money per subscriber, per service. This was not put forward by any of the participants and is set aside. The profitability of a cable service is not solely, or even mainly, a function of its number of subscribers or contacts. Some services (e.g. pay-per-view) with few subscribers have large revenues and pay large amounts for their programming. Others (e.g. Vision TV), while having a large number of subscribers, have relatively low revenues and pay relatively small amounts for their programming.

Two other formulas were put forward by the participants.

The rate could be a set amount of money per subscriber irrespective of the number of services

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<sup>35</sup> In its reply, MuchMusic endorsed the approach outlined in the Pay Services' argument, which would lower the royalties by approximately \$1 million.

received by each subscriber. This approach avoids the need for complicated calculations, and is relatively easy to administer.

This approach was used in the retransmission tariff. It avoided penalizing retransmitters that depend more heavily on distant signals only because of where they are located. Distant signals are part of the basic cable package, and are viewed by the industry as essential for attracting subscribers and keeping them satisfied. A tariff based on the number of signals carried could have resulted in retransmitters dropping signals. Setting a rate that does not change with the number of signals offered ensured that royalty levels would not become a major consideration in the decision to keep or drop a particular signal. It may also have ensured that the same number of signals would be available throughout the country. A tariff based on the number of subscribers, then, is especially interesting for services sharing certain characteristics with distant signals.

Having said this, a tariff based on the number of subscribers has drawbacks. It takes no account of the fact that certain discretionary services have much lower levels of penetration than others. It does not adjust automatically to shifts within the group of services being offered. Finally, it does not adapt to the arrival of new services, nor to the departure of existing ones. This is likely to occur more frequently if the industry moves to an increasingly "pick and pay" environment.

Another approach is to set a rate per service, based, for example, on a percentage of revenues or of programming costs. This approach ensures that account is taken of differences in the characteristics of each service: revenue source, use of music, etc. Carefully crafted, it can also be simple and easy to apply and administer. It offers continuity. It automatically reflects changes in the importance of the group, shifts within the group as well as arrivals and departures of services. The main drawback of this approach is that it also carries with it the risk of a drop in services or a movement to discretionary tiers.

In the Board's view, the tariff need not adopt a single approach. Where services, such as Canadian specialty services, achieve very high levels of penetration, they can be subject to the signal rate per subscriber formula. This will avoid, as much as possible, any reduction in the number of services offered. Most other services are more amenable to a rate per service approach, without risking a drop in their offering.

The most obvious candidates for a service based rate are Canadian pay services. These are premium services and, for the most part, fully discretionary. If they are offered as a package rather than separately, this is the result of a marketing decision by the cable operator and the service provider.

American specialty services are also amenable to this approach. They are not offered on the basic tier. Cable operators can readily identify the amount collected for those services and can adjust their prices without regulatory authorization.

Setting a rate per service for Canadian pay and American specialty services would cover

approximately 33 per cent of signal-contacts.<sup>36</sup> It also makes the portfolio approach for the remaining cable services much more sensible. What is left, at least until December 1994, are 13 Canadian specialty services<sup>37</sup> with a much more equal distribution across the country and very high penetration figures.<sup>38</sup> What is then achieved is the equalization of the rate per subscriber for the most basic part of the cable services package, the true core of the " *de facto* basic tier". This eliminates the issue treating services differently according to the tier in which the service is offered. Furthermore, the risk of any service drop off is virtually eliminated.

An examination of Table 6 shows that only a small proportion of systems, serving an even smaller proportion of subscribers, offer a small number of Canadian specialty services.<sup>39</sup> The reduction in the administrative burden resulting from using this tariff formula would, of itself, more than justify the approach.

There are other reasons for using a portfolio approach for these services during the period under examination. First, it avoids the need to account for the relative use of music by each service. Second, the tariff deals with past events. Neither cable operators, nor the service providers can change their past behaviour to reduce their liabilities. Therefore, so long as a fair rate is set for the portfolio, there is no particular reason to burden SOCAN or its licensees with a formula requiring extra calculations and administrative burdens where the result is going to be more or less the same.

Consequently, the tariff will contain two main components. Canadian specialty services shall be subject to a portfolio tariff, whose rate will be set without regard to the number of such services offered by an individual transmitter. Canadian pay and American specialty services shall be subject to a separate tariff. The other services subject to the tariff will be accounted for in the manner described later.

The next step, then is to determine the rate base and the rates for each component of the tariff.

## **ii. The Rate Base**

The Board rejects SOCAN's view that within the market for cable television services, transmitters are trading at the same level as over-the-air commercial operators.<sup>40</sup> This approach relies mainly on three assumptions. First, since transmitters deliver cable services to the consumer, they are, as over-the-air operators, the last level of trade. Second, a tariff based on data which is in the hands of the service providers is difficult to enforce in the face of the lack of information on the programming expenses of American services. Third, it is, as Professor

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<sup>36</sup> See Table 5. In 1994, the average number of such services received was 3.19 on a total of 9.85.

<sup>37</sup> The Weather Network and *MétéoMédia* are counted as one service.

<sup>38</sup> See Table 5. This last statement is incorrect for the three multicultural services, but their impact on the overall tariff is marginal. Treating them separately would create an additional administrative burden out of proportion to any increased accuracy or fairness in the tariff.

<sup>39</sup> Twelve per cent of systems with more than 1,000 subscribers carry no more than three Canadian specialty services. These account for 1.73 per cent of subscribers in those systems.

<sup>40</sup> This leads SOCAN to treat the transmitters' affiliation payments as "programming expenses".

Liebowitz notes, a "judgment call" as to which is the appropriate comparison.

In the Board's view, it is appropriate to compare the over-the-air commercial television industry with the cable services industry, not with the transmitters. It may be that, in law, the transmitter is the person who performs or communicates. In economic terms, however, the cable operator is more readily identified with a common carrier. An important part of the price consumers pay for subscribing to cable is for the improvement in the reception of local over-the-air signals: this does not add to the value of music in the programming offered. The good provided by the cable operator has nothing to do with the manufacturing of programming, and everything to do with its distribution; SOCAN should derive no economic benefit from that "added value".

By contrast, from an economic perspective, service providers are readily comparable to over-the-air broadcasters. Those who put services and signals together compete in the same marketplace to acquire essentially the same inputs and from the same sources, with about the same amount of creative input into it.<sup>41</sup> In fact, the service providers pay for all the creative inputs except the music rights: it seems logical to look at that level for comparisons to establish the quantum of the tariff.

For the same reasons, the tariff formula set out in Tariff 2.A should be used as a starting point in articulating Tariff 17. The Board is unconvinced by the arguments put forward to the contrary. Over-the-air broadcasters and service providers operate in similar industries, competing for the same inputs, and offering viewers a similar product: programming. Their sources of income may be quite different, but the way in which they spend that income is not. The tariff for one should not create a competitive imbalance between the two players.

The Board therefore uses 2.1 per cent of the service providers' revenues as its starting point.

## **B. ADJUSTMENTS**

The participants suggested several adjustments to any rate that may be set.

### **i. Possible corrections to the rate for all services**

Objectors suggested several reductions to the rate, based on perceived differences between the over-the-air and cable television industries. MuchMusic asked for a 33.3 per cent reduction, arguing that several factors reduce the value of the music: limitations on advertising, programming restrictions, channel placement and cable carriage, ability to attract audiences during prime time, etc. These elements of the broadcasting system are the result of CRTC policies and reflect the general regulatory environment of the industry. To paraphrase the second retransmission decision, the regulatory environment cannot simply be ignored; it is part of the service providers' reality of doing business. All participants earn revenues that enable them to purchase programming inputs in that environment.<sup>42</sup> All inputs, other than musical inputs, feel

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<sup>41</sup> The testimony of Mr. Rheault, for example, describes that in his work the service provider is the end user: Tr., p. 1092.

<sup>42</sup> *Royalties for Retransmission of Distant Radio and Television Signals* (Re) (1993), 47 C.P.R. (3d) 327 (Cop. Bd.),



the effects of these policy decisions; musical inputs should be equally affected, for better or worse.

Some participants asked that a link be established between the relative viewing shares of over-the-air signals and cable services and the aggregate quantum. This is unnecessary. Such correlations are useful when no other reliable measure of economic value is available.<sup>43</sup> In this case, however, the service providers' revenues provide a measure of value.

Furthermore, the Board agrees with Professor Liebowitz that the revenue structures of these two sectors of the television industry are so different as to make viewing comparisons inadvisable. Service providers derive most of their revenues not from advertising, but from affiliation fees. When advertising is not the prime component of revenue, the strict linkage between audience size and revenues, and also audience size and programming expenditures, breaks down. This explains why payments for creative inputs are out of proportion with the services' audience shares.

Viewed from another angle, the most significant economic decision in the market for cable television services is made, not when the program is viewed, but when the service is purchased. It is also true that "advertisers are willing to pay a certain amount for a viewer, but the amount they are willing to pay is far less than the viewer is actually willing to pay for the programming."<sup>44</sup> This raises the price of programming inputs, and benefits the suppliers of these inputs. In the Board's view, producers of music inputs should share in the benefits brought about by the differences in the market structure.

No adjustment is required for variations in music use among cable services included in the portfolio. They may use different amounts of music; on average, however, they use the same amount as over-the-air signals. Adjustments are also unnecessary for the services for which a separate rate is set. Based on the evidence on the record, all, except CMT and TNN, appear to use about the industry average amount of music.<sup>45</sup> Differences are not large enough to justify such a correction.<sup>46</sup>

It was suggested that the revenues of American services should be topped up to account for the advertising revenues these services may derive from their Canadian market. Notwithstanding the opinion expressed on this issue, the record of these proceedings is that American services receive no advertising revenues in their Canadian markets. Furthermore, the evidence offered by the participants was too scant to allow a serious attempt to impute advertising revenues to American services.

None of the corrections suggested is appropriate for services for which the Board sets a separate rate. Since the only revenues of those services are the affiliation payments made to them by

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<sup>43</sup> This was done, for example, in the case of the CBC (television and radio) and of non-commercial radio stations.

<sup>44</sup> Professor Liebowitz, Tr., p. 1319.

<sup>45</sup> See, e.g., Exhibit Family-12.

<sup>46</sup> See, for example, the Board's previous decisions with respect to commercial radio and to CBC radio.

transmitters, the Board sets the rate for these services at 2.1 per cent of each cable system's affiliation payments.

## **ii. The relative importance of programming expenses and the rate for the portfolio**

One adjustment warrants consideration for Canadian specialty services.

The Pay Services suggested taking into account the "different economic importance of [programming] to broadcast and non-broadcast revenues".<sup>47</sup> In 1993, programming expenses accounted for 46.6 per cent of the total revenues of the services included in the Board's portfolio; for Canadian over-the-air commercial stations, the corresponding figure was 54.3 per cent.<sup>48</sup> For the years 1989 to 1993, the difference overall was 18.4 per cent.<sup>49</sup>

The Board makes this adjustment. As between these two sectors of the industry, the Board finds it appropriate that the share paid for music remain constant when compared to the rest of creative inputs. Using data for the period 1989-1993, the correction lowers the rate from 2.1 to 1.7 per cent.

The Board uses the average for the whole period for two reasons. First, as the tariff deals with past events, there is no need to make specific adjustments over the period. Second, and more important, there is merit in using rolling five-year averages in these circumstances. To paraphrase the Board's decision on the tariff for non-commercial radio stations for the year 1994, using data over a longer period reduces fluctuations and provides SOCAN, as well as users, with a measure of stability.

Applying a rate of 1.7 per cent to the revenues of the services in the Board's portfolio, excluding ASN and TV5, and dividing by the number of subscribers yields rates of between 4.43¢ a subscriber in 1990 and 6.43¢ in 1994.<sup>50</sup>

## **iii. Accounting for other services**

SOCAN's proposed tariff deals with other services which differ in some ways from the main targets of the tariff.

### ***a. ASN and TV5***

ASN raises peculiar difficulties. SOCAN did not factor its revenues into its general formula. Testifying for ASN, Mr. Mudry noted that imposing a separate rate on the cable operator for ASN might discourage its carriage. He even volunteered that royalties should be paid directly by the service provider.

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<sup>47</sup> Argument, para. 61.

<sup>48</sup> The Pay Services came to a different result because they used all services in their calculations and not only those included in the Board's portfolio.

<sup>49</sup> See Table 7.

<sup>50</sup> See line 4 of Table 8.

There is little to distinguish ASN from over-the-air commercial stations. In the long run, the wording of Tariff 2.A should probably be modified to cover it; alternatively, a separate tariff could be set, mirroring the formula used in Tariff 2.A, and allowing for any distinctions by raising or lowering the rate. For the purposes of these proceedings, however, the only practical approach is to include ASN in the portfolio and to include its revenues in the calculation of the aggregate rate.

The situation of TV5 is different in two respects. First, SOCAN and TV5 agree that for 1990, the music performing rights had been cleared at source by the parent service in Europe. Therefore, there is no need to account for TV5 in the rate for that year.

Second, TV5 is a subsidized service, whose revenue and expenditure patterns are quite different from those of other services included in the Board's portfolio. In 1993, affiliation payments were around \$6.7 million, while total revenues were \$13.7 million. TV5 derived no revenues from advertising. Using only affiliation payments to set the royalty would prejudice suppliers of music inputs: they should derive the same benefits from subsidies received by TV5 as other suppliers of creative inputs. On the other hand, not all of that subsidy benefits such inputs; some of it represents what governments are ready to pay for a service that would not be commercially viable. Therefore, the Board finds it preferable to account for TV5 by adding imputed revenues, calculated by dividing the TV5 programming expenditures by the average ratio of programming expenditures to revenues of Canadian specialty services, to the base used to set the aggregate rate. Using that formula yields \$9.8 million for the year 1993.<sup>51</sup>

As line 9 of Table 8 shows, adding these amounts to the revenue base used to set the rate for the Board's portfolio yields rates of between 4.53¢ in 1990 and 6.74¢ in 1994.

#### ***b. Alphanumeric services, Parliamentary channels and educational services***

The record of these proceedings contains little to allow the Board to set a rate for those services. Alphanumeric services use a lot of music, but are of marginal value to subscribers. Participants seem to agree that the royalties for the use of music on these services should be minimal. Parliamentary channels appear to use little, if any, protected music. Finally, little evidence was filed in respect to the royalties that should be paid for the use of music on educational services (Access Network, Knowledge Network and SCN). SOCAN did not seem to account for their presence in its formula. The audience share of these services is minimal; participants seem to agree that their value in the overall package of cable services is marginal.<sup>52</sup> Given the record, they can be included in the portfolio without adjusting its rate.

#### ***c. Community channels***

The only proposal for community channels came from SOCAN, who suggested that they be

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<sup>51</sup> See Table 7.

<sup>52</sup> Parallels between these services and those of TVOntario and *Radio-Québec* are evident. Thought should be given to a tariff set on a similar basis, and probably reintegrated into the general television tariff.

assessed 3.49 per cent of their production costs, adjusted for viewing. This would have yielded aggregate royalties of \$1.9 million in 1993. That approach can be set aside for two reasons. First, the rate of 3.49 per cent is as inappropriate for community channels as it is for other services. Second, the amount generated would be clearly excessive. Programming expenses on community channels in 1993 represent close to half of the combined programming expenses of the Canadian specialty services and ASN and are out of proportion with their actual importance.<sup>53</sup>

Community channels are *sui generis*. Their existence and expenditure patterns are driven by considerations that have little, if anything, to do with economic considerations: a large share of these costs is attributable to such elements as volunteer training and support. Their operations and objectives are similar to those of non-commercial radio stations.

In this case, a comparison of viewing of commercial and non-commercial services may be useful, as there appears to be no other measure of economic value. According to BBM data,<sup>54</sup> community channels obtained 0.23 per cent of all television viewing in 1994, while the services included in the Board's portfolio gathered 7.6 per cent.<sup>55</sup> Applied to the expected amount of royalties payable by the services included in the portfolio, that ratio would yield royalties of about \$180,000 for all community channels. Given the amount involved, it is simpler to include it in the portfolio rate by using an adjustment factor.<sup>56</sup> This raises the rate in 1994 from 6.74¢ to 6.95¢.<sup>57</sup>

#### **iv. A Quebec adjustment**

All participants put forward a Quebec adjustment, invoking between them differences in viewing habits, in industry structure, in market size and in the number of cable services offered.

SOCAN proposed to set the rates at approximately 85 per cent of those in effect in the rest of Canada, based on a difference in supply. CCTA proposed the same definition of Francophone markets as used in the retransmission tariff, and asked for a reduction of 25 per cent, based on relative viewing of all cable services in Quebec and in the rest of Canada. MuchMusic asked for a 25 per cent discount on French-language services, invoking certain structural characteristics of the Quebec market: smaller audiences, higher relative costs, limited advertising market and greater competitive pressures from both English and French-language services.

The economic viability of French-language cable services is more problematic than that of equivalent English-language services because of the limited size of the market. The CRTC itself has recognized this through its reluctance to license as many French-language as English-language services.<sup>58</sup> Having said this, the true market for those services is in systems in

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<sup>53</sup> \$75.1 million for community channels: Exhibit SOCAN-6; \$151.5 million for Canadian specialty services: see Table 7 and Exhibit MuchMusic-36

<sup>54</sup> Nielsen data does not isolate viewing to community channels.

<sup>55</sup> See Table 9.

<sup>56</sup> See Table 9.

<sup>57</sup> See line 12 of Table 8.

<sup>58</sup> See Exhibit SOCAN-3, Appendix D, CRTC Public Notice 1993-74, p. 27.

Francophone markets, and given the tariff structure used by the Board, the practical way of recognizing the need for a different price is to set a rate for those systems.

As to the amount of the required adjustment, both supply and viewing statistics provide useful information. Thus, in 1994, the average number of signal-contacts in Canada, excluding Quebec, for English-language Canadian specialty services and ASN, was 5.98. The average number of French-language specialty service signal-contacts in Quebec was 4.95, or 17.2 per cent less.<sup>59</sup> On the other hand, viewing to all Canadian specialty services, including ASN, averaged 7.65 per cent in Canada excluding Quebec, and 6.76 per cent, or 12 per cent less, in Quebec over the period 1990-1994.<sup>60</sup> Therefore, a downward adjustment of 15 per cent would appear appropriate.

No adjustment is warranted for American specialty and Canadian pay services, which are discretionary. The tariff formula, a percentage of affiliation payments, ensures that the royalties are automatically lower if the market commands a lower price. Therefore, the market can be relied on to generate without correction the appropriate quantum of royalties.

#### **v. A low-use discount**

CANCOM asks to pay a lower rate than other transmitters because it offers only two Canadian specialty services. Systems serving more than 1,000 subscribers offer on average 6.81 cable services.<sup>61</sup> Table 6 shows that in January 1994, 50 such systems (or 12 per cent) offered no more than three services. Most of these had between 1,001 and 2,000 subscribers. All 50 systems account for 1.73 per cent of subscribers to all systems with over 1,000 subscribers.<sup>62</sup>

The Board agrees that transmitters who use substantially fewer cable services should pay less. Therefore, transmitters offering no more than three Canadian specialty services shall pay half the rate for the services in the Board's portfolio. The rate for Canadian pay and American specialty services is not affected by this correction.

### **C. THE LICENSEE**

The Board agrees with SOCAN that for the period under examination, the licence for the use of music on cable services should be issued to the transmitters, even though the Board sets the rate as a function of the service providers' revenues. The transmitters are, after all, those who actually communicate the music to the public. Moreover, collecting the tariff from them minimizes the administrative burden of the tariff in two ways: the tariff structure, which mirrors that of the retransmission tariff, is familiar, and the transmitters, who need a licence for cable-originated services in any case, deal with all uses covered in the tariff through a single payment. Finally, any liability of the service providers for the transmitters' performances before September 1, 1993 would rest not on subsection 3(1.4) of the *Act*, which applies only to telecommunications, but on

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<sup>59</sup> See Table 10A.

<sup>60</sup> See Table 11.

<sup>61</sup> See Table 10A.

<sup>62</sup> CANCOM, which is not included in these data, served some 5,000 DTH customers in 1991, rising to 30,000 in 1994: see Tr., pp. 3454-3455.

some other, less certain, principles of copyright law.

Targeting one person for a debt where the right exists to collect it from more than one is reasonable. SOCAN has chosen, not unreasonably, to target the transmitter in its collection strategy. In a pick and pay environment, the focus may shift from purchasing services to purchasing programming. For the period under examination, however, transmitters are selling cable services to the subscribers, as a package or a series of packages. Identifying the transmitter as the licensee is therefore appropriate, especially for the services included in the Board's portfolio. The need to minimize the administrative burden imposed by the tariff also justifies identifying the transmitter as the licensee for the services outside that portfolio.

#### **D. THE TARIFF FOR 1995**

Initially, SOCAN asked for a 30 per cent increase in the rate for 1995. In its final proposal, however, it asked that the rates proposed for 1994 be raised by 1¢ (approximately 5 per cent) or that the 1995 tariff be "left for consideration at some appropriate time in the future." CCTA, for its part, through the testimony of Mr. Temple and Dr. Pezarro, proposed increases in the order of 11 per cent.<sup>63</sup> WTN, The Life Network and Showcase asked that the rate stay at the 1994 level, while YTV and TSN/RDS suggested that the consideration of the 1995 tariff be left to another day.

The tariff for 1995 should be set now, if only because the year has already come and gone. For services outside the Board's portfolio, this raises no difficulties: the tariff formula is self-adjusting. As to the others, any advantages that might result from better information, especially for the new services, would be greatly outweighed by the unfairness inherent in further postponing a decision.

Setting the rate for 1995 is not without difficulties. It was a transition year; in the words of Dr. Ellis, it was probably a watershed for the marketing of specialty services. The impact on the calculation of the rate for the portfolio of the eight new services introduced in 1995<sup>64</sup> may well be marginal. Based on the sketchy information on the record, they are not achieving the penetration rates that were hoped for.

There are also signs that the revenues of the service providers may be levelling off. The wholesale rates for cable services on the basic tier have been frozen since 1994 and will remain so for the next five years.<sup>65</sup> There has been a movement of services to the discretionary tier, which may result in a lowering of the transmitters' affiliation payments. The problems experienced with negative option marketing may result in further changes in the market structure. There is no guarantee that the arrival of the new services will result in an increase in advertising revenues. Finally, the new services are not full-fledged and fairness may very well dictate that some time be allowed before they are counted in setting the tariff.

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<sup>63</sup> Professors Donner and Lazar did not offer figures for 1994 or 1995.

<sup>64</sup> Assuming, for the purposes of these proceedings, that it is appropriate to include them in it.

<sup>65</sup> CRTC Public Notice 1994-59. Only The Life Network will be allowed to increase its wholesale rate towards the end of the period.

On the other hand, with the arrival of the new services, the number of signal-contacts almost inevitably will go up. Since the industry relies heavily on affiliation payments, it is likely that the revenues for the group will go up even if the advertising revenues for the industry remain constant.

These contradictory signals mean that setting the rate for 1995 involves a large measure of speculation. This makes setting the rate at the same level as in 1994, at first glance, an attractive proposition. After all, tariffs that are set at a fixed amount per subscriber tend to be based on information from a test year. This has several advantages: all participants know what to look for, as years go by, before deciding to seek an increase or a reduction in the rate. Such an approach, however, may be fair only for markets that are relatively stable, such as the distant signal market. The current market for pay and specialty services is certainly not stable.

In the end, two facts remain. First, the number of cable services has increased. Second, the formula used by the Board to set the rate for the portfolio of services results in an average yearly increase of 8.2 per cent between 1991<sup>66</sup> and 1994, even though the number of available services remains constant. Therefore, it seems fair to adjust the rate at least by the same factor in 1995 as for the rest of the period.

#### **E. THE PREFERENTIAL RATE**

SOCAN proposes that small systems pay a set annual rate of between \$15 and \$205 for 1990, rising to between \$27 and \$800 in 1995. CCTA for its part, asks that the rate be set at \$10 per year for all systems, while CANCOM and Regional Cablesystems ask that it be set at \$5 so as to be more or less in line with the retransmission royalties SOCAN received from small systems.

Three issues need to be addressed here. The rate or rates, the services covered by the rate, and the systems that will pay that rate.

The Board rejects the multiple rate approach put forward by SOCAN. As explained in the retransmission decisions, a single rate offers important advantages to small systems. The Board sees no reason for these advantages not to be extended to this tariff.

In setting the rate, comparisons with the preferential rate set in the retransmission tariff are useful, but only to a point. It would be awkward to charge more for music on the services than what is charged for all programming, including music, on over-the-air signals. Therefore, the rate should be lower than \$100 unless compelling countervailing evidence is offered. No such evidence was advanced.

On the other hand, while the *Act* requires a preferential rate for small systems, it does not dictate that the preference be of the same magnitude as in retransmission. The measure can be adjusted according to the economic impact of the tariff under examination.

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<sup>66</sup> 1990 is excluded. For the reasons stated earlier, no royalties are payable for TV5. As a result, using the 1990 royalties to derive the rate of increase would create a distortion.

In the Board's view, a rate of \$10 per year will give small systems the preferential rate they are entitled to under the *Act* while recognizing the authors' entitlement to compensation for the use of their property. This is less than what 90 per cent of the small systems would have paid in 1994, if the formula for other systems was applied to them.

The change in the definition of small system in 1995 should not result in a change in the structure or level of the preferential tariff. The target group remains essentially the same. While the maximum number of premises served has been raised to 2,000, the clearer notion of licensed area has been substituted for the more ambiguous notion of "community". Furthermore, as a result of section 3 of the Regulations, some systems serving no more than 2,000 premises will not be small systems because of being part of a unit. All in all, the economic realities facing small systems as a group remain the same.

The second step requires identifying the cable services covered by the preferential rate. Consideration could be given<sup>67</sup> to providing preferential treatment only to the services within the portfolio. However, the preferential rate should cover all services. Any other approach, while doing little to increase SOCAN's revenues, would greatly increase the administrative inconvenience to the transmitter and therefore, defeat one of the goals of the single rate approach.

Finally, the *Act* and the *Definition of "Small Cable Transmission Systems" Regulations* require that a preferential rate be set only for cable systems. To not extend the rate to other smaller operators would create, however, an artificial economic advantage based on the technology used to deliver the cable service, with little, if any, countervailing benefit to SOCAN.

#### **F. THE RATE FOR "MEDIUM-SIZED" SYSTEMS**

Professor Liebowitz suggested that the tariff be scaled in for systems serving up to 100,000 subscribers. He stated that larger systems should pay a higher rate because they tend to offer more cable services than small systems do. CCTA asks that the rate be scaled in as in the retransmission tariff. The Pay Services asked that the staircase start at 20 per cent of the full rate, with the full rate applying at 6,000 subscribers.

The Board agrees that the rate should be scaled in for smaller systems. The rate being set by the Board is much lower than in the retransmission tariff; therefore, the risks of a transmitter refusing to deliver the service to a subscriber because of the sudden increase in royalties when a small system becomes a "large" one, are lower here than they were with the retransmission tariff. It is also true, however, that smaller systems' portfolios of services tend to be smaller. Furthermore, it remains true here, as it was in the case of retransmission, that "the problems associated with the operation of a small system simply do not vanish into thin air once a system crosses the [small systems] line."

Furthermore, the Board sees no reason to use an approach different from the one in the

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<sup>67</sup> Subject to the interpretation of subsection 67.2 (1.1) of the *Act*.



retransmission tariff. The same scales should be used, with the same increments, if only to reduce the administrative burden of the tariff on the transmitters.

Again, there is no need to scale in the rate for cable services that are outside the Board's portfolio. First, the rate is a strict function of the affiliation payments. These, in turn, are a function of the number of subscribers. Therefore, the amount paid adjusts automatically to the size of the system. Second, and once again, these are purely discretionary services warranting no special treatment.

### **G. THE QUANTUM GENERATED BY THE TARIFF**

Complete system by system data is available for 1994. For that reason, that year is used for estimating the total royalties to be paid under Tariff 17.

Without scaling the tariff, the services contained in the portfolio would produce royalties of \$5.971 million in 1994. Taking into account scaling for systems with between 1,001 and 6,000 subscribers, the tariff generates \$5.732 million. This is reduced to \$5.495 million after the adjustments for Francophone markets and for systems carrying no more than three Canadian specialty services.

Assuming the same distribution in cable systems and subscribers existed throughout the period, we can estimate the gross royalties generated for that period. The result is then reduced by 8 per cent for the low use and Francophone markets discounts, as well as for the scaling that occurs between 1,001 and 6,000 subscribers. The portfolio would thus generate, \$3.395 million in 1990, rising to \$4.933 million in 1993.<sup>68</sup>

The royalties generated by the American specialty services and Canadian pay television services are a simple function of the affiliation revenues generated by them. Affiliation payments made by Canadian cable operators to American services can be derived from the data provided in SOCAN-8, for 1990 to 1993.<sup>69</sup> Using these figures, royalties generated amount to \$576,000 in 1990 and rise to \$1 million in 1993. The royalties for Canadian services in 1990 are estimated at \$2.056 million and reach \$2.493 million in 1994.<sup>70</sup>

In 1990, there were 1,274 small systems; in 1994, there were 1,591. The royalties generated by these systems would range from \$12,740 in 1990 and \$15,910 in 1994.

These figures are only estimates, and suffer certain limitations. The data is used from a moment in time while its characteristics are extrapolated to an entire period. The actual amounts paid will naturally be based on monthly data. Furthermore, no account is taken of royalties generated by CANCOM or by commercial and institutional subscribers.

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<sup>68</sup> See Table 12.

<sup>69</sup> Revenue data is not available for American services in 1994.

<sup>70</sup> See Table 12.

## H. INTEREST

CCTA asks that no interest be charged on the amounts owed before the decision is issued. It points out that SOCAN filed no evidence on this issue, that the delay in deciding the issue results from a legitimate challenge to the legal basis for the tariff, that the litigation was not frivolous and that Bill C-88 makes no mention of interest.

The Pay Services add that the creation and certification of the tariff creates a windfall to SOCAN's members. Creators who were commissioned to create music before the tariff was filed will receive royalties they had not expected when they negotiated their commissions. They submit that this should be taken into account in determining that no transitional or interest payment is required.

Interest should be paid on amounts owed before this decision is issued. Were this matter before the courts rather than the Board, pre-judgment interest would be charged from the date the cause of action arose, which in this case would be January 1, 1990, the date of the first use. Pre-judgment (or in this case pre-decision) interest is imposed to recognize that in itself, the delay in payment creates a benefit for the debtor and a cost to the creditor.<sup>71</sup> Pre-judgment interest is assessed even where the cause for the delay in making the decision is reasonable, and even if the person against whom it is assessed had a reasonable case to argue. Here, no one, except MuchMusic, ever made an offer to settle or tendered money. Nor can it be argued that composers never expected compensation for the music provided by cable operators to their subscribers. The fact that SOCAN did not see fit to apply for an interim tariff, which would have allowed it to start collecting some money, is not, in itself, sufficient to justify departing from the Board's past practice, which mirrors that of superior courts.

However, the interest factors for 1990 will be reduced by 4 per cent to account for the dealings between SOCAN's predecessors and MuchMusic. MuchMusic had an agreement with both PROCAN and CAPAC for 1990. These contained a cancellation clause: in the case of CAPAC, it was open ended, while in the case of PROCAN, it was not. MuchMusic concedes that CAPAC properly cancelled its 1990 deal, but maintains that PROCAN did not act within the appropriate time period. MuchMusic sent cheques to PROCAN which were returned.<sup>72</sup> The amount involved is \$120,000.<sup>73</sup> The Board views this as equivalent to an offer made in court, and considers therefore that SOCAN should receive no interest on that amount for the whole period.

## VI. LEGAL ISSUES

Participants raised several legal issues in the course of these proceedings. In this part, they are identified and, where necessary, dealt with.

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<sup>71</sup> See also the reasoning of MacGuigan J., in *Canadian Cable Television Association v. American College Sports Collective of Canada, Inc.*, [1991] 3 F.C. 626 (C.A.) at 659-661.

<sup>72</sup> Tr., 2920, 2935; contra, see 3081, and Exhibit SOCAN-25.

<sup>73</sup> Exhibit MuchMusic-8.

## **A. LEGAL FOUNDATION FOR THE TARIFF**

As a result of the legislative evolution described earlier, for the period under examination, Tariff 17 rests on two distinct statutory foundations. Until September 1, 1993, SOCAN is entitled to a tariff because "the transmission of non-broadcast services by [cable operators] ... is a performance in public".<sup>74</sup> After that date, SOCAN is entitled to a tariff because such a transmission constitutes a communication to the public by telecommunication.

## **B. SHOULD THE TARIFF DEAL WITH SUPERSTATIONS?**

SOCAN argues that three superstations fall outside of the retransmission regime because, as received and distributed in Canada, they are different from the signals transmitted locally for free reception. SOCAN submits that Tariff 17 applies to any superstation whose signal either does not meet the definition of "signal" in subsection 28.01(1) of the *Act* or is not retransmitted simultaneously and in its entirety as is required by subsection 28.01(2). A close reading of the provision leads to the conclusion that the approach put forward by SOCAN is incorrect.

At their point of origin, superstation signals are over-the-air signals. The *Act* makes no distinctions between superstation signals and other over-the-air signals; the fact that satellite technology is used to offer them outside their local markets is not a factor that the *Act* takes into account.

A signal is defined in subsection 28.01(1) as "a signal... transmitted for free reception by the public by a terrestrial ... station." This makes it clear that a signal is a signal for the purposes of the retransmission regime at the moment it is first transmitted. Nothing in the definition indicates that a signal can ever cease being a signal.

SOCAN's argument focuses not on the characteristics of a signal, but on the conditions imposed on the cable operator to benefit from the protection of the compulsory licence. According to paragraph 28.01(2)(c), the retransmission of a signal is not an infringement of copyright if, amongst other things, "the signal is retransmitted ... in its entirety, except as otherwise required or permitted by or under the laws of Canada". That provision can bolster SOCAN's argument only if two propositions can be established:

- first, that a signal not satisfying these conditions falls outside the retransmission regime; and
- second, that alterations made before an otherwise qualifying signal reaches the cable operator can determine the status of the signal within the retransmission regime.

Neither proposition is true. The second is easily dealt with. The words "the signal is *retransmitted*" impose a condition on the retransmitter, who is instructed not to tamper with the signal unless allowed or required to do so under Canadian law. There is no mention of changes made to the signal before the retransmitter receives it.

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<sup>74</sup> CCTA, p. 154g.

This interpretation meets the test of common sense. The *Act* should not be interpreted to impose conditions that are impossible to fulfil. Retransmitters cannot be expected to prevent changes to the signal before they get it, especially if changes are made to an American signal in order to comply with American law (e.g. the Federal Communications Commission's "FCC" syndex rules).

The first proposition also fails because it does not account for the wording of paragraph 28.01(2)(c) of the *Act*. The provision states that the cable operator who retransmits a signal in its entirety does not infringe the right to communicate to the public by telecommunication. The corollary to that statement is not, as the SOCAN approach would suggest, that the signal tampered with by a cable operator suddenly falls outside the retransmission regime. Instead, the corollary seems to be that the retransmitter who tampers with a signal is not protected by the provision and therefore, infringes the right to communicate to the public by telecommunication.

It makes more sense to focus on the conduct of the retransmitter, whose activity is defined as non-infringing, than on the signal. It would be awkward if the regime allowed a signal to remain a signal when it is modified in accordance with Canadian law, but to lose its status as a signal if other modifications are made to it, especially if such modifications are made outside Canada to comply with foreign law.

For these reasons, the Board concludes that all superstations currently offered in Canada are distant signals governed by the retransmission regime.

### **C. CAN THE BOARD IDENTIFY THE PERSON TO WHOM THE LICENCE WILL BE ISSUED?**

The Board holds that the tariff can identify transmitters as the licensees. Their liability is not in doubt. Up to September 1, 1993, they performed works in public: this conclusion is the linchpin of the *CCTA* decision. After that date, they communicated works to the public by telecommunication.

### **D. WHAT IMPACT DOES SUBSECTION 3(1.4) HAVE ON HOW THE TARIFF IS SET?**

A provision dealing with joint and several liability for certain communications to the public by telecommunication was first introduced in the *Act* in 1989. It became applicable here, as amended, on September 1, 1993, as a result of the new definition of "musical work", which transformed the act performed by transmitters from a public performance to a public telecommunication.

The provision has two effects. First, it makes the service provider and the transmitter jointly and severally liable for the public telecommunication effected when the cable subscriber receives a service. Second, by declaring that the communication from the service provider through the transmitter and to the subscriber is a single communication, it ensures that copyright owners can claim only one payment for that communication.<sup>75</sup>

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<sup>75</sup> By contrast, the cable operator's performance effected by retransmitting a local signal is separate from that of the

At common law, where co-debtors are jointly and severally liable, each is individually liable for the entire debt. The creditor can seek payment from any or all of them, none being able to object that payment has not been first asked from the others. The rules in the province of Quebec are similar. The creditor can ask any of the co-debtors, none of whom can plead the benefit of division.<sup>76</sup>

As a result, SOCAN is left with a single claim that it can exercise, for the whole and at its discretion, against two persons. This raises two issues.

The first is whether the tariff must target both the transmitter and the service provider. As was stated earlier, targeting one person for a debt where there is a right to collect from more than one of them is reasonable. Moreover, the *Act*, as it stands, allows the Board to structure the tariff in the way asked by SOCAN. By asking that the licensee be the transmitter, SOCAN is asking no more and no less than it is entitled to by the ordinary principles of joint and several liability. Once SOCAN issues the licence to the transmitter for that deemed single communication, the relevant provisions of the *Act* will come into play.

Thus, any remedies SOCAN may have against the joint co-debtors will probably subsist. These may be curtailed by SOCAN's decision to file against only one of the co-debtors. This is a concern of SOCAN, which rests outside the mandate of the Board.

Although they cannot obtain a licence, the service providers face no unexpected liability. They will be able to use the transmitters' licences as a shield against action from SOCAN: a person cannot be held liable for facilitating, or even authorizing, a protected use that has already been authorized by the owner of the rights in a work.<sup>77</sup> Moreover, even if a transmitter defaults on the tariff, service providers will be able to halt legal action by offering to pay the royalties.<sup>78</sup>

The second issue is whether the tariff should set the cable operators' and the service providers' shares of royalties for which they are jointly and severally liable. This issue is not within the Board's jurisdiction. The issues of who ultimately absorbs the royalty and the degree to which transmitters can seek contribution from the service providers are private law matters having nothing to do with setting the quantum of the royalty. The Board can adjudicate private law matters only as a necessary incident to the exercise of its jurisdiction, and only if this is linked to, or required by, the Board's mandate to value the rights for which royalties are sought and to set related terms and conditions.<sup>79</sup>

Subsection 3(1.4) of the *Act* is entirely distinct, and separate, from the provisions setting out the regulatory regime that the Board is required to administer. It rests on notions of private law, which already set out rules for the apportionment of the liability between cable operators and

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broadcaster's and could command a separate price: see *Canadian Association of Broadcasters v. SOCAN* (1994), 58 C.P.R. (3d) 190 (F.C.A.), which confirmed the Board's ruling on this issue.

<sup>76</sup> C.c.Q. aa. 1523 and 1528.

<sup>77</sup> *CAPAC v. CTV*, [1968] S.C.R. 676; *CTV*, at 136h.

<sup>78</sup> S. 67.2(3) of the *Act*.

<sup>79</sup> See *CTV*.

service providers. Thus, the law of contribution uses criteria such as the terms of the relevant contracts and the importance of the relative benefit received by each co-debtor. These rules, integrated into the *Act* through its express reference to the notion of joint and several liability, raise issues of private law that are better left for the courts to sort out.

Even if the Board could deal with the issue, it would be both impractical and inappropriate for it to do so. The record of these proceedings reveals that the situations of the various players in the industry vary considerably. To deal adequately with those issues would require case by case analysis of specific situations. This kind of exercise is not suited to tariff setting and is better left to the marketplace. Furthermore, these are issues involving discussions between business associates, not questions to be settled between rights owners and users.

Of course, the Board's formula does not give a clear indication of how liability between cable operators and service providers and among service providers should be shared.<sup>80</sup> This raises no more difficulties than would arise if a service provider defaulted on copyright payments for works, other than musical works, for which it cleared rights. The copyright owner would have a recourse against the cable operator; yet, the owner would clearly face difficulties in identifying precisely how much each cable operator might owe. Again, the marketplace is capable of dealing with this issue.

#### **E. LEGAL ISSUES ARISING FROM THE SETTING OF A PREFERENTIAL RATE FOR SMALL SYSTEMS**

Very little was said in argument on this issue. Essentially, SOCAN suggested that a preferential tariff be set for the whole period, that the definition of small system in the retransmission regime be used for the purposes of these proceedings until December 31, 1994, and that the regulatory definition that came in force on December 6, 1994 be used thereafter. SOCAN seemed content to have a preferential tariff apply to all communications in which the cable operator is involved. The other participants seemed to merely endorse the position put forward by SOCAN.

Yet, the determination of the small system preferential tariff in these proceedings raises several legal issues.

For example, the *Act* does not provide for a preferential tariff for small systems before September 1, 1993. The Board is required to set fair royalties. Therefore, any distinction in the rate set for various sizes of systems during that period has to be based on a determination of a fair tariff. An argument could be made that a preferential tariff is necessarily lower than a fair tariff and that, as a result, the tariff up to September 1, 1993 should be higher than afterwards.

SOCAN took the proper course, however, under the very specific circumstances of these proceedings, in asking that a preferential tariff be set for the period before September 1, 1993. In the past, the Board has determined that fair rates are often lower for smaller systems, which face different financial realities and make a different use of the product. Therefore, any rate set for the

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<sup>80</sup> Given the formula used for Canadian pay and American specialty services, the issues will obviously be easier to resolve in the case of those services.

smallest systems would be low. Furthermore, in the matter under consideration, setting a series of separate rates would create an administrative nightmare for both SOCAN and the transmitters which would generate little, if any, net return. This in itself would make the tariff unfair.

A second issue arises. As of September 1, 1993, subsection 67.2(1.1) of the *Act* expressly provides that "The Board shall ... ensure that there is a preferential royalty rate..." However, until December 6, 1994, no regulatory definition was in place.

The entitlement to a preferential tariff is independent of a regulatory definition of small system. In the absence of such a definition, the Board is still required to set such a tariff. It must then determine those systems to which it applies, as incident to its rate setting function. In doing so, the Board is not bound by any regulatory definition.

SOCAN proposes using the retransmission definition for that period. That definition is far from perfect, as the Board stated in the decision on the retransmission tariff for 1992-1994. Here again, the costs and administrative difficulties associated with applying different definitions for retransmission and Tariff 17 purposes alone would make unfair any tariff that does not use the definition set out for the retransmission tariff.

Finally, the *Definition of "Small Cable Transmission Systems" Regulations* came in force on December 6, 1994. It is significantly different from the original definition of small retransmission system. The latter applied where a system served no more than 1,000 premises in a community.<sup>81</sup> The former applies where a system serves no more than 2,000 premises in the same licensed service area.

The Board is bound by a regulatory definition as soon as it is in force. Therefore, SOCAN's suggestion that the retransmission definition be used until January 1, 1995 raises some difficulties. Fortunately, the approach taken in the retransmission tariff, and imported into the tariff under examination, allows for the status of a small system to be determined at the beginning of the year. Therefore, it would seem that the coming in force of the new definition during the year does not raise practical difficulties.

#### **F. LEGAL ISSUES RAISED DURING THE PROCEEDINGS THAT NEED NOT BE ADDRESSED IN THIS DECISION**

Many of the legal issues raised during these proceedings need not be addressed because of the tariff formula adopted by the Board. These issues can be left for another day and another forum. These include:

- whether the Board can set a tariff for the act of authorizing a performance;
- whether service providers are liable for royalties for the period between January 1, 1990 and September 1, 1993;

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<sup>81</sup> For a description of the various difficulties raised by this definition, see *Royalties for Retransmission of Distant Radio and Television Signals* (Re) (1993), 47 C.P.R. (3d) 327 (Cop. Bd.), at 357h-359f.

- whether the Board could substitute the service providers for the transmitters as licensees under the tariff;
- whether setting the shares of the co-debtors would be beyond the constitutional authority of the Canadian Parliament;
- whether, by requesting that the licence be issued to the transmitter, SOCAN has somehow curtailed its remedies against the service providers;
- whether some of the music used by TSN is cleared at source.

## VII. TARIFF WORDING

In its final argument, SOCAN suggested that the wording of Tariff 17 closely parallel that of the retransmission tariff. This is appropriate, since the tariff structures are similar and the persons licensed are the same. Therefore, all efforts have been made to follow in Tariff 17 the structure and language already set out in the retransmission tariffs for the relevant periods.

The following comments may help in understanding the tariff.

The application of the tariff is structured around the notion of "signal". This is directly imported from the retransmission regime. As formulated, the definition will target signals other than signals for which three conditions are met: they originate from a terrestrial station, they were originally transmitted for free reception, and they are being retransmitted in accordance with the retransmission regime. As a result, Tariff 17 will apply to any satellite signal (whether or not a fee must be paid for its reception), as well as to all signals for whose reception the viewer is expected to pay, whether or not the signal is scrambled or originates from a cable operator or terrestrial station.<sup>82</sup> Furthermore, the issue of whether the viewer receives the signal directly or through an intermediary is irrelevant.

The proposed wording for the tariff may not cover telephone companies. However, there is no need to deal with the issue in this decision, since, except for a few experiments with video on demand, telephone companies do not provide similar services at the present time.

The reporting requirements are more detailed than those suggested by SOCAN, because of the need to follow closely the structure of the retransmission tariff. In most cases, SOCAN has already received the relevant information in the context of receiving retransmission royalties.

The tariff contains, as did the 1990-1992 retransmission tariff, certain transitional provisions made necessary because the tariffs take effect on January 1, 1990 even though they were approved much later. A table sets out interest factors to be used on sums owed in a given month. These were derived by using the Bank Rate. Interest is not compounded. The amount owed for any given month is the amount calculated in accordance with the tariff multiplied by the factor set out for that month. The factors have been reduced by 4 per cent to account for the offer of payment made by MuchMusic for the year 1990. The Board believes that this will greatly simplify the transmitter's calculations and SOCAN's verifications.

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<sup>82</sup> On December 20, 1995, the CRTC licensed a French-language terrestrial pay per view service, *Canal Première*.



The tariff states that amounts owed according to it are payable on April 30, 1996, which is ten days after its publication. This should raise no difficulties. Section 11 of the tariff ensures that transmitters who pay the royalties before May 30, 1996 will incur no extra interest charges.



Claude Majeau  
Secretary to the Board

## APPENDICES

### APPENDIX 1 / ANNEXE 1

#### LIST OF MOST SERVICES SUBJECT TO TARIFF 17

#### LISTE DE LA PLUPART DES SERVICES ASSUJETTIS AU TARIF 17

**Note: The asterisk identifies those services who participated in the proceedings**

**Note : l'astérisque identifie les services représentés à l'audience**

#### **Canadian Pay Television and Pay-per-View Services Services canadiens de télévision payante et à la carte**

- \* 1. Super Channel
- \* 2. The Movie Network<sup>1</sup>
- \* 3. Super Écran
- \* 4. Family Channel
- \* 5. MovieMax!
- 6. Classic Channel
- \* 7. Viewers' Choice
- \* 8. Home Theatre

#### **Canadian Specialty Services / Services spécialisés canadiens**

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<sup>1</sup> Formerly First Choice/Antérieurement *First Choice*

- \* 1. Cathay<sup>2</sup>
- \* 2. MuchMusic
- \* 3. The Sports Network (TSN)
- \* 4. Chinavision<sup>3</sup>
- 5. Teletatino
- \* 6. Canal Famille
- \* 7. Le Réseau des Sports (RDS)
- \* 8. MusiquePlus
- \* 9. TV5
- \* 10. Météomédia/The Weather Network
- \* 11. Vision TV
- \* 12. Newsworld
- \* 13. YTV
- \* 14. Life Network
- \* 15. Showcase
- \* 16. Bravo!
- \* 17. Women's TV Network (WTN)
- \* 18. Discovery Channel
- 19. New Country Network (NCN)
- \* 20. Réseau de l'information (RDI)
- \* 21. Canal D

### **U.S. Specialty Services / Services spécialisés américains**

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<sup>2</sup> This service was a pay television service from 1989 to 1992; it is now called Talentvision. Ce service était un service de télévision payante de 1989 à 1992; il opère aujourd'hui sous le nom de *Talentvision*.

<sup>3</sup> Now known as Fairchild/Aujourd'hui désigné sous le nom de *Fairchild*

1. Arts & Entertainment (A&E)
- \* 2. Cable News Network (CNN)
- \* 3. Headline News (CNN-2)
4. CNBC / FNN
- \* 5. The Nashville Network (TNN)
- \* 6. Country Music Television (CMT)<sup>4</sup>
7. The Learning Channel (TLC)
8. The Weather Channel (TWC)
9. The Silent Network
10. Black Entertainment TV (BET)
11. Lifetime Television
12. Comedy Central
13. USA Network

## **OTHER CABLE SERVICES / AUTRES SERVICES CÂBLÉS**

### **Community Channel / Canal communautaire**

\* Most cable systems with more than 2,000 subscribers operate a community channel.

La plupart des systèmes de câble desservant plus de 2 000 abonnés offrent un canal communautaire.

### **Educational services / Services éducatifs**

1. Access Network (Alberta)
2. La Chaîne (Ontario)
3. Knowledge Network (Saskatchewan)
4. Saskatchewan Community Network (Saskatchewan)

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<sup>4</sup> This service was removed from the CRTC list of eligible satellite services as of January 1, 1995. Ce service a été retranché de la liste des services par satellite admissibles du CRTC à compter du 1<sup>er</sup> janvier 1995.

**Commercial Television Services (delivered by cable)**

**Services de télévision commerciale (transmis par câble)**

\* 5. Atlantic Satellite Network (ASN)

**Other CATV Services / Autres services câblés**

\* 6. Canadian Home Shopping Network (CHSN)

7. Parliamentary Channel / Canal Parlementaire

8. Provincial Legislatures / Législatures provinciales

9. Various Non-programming services / Divers services hors-programmation

**APPENDIX 2 / ANNEXE 2**

Number of subscribers to major services subject to Tariff 17 Nombre d'abonnés aux principaux services assujettis au tarif 17						
	1990			1994		
	Canada	Québec	Rest Of Canada/ Canada excluant le Québec	Canada	Québec	Rest Of Canada/ Canada excluant le Québec
Weather	6,039,809	1,480,999	4,558,810	7,222,409	1,697,526	5,524,883
YTV	6,039,678	1,013,954	5,025,724	7,139,320	1,338,676	5,800,644
Newsworld	6,016,587	1,084,645	4,931,942	6,955,888	1,213,227	5,742,661
TSN	5,415,721	383,620	5,032,101	6,149,544	427,711	5,721,833
MuchMusic	5,328,604	385,208	4,943,396	5,995,783	350,327	5,645,456
Vision	5,390,560	352,813	5,037,747	5,964,949	344,243	5,620,706
Telelatino	227,175	515	226,660	756,226	6,223	750,003
Chinavision	18,262	0	18,262	120,656	0	120,656
Cathay	11,916	0	11,916	16,565	0	16,565
TV5	2,870,682	1,592,395	1,278,287	5,332,329	1,799,615	3,532,714
MusiquePlus	1,868,761	1,599,543	269,218	2,140,088	1,808,055	332,033
RDS	1,608,056	1,567,479	40,577	1,950,420	1,807,501	142,919
Canal Famille	1,641,531	1,598,624	42,907	1,878,860	1,817,285	61,575
First Choice	489,546	28,965	460,581	457,883	33,935	423,948
Family Channel	322,513	3,149	319,364	391,366	4,418	386,948
Super Channel	200,638	0	200,364	231,850	0	231,850
Super Écran	131,656	127,436	4,220	214,815	210,458	4,357
A&E	1,957,930	3,188	1,954,742	5,262,956	15,559	5,247,397
CNN	2,007,725	54,927	1,952,798	5,266,896	54,759	5,212,137
TNN	1,504,633	10,364	1,494,269	5,154,210	21,455	5,132,755
The Learning Channel	313,183	0	313,183	2,851,308	0	2,851,308
Headline News	788,578	4,837	783,741	2,337,923	0	2,337,923
Country Music Television	893,225	11,668	881,557	1,768,108	19,778	1,748,330
Basic Subscribers/ Abonnés	6,886,397	1,600,107	5,286,290	7,472,177	1,723,330	5,748,847

au service de base		
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Source: SOCAN-2, Summaries

Data is from September 1990 and January 1994. In some cases the number of subscribers to a particular service may be larger than the number of basic subscribers. The difference is apparently caused by the inclusion of commercial subscribers in the totals for each service.

Les données sont de septembre 1990 et janvier 1994. Dans certains cas, le nombre d'abonnés à un service est plus élevé que le nombre d'abonnés au service de base. La différence semble être le résultat de l'inclusion des abonnés commerciaux dans le total de chaque service.

### APPENDIX 3 / ANNEXE 3

#### TABLES / TABLEAUX

1A	Canadian Specialty Services - Number of Contacts According to Tier Services spécialisés canadiens - Nombre de contacts selon le volet
1B	Canadian Specialty Services - Acceptance Rate According to Tier Services spécialisés canadiens - Taux d'acceptation selon le volet
2	Distribution of Subscribers / Répartition des abonnés
3	Distribution of Systems / Répartition des systèmes
4	Average Number of Services Received by System Size Moyenne de services reçus selon la taille du système
5	Average Number of Services Received by Subscriber by Type of Service Moyenne de services reçus par abonné selon le type de service
6	Distribution of Systems with Over 1,000 Subscribers Based on the Number of Canadian Specialty Services Offered Répartition des systèmes comptant plus de 1 000 abonnés selon le nombre de services spécialisés canadiens offerts
7	Calculation of the Royalty Rate Applicable to the Portfolio Services Calcul du taux des redevances pour les services compris dans le portefeuille
8	Calculation of the Royalty per Subscriber per Month for the Portfolio Services Calcul de la redevance mensuelle par abonné pour les services du portefeuille
9	Community Channel Adjustment / Ajustement pour le canal communautaire
10A	Average Number of Canadian Specialty Services Received - Systems with Over 1,000 Subscribers Moyenne de services spécialisés reçus - Systèmes comptant plus de 1 000 abonnés
10B	Average Number of Canadian Specialty Services Received - Systems with Over 2,000 Subscribers Moyenne de services spécialisés reçus - Systèmes comptant plus de 2 000 abonnés
11	Viewing to Canadian Specialty Services and ASN in Thousands of Hours Écoute des services spécialisés canadiens et de ASN en milliers d'heures
12	Royalty Generated by Large Systems / Redevances provenant des grands systèmes

#### TABLE 1A / TABLEAU 1A

Canadian Specialty Services - Number of Contacts According to Tier  
Services spécialisés canadiens - Nombre de contacts selon le volet

	January 1994 / Janvier 1994		
	Basic Tier Volet de base	Extended Tier Volet de base élargi	Discretionary Tier Volet facultatif
<b>Canada</b>			
Total Number of Contacts Nombre total de contacts	36,876,709	12,066,811	118,483
Percentage / Pourcentage	75.2%	24.6%	0.2%
<b>Quebec</b>			
Total Number of Contacts Nombre total de contacts	11,734,202		65,016
Percentage / Pourcentage	99.4%		0.6%
<b>Rest of Canada</b>			
<b>Canada excluant le Québec</b>			
Total Number of Contacts Nombre total de contacts	25,142,507	12,066,811	53,467
Percentage / Pourcentage	67.5%	32.4%	0.1%

Source: SOCAN-2

TABLE 1B / TABLEAU 1B			
Canadian Specialty Services - Acceptance Rate According to Tier Services spécialisés canadiens - Taux d'acceptation selon le volet			
January 1994 / Janvier 1994			
	Basic Tier Volet de base	Extended Tier Volet de base élargi	Combined Contacts on Basic and Extended Somme des contacts au volet de base et au volet de base élargi
<b>Canada</b>			
Number of Contacts Nombre de contacts	36,876,709	12,066,811	48,943,520
Potential Contacts Nombre de contacts potentiel	36,876,709	13,205,351	50,182,060
Acceptance Rate Taux d'acceptation	100%	91.4%	97.5%
<b>Quebec</b>			
Number of Contacts Nombre de contacts	11,734,202		11,734,202
Potential Contacts Nombre de contacts potentiel	11,734,202		11,734,202
Acceptance Rate Taux d'acceptation	100%		100%
<b>Rest of Canada</b>			
<b>Canada excluant le Québec</b>			
Number of Contacts Nombre de contacts	25,142,507	12,066,811	37,209,318
Potential Contacts Nombre de contacts potentiel	25,142,507	13,205,351	38,347,858
Acceptance Rate Taux d'acceptation	100%	91.4%	97%

Source: SOCAN-2

TABLE 2 / TABLEAU 2				
Distribution of Subscribers / Répartition des abonnés				
	1989		1994	
0-1,000	287,627	4.46%	362,842	4.86%
1,001-2,000	154,966	2.40%	167,631	2.24%
2,001-6,000	485,142	7.52%	511,724	6.85%
Over/plus de 6,000	5,519,417	85.61%	6,428,619	86.05%
TOTAL	6,447,152	100.00%	7,470,816	100.00%

Source: SOCAN-2

TABLE 3 / TABLEAU 3				
Distribution of Systems / Répartition des systèmes				
	1989		1994	
0-1,000	1,274	76.75%	1,591	79.59%
1,001-2,000	111	6.69%	120	6.00%
2,001-6,000	138	8.31%	142	7.10%
Over/plus de 6,000	137	8.25%	146	7.31%
TOTAL	1,660	100.00%	1,999	100.00%

Source: SOCAN-2

TABLE 4 / TABLEAU 4				
Average Number of Services Received by System Size / Moyenne de services reçus selon la taille du système				
	All Services / Tous les services [1]		All Services Excluding CATV Services / Tous les services à l'exclusion des CATV [2]	
	1989	1994	1989	1994
0-1,000	3.86	7.31	2.97	6.12
1,001-2,000	7.38	10.97	5.34	8.63
2,001-6,000	8.70	13.92	5.53	10.14
Over/plus de 6,000	17.31	22.94	8.68	12.91
TOTAL	15.83	21.29	8.11	12.29

Source: SOCAN-2

Note: [1] The data in this table includes ASN, Educational services, CPAC and the Provincial Legislature services.

Les données dans ce tableau incluent ASN, les services éducatifs, la Chaîne parlementaire et les législatures provinciales.

[2] CATV services are those identified as such in the "Station" field of the database, SOCAN-2.

Les signaux CATV sont ceux désignés comme tel sous le champ «Station» dans la banque de

données SOCAN-2.

TABLE 5 / TABLEAU 5										
Average Number of Services Received by Subscriber by Type of Service										
Moyenne de services reçus par abonné selon le type de service										
1989	CANADA					QUÉBEC				
	Canadian Specialty Spécialisés canadiens	American Specialty Spécialisés américains	Pay television Télévision payante	ASN	Total	Canadian Specialty Spécialisés canadiens	American Specialty Spécialisés américains	Pay television Télévision payante	ASN	Total
0-1,000	1.93	0.33	0.09	0.24	2.60	2.28	0.01	0.16	0.07	2.52
1,001-2,000	3.13	1.12	0.21	0.18	4.64	3.50	0.01	0.20	0.14	3.85
2,001-6,000	3.61	0.84	0.17	0.23	4.85	4.03	0.01	0.13	0.11	4.27
Over/plus de 6,000	6.47	1.21	0.21	0.06	7.94	5.89	0.06	0.07	0.00	6.02
TOTAL	5.97	1.14	0.20	0.08	7.39	5.56	0.05	0.08	0.01	5.71
1994	CANADA					QUÉBEC				
	Canadian Specialty Spécialisés canadiens	Pay television Télévision payante	Pay television Télévision payante	ASN	Total	Canadian Specialty Spécialisés canadiens	American Specialty Spécialisés américains	Pay television Télévision payante	ASN	Total
0-1,000	3.39	1.33	0.16	0.29	5.17	4.63	0.12	0.23	0.15	5.13
1,001-2,000	4.54	2.22	0.19	0.23	7.18	5.37	0.15	0.17	0.10	5.79
2,001-6,000	5.62	2.22	0.19	0.25	8.28	5.87	0.13	0.14	0.17	6.30
Over/plus de 6,000	6.87	3.19	0.18	0.06	10.31	7.07	0.05	0.14	0.00	7.26
TOTAL	6.57	3.01	0.18	0.09	9.85	6.85	0.06	0.14	0.02	7.07

Source: SOCAN-2

TABLE 6 / TABLEAU 6						
Distribution of Systems with Over 1,000 Subscribers Based on the Number of Canadian Specialty Services Offered						
Répartition des systèmes comptant plus de 1 000 abonnés selon le nombre de services spécialisés canadiens offerts						
1994						
Number of Services Nombre de services	Canada		Québec		Rest of Canada Canada excluant le Québec	
	Number of Systems Nombre de systèmes	Percentage of Subscribers Pourcentage d'abonnés	Number of Systems Nombre de systèmes	Percentage of Subscribers Pourcentage d'abonnés	Number of Systems Nombre de systèmes	Percentage of Subscribers Pourcentage d'abonnés
1	7	0.14%	0	0.00%	7	0.18%
2	32	1.07%	1	0.09%	31	1.37%
3	11	0.52%	1	0.09%	10	0.65%
4	28	0.97%	6	0.63%	22	1.07%
5	57	2.41%	11	1.46%	46	2.69%
6	87	11.41%	17	3.81%	70	13.71%
7	104	24.39%	23	17.04%	81	26.61%



8	47	29.75%	19	13.53%	28	34.65%
9	26	15.52%	11	44.73%	15	6.69%
10	7	9.15%	4	5.74%	3	10.18%
11	1	2.99%	1	12.88%	0	0.00%
12	1	1.69%	0	0.00%	1	2.20%
13	0	0.00%	0	0.00%	0	0.00%
Totals/Totaux	408	100.00%	94	100.00%	314	100.00%

Source: SOCAN-2.

	Total [1]	TV5 Imputed/Imputé [2]	Adjusted Total Total ajusté [1]+ [2]	Television Ratio Ratio télévision [3]	
1993	Revenues Recettes Expenditures Dépenses	308,384,763 143,004,279	9,781,618 4,535,935	318,166,381 147,540,214	
[4]	Ratio	46.37%	46.61%	54.31%	1.80%
1992	Revenues Recettes Expenditures Dépenses	270,314,830 118,749,220	10,425,204 4,579,789	280,740,034 123,329,009	
[4]	Ratio	43.93%	44.16%	55.14%	1.68%
1991	Revenues Recettes Expenditures Dépenses	245,610,320 108,946,743	12,796,684 5,676,297	258,407,004 114,623,040	
[4]	Ratio	44.36%	44.65%	56.94%	1.65%
1990	Revenues Recettes Expenditures Dépenses	215,266,377 99,715,696	13,074,909 6,056,560	228,341,286 105,772,256	
[4]	Ratio	46.32%	46.61%	56.37%	1.74%
1989	Revenues Recettes Expenditures Dépenses	111,130,417 49,473,289	10,382,078 4,621,917	121,512,495 54,095,206	
[4]	Ratio	44.52%	45.13%	54.08%	1.75%
<b>Weighted Average Ratio / Ratio moyen pondéré 1989-1993</b>	Revenues / Expenditures Dépenses Ratio / Ratio		Specialty Services Services spécialisés 1,150,706,707 519,889,227 45.18%	Television Télévision 6,950,042,474 3,848,173,387 55.37%	1.71%

Source:

[1] SOCAN-8, Tab-B. These figures exclude TV5/Pièce SOCAN-8, onglet-B. Ces données

excluent TV5.

[2] The revenues are derived by applying the ratio of revenues to programming expenses from the other Canadian Specialty Services to the expenses of TV5/On obtient ces recettes en multipliant les dépenses de programmation de TV5 par le rapport entre les recettes et les dépenses de programmation des autres services spécialisés canadiens.

[3] SOCAN-8, Tab-B/Pièce SOCAN-8, onglet-B.

[4] The rate applicable to Canadian Specialty Services is equal to 0.021 times the ratio of programming expenses to revenues of Canadian Specialty Services over that of commercial television stations/Le taux applicable aux services spécialisés canadiens est de 0,021 multiplié par le ratio dépenses de programmation/recettes des services spécialisés canadiens sur celui de la télévision commerciale.

TABLE 8 / TABLEAU 8					
Calculation of the Royalty per Subscriber per Month for the Portfolio Services					
Calcul de la redevance mensuelle par abonné pour les services du portefeuille					
	1990	1991	1992	1993	1994
<b>Canadian Specialty Services Excluding TV5 / Services spécialisés canadiens excluant TV5</b>					
[1] Total Revenue Revenu total	215,266,377	245,610,320	270,314,830	308,384,763	339,075,081
[2] Tariff / Tarif @ 1.7%	3,659,528	4,175,375	4,595,352	5,242,541	5,764,276
[3] Subscribers Abonnés	6,886,397	7,008,082	7,191,829	7,347,977	7,470,816
[4] Cents per Month per Subscriber Cents par mois par abonné [2]/[3]	4.43	4.96	5.32	5.95	6.43
<b>Adjustments to the Rate / Ajustements au taux</b>					
[5] TV5 Adjusted Revenues Revenus ajustés de TV5		12,796,684	10,425,204	9,781,618	8,836,090
[6] ASN Revenues Revenus de ASN	5,482,499	6,086,208	6,444,334	6,973,155	7,741,845
[7] Total Revenues Revenus totaux	5,482,499	18,882,892	16,869,538	16,754,773	16,577,935
[8] Cents per Month per Subscriber Cents par mois par abonné [7]/[3]	0.10	0.38	0.33	0.32	0.31
[9] Total [4]+[8]	4.53	5.34	5.65	6.27	6.74
<b>Community Channel Adjustment / Ajustement pour le canal communautaire</b>					
[10] Adjustment Factor Facteur d'ajustement	0.0258	0.0273	0.0211	0.0169	0.0303
[11] Cents per Month per Subscriber Cents par mois par abonné [9]*[10]	0.12	0.15	0.12	0.11	0.20

[12]	<b>Portfolio Rate</b> <b>Taux du portefeuille</b>	4.66	5.49	5.78	6.37	6.95
[13]	<b>Rounded Rate / Taux arrondi</b>	4.7¢	5.5¢	5.8¢	6.4¢	7.0¢

Source:

[1] SOCAN-8, Tab-B. Data for 1994 is from the Pay and Specialty Services Statistical and Financial Summaries 1989-1994, published by the CRTC. These revenues exclude TV5 / Pièce SOCAN-8, onglet-B. Les données de 1994 proviennent de : «Services de télévision payante et d'émissions spécialisés, Relevés statistiques et financiers 1989-1994», publié par le CRTC. Les revenus de TV5 sont exclus.

[2] Line [1]\*0.017 / Ligne [1]\*0,017

[3] SOCAN-2, Summaries

[5] Table 7. TV5 revenues for 1990 are not included in the total / Tableau 7. Les revenus de TV5 pour 1990 ne sont pas inclus ici

[6] MuchMusic-36. Data for 1994 is extrapolated from 1993, using the average growth rate for the period 1989-1993 / Les données de 1994 sont une extrapolation de 1993, en se servant du taux de croissance moyen de la période 1989-1993

[10] Table 9/Tableau 9

[12] [9] + [11] Note that the figures in the table may not sum because of rounding / Notez qu'il est possible que les totaux du Tableau ne soient pas exacts car les données sont arrondies.

TABLE 9 / TABLEAU 9										
Community Channel Adjustment / Ajustement pour le canal communautaire										
Total Canada Total canadien	1990		1991		1992		1993		1994	
	Hours/Heures (000)	%	Hours/Heures (000)	%	Hours/Heures (000)	%	Hours/Heures (000)	%	Hours/Heures (000)	%
Viewing to Community Channel Écoute du canal communautaire	766.69	0.17	869.67	0.19	753.41	0.16	644.11	0.14	1 179.45	0.23
Viewing to all Portfolio Services Écoute de l'ensemble des services du portefeuille Community	29,764.14	6.69	31,817.02	7.05	35,632.30	7.58	38,099.39	8.15	38,958.53	7.60
		0.025		0.027		0.021		0.016		0.030

Channel Adjustment Factor Facteur d'ajustement pour le canal communautaire [1]	8	3	1	9	3
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[1] This is the ratio of viewing to Community Channel over viewing to the portfolio services for all of Canada Il s'agit du rapport entre l'écoute canadienne du canal communautaire et celle de tous les services du portefeuille.

Source: CCTA-3, Appendix C and CCTA-19/Pièces CCTA-3, Annexe C et CCTA-19.

TABLE 10A / TABLEAU 10A Average Number of Canadian Specialty Services Received Systems with Over 1,000 Subscribers Moyenne de services spécialisés reçus Systèmes comptant plus de 1 000 abonnés 1994			
Service Language Langue du service	ASN included / inclus		
	Canada	Rest of Canada Canada excluant le Québec	Québec
English/Anglais	5.06	5.98	2.01
French/Français	1.75	0.78	4.95
Total	6.81	6.46	6.96

Source: SOCAN-2

TABLE 10B / TABLEAU 10B Average Number of Canadian Specialty Services Received Systems with Over 2,000 Subscribers Moyenne de services spécialisés reçus Systèmes comptant plus de 2 000 abonnés 1994			
Service Language Langue du service	ASN included / inclus		
	Canada	Rest of Canada Canada excluant le Québec	Québec
English/Anglais	5.10	6.03	2.03
French/Français	1.76	0.79	4.97
Total	6.86	6.82	6.99

Source: SOCAN-2

TABLE 11 / TABLEAU 11 Viewing to Canadian Specialty Services and ASN in Thousands of Hours / Écoute des services spécialisés canadiens et de ASN en milliers d'heures	
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	Rest of Canada / Canada excluant le Québec					Québec				
	1990	1991	1992	1993	1994	1990	1991	1992	1993	1994
ASN	4,088.77	4,629.48	5,366.62	5,964.52	5,938.34	34.33	41.67	51.92	63.70	55.78
Cathay	—	—	—	190.12	216.60					
Chinavisio n	377.83	473.06	473.44	288.39	—					
Telelatino	84.87	30.99	207.54	191.08	192.97	4.03	22.13	59.54	2.58	3.02
Much	2,106.61	1,959.66	1,769.17	1,667.59	1,407.93	111.48	85.14	74.83	56.14	48.14
Music										
Newsworl d	2,213.21	2,161.11	2,652.59	3,670.00	3,369.44	163.35	219.45	250.89	280.27	376.03
TSN	8,698.92	8,681.44	9,804.40	11,134.2	8,685.27	291.34	285.93	338.92	314.22	279.50
Vision	561.26	675.34	946.69	800.87	1,083.67	20.94	29.52	56.50	31.25	37.73
Weather	239.97	405.18	537.24	549.10	678.65	—	—	—	0.33	—
YTV	4,366.79	5,556.52	5,466.08	5,635.28	7,451.57	364.78	437.11	607.11	532.85	805.24
Canal	82.03	100.70	111.93	125.20	103.94	2,655.15	2,850.72	3,194.45	3,356.27	4,027.67
Famille										
Méteomé dia	2.08	2.69	4.02	1.69	18.16	81.40	128.43	177.53	206.11	216.00
MusiquePl us	26.76	44.13	22.13	35.38	15.82	1,012.57	1,138.40	957.64	816.66	854.26
RDS	31.07	48.39	58.61	65.24	48.18	1,249.82	1,771.19	2,365.06	2,074.52	1,676.26
TV5	51.05	38.64	77.45	45.74	130.82	843.73	—	—	—	1,237.55
Total – Portfolio	22,931.2	24,807.3	27,497.9	30,364.4	29,341.3	6,832.92	7,009.69	8,134.39	7,734.90	9,617.18
Services Services du portefeuil le	2	3	1	9	5					
Total	332,616.	344,436.	358,746.	347,428.	381,724.	112,333.	106,953.	111,184.	120,009.	131,217.
Viewing- Cabled Househol ds / Écoute totale % foyers câblés	53	15	91	55	69	97	75	14	92	70
Viewing Share Part d'écoute	6.89%	7.20%	7.67%	8.74%	7.69%	6.08%	6.55%	7.32%	6.45%	7.33%
<b>1990-1994 Totals / Totaux</b>		Viewing to Portfolio Services			Total Viewing / Écoute totale			Ratio		
Rest of Canada/Canada excluant le Québec		Écoute des services du portefeuille								
					134,942			7.65%		
					39,329			6.76%		
					1,764,953					
					581,699					

Source: CCTA-3, Appendix C and CCTA-19/Pièces CCTA-3, Annexe C et CCTA-19

		1994	1993	1992	1991	1990
[1]	Number of Subscribers Nombre d'abonnés	7,471	7,348	7,192	7,008	6,886
[2]	Gross Royalty for the portfolio services Redevances brutes des services du portefeuille	\$5,971	\$5,361	\$4,755	\$4,394	\$3,690
<b>Less / Moins:</b>						
[3]	Reduction due to scaling Réduction due à l'échelonnement (4%)	\$239	\$214	\$190	\$176	\$148
[4]	Low use adjustment Ajustement pour usage limité (0.6%)	\$33	\$32	\$29	\$26	\$22
[5]	Francophone markets adjustment Ajustement pour les marchés francophones (3.4%)	\$204	\$182	\$162	\$149	\$125
[6]	Net royalty for portfolio services Redevances nettes des services du portefeuille	\$5,495	\$4,933	\$4,374	\$4,043	\$3,395
[7]	Royalty for Canadian Pay services Redevances des services de télévision payante	\$2,493	\$2,448	\$2,367	\$2,107	\$2,056
[8]	Royalty for US services Redevances des services américains	\$1,002	\$1,002	\$288	\$388	\$576
	<b>Total</b>	<b>\$8,990</b>	<b>\$8,383</b>	<b>\$7,029</b>	<b>\$6,538</b>	<b>\$6,027</b>

[1] The number of subscribers is from the complete database for January 1994 and the summaries for 1990-1993. / Les données de 1994 proviennent de la banque de données générale et celles de 1990-1993 des sommaires.

[2] In 1989 and in 1994, approximately 95% of subscribers were in systems with more than 1,000 subscribers. To arrive at the gross royalty estimate for 1990 to 1993, we multiply the number of subscribers by 0.95 and by the applicable rate for the appropriate year. / En 1989 et en 1994, environ 95% des abonnés étaient dans des systèmes desservant plus de 1 000 abonnés. En multipliant le nombre d'abonnés par 0,95 et par le taux applicable pour l'année choisie, on obtient l'estimation de redevances brutes.

[3] \*In 1994, scaling generates a 4% reduction of gross royalties. / En 1994, l'échelonnement produit une réduction de 4% des redevances brutes.

[4] \*The 50% adjustment for systems carrying no more than three services amounts to 0.6% of

the gross royalties for 1994.

L'ajustement de 50% pour les systèmes offrant au plus trois signaux équivaut à 0,6% des redevances brutes de 1994.

[5] \*The 15% reduction for Francophone markets equates to 3.4% of gross royalties for 1994. / L'ajustement de 15% pour les marchés francophones représente 3,4% des redevances brutes en 1994.

[7] 2.1% of revenues of Canadian pay services. Data is from SOCAN-8. Data for 1994 is from the CRTC Pay and Specialty Services Statistical and Financial Summaries 1989-1994. / 2,1% des recettes des services de télévision payante canadiens. Les données proviennent de SOCAN-8. Les données de 1994 proviennent de: «Services de télévision payante et d'émissions spécialisés, Relevés statistiques et financiers 1989-1994» publié par le CRTC.

[8] 2.1% of affiliation payments (SOCAN-8). The data for 1994 was not available, we use the 1993 figure as an estimate.

2,1% des paiements d'affiliation (SOCAN-8). Les données de 1994 n'étant pas disponibles, nous utilisons les données de 1993 comme estimation.

\* The same adjustment is made for the years 1990-1993. / Le même ajustement est fait pour les années 1990-1993.

## **DISSENTING OPINION BY MEMBER FENUS**

### **I. PREAMBLE**

My colleagues and I disagree on the fundamental aspects of the tariff) the target and the structure.

The tariff formula I have in mind is altogether different from theirs. I believe it is better suited to meet the needs of the parties. It is sensitive to the realities of the marketplace. It recognizes the commercial interplay between services<sup>1</sup> and transmitters<sup>2</sup> and it appreciates the unique differences of the services. Finally, it readily adapts to future developments in the market, yet deals appropriately with past events. In effect, it is a tariff that is fair and equitable between SOCAN, the services, and the transmitters as well as fair and equitable when compared with the tariff applicable to over-the-air broadcasting.

There are features of the majority decision that I fully support:

- Tariff 2.A is the appropriate starting point to structure a tariff;
- The relative importance of programming expenses warrants special consideration, resulting in an adjustment to the tariff rate;<sup>3</sup>
- For the purpose of the SOCAN regime, "superstations" are over-the-air television broadcast signals subject to the retransmission regime;
- "Pre-judgment" interest on deferred payments;
- The legal foundations for the tariff;
- Joint and several co-debtors are each liable to SOCAN for the entire amount of the debt.

### **II. WHO SHOULD HOLD THE LICENCE(S)?**

Over-the-air stations are their own "carriers". This is an essential difference between the broadcasting and non-broadcasting systems. Services are prevented, by the terms of their licences, from reaching their viewers directly: they must do this through transmitters.<sup>4</sup> Services produce and package programming; transmitters supply the programming to their subscribers. Thus, viewers receive services as a result of a "joint effort" or a "partnership of action". This relationship between the services and the transmitters is symbiotic. In contractual terms, this symbiosis is crystallized in affiliation agreements and in the payments by the transmitters of affiliation fees to the services for their programming. The affiliation fees are prime revenue

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<sup>1</sup> The term refers to non-broadcast television signals which are programming undertakings within the meaning of the *Broadcasting Act*.

<sup>2</sup> The term refers to distribution undertakings within the meaning of the *Broadcasting Act* and includes such entities as cable operators, DTH operators (CANCOM), the telephone companies (Telcos), Multipoint Distribution Systems (MDS), Local Multipoint Communications Systems (LMCS), and other such transmitters of non-broadcast television signals.

<sup>3</sup> The majority decision adjusts the portfolio rate only. I believe all the services should be included in determining the adjustment. As such, this results in a smaller rate reduction than theirs.

<sup>4</sup> The only possible exception is cable-originated services. The tariff formula I outline later deals with that issue.



sources for the services and major cost factors for the transmitters.

The relationship between the transmitters and the services is such that one without the other amounts to a void, or more appropriately, a snowy, hissing television screen. Fairness and reasonableness dictate that the tariff take into account this relationship. This should carry with it some measure of mutual responsibility for the payment of a tariff. In my view, to burden only one of the participants in this market with the tariff is unfair. Therefore, both services and transmitters should be licensed as users of SOCAN's repertoire.

Targeting both the transmitters and the services is not novel. Throughout the late 1980s, SOCAN's predecessors, CAPAC and PROCAN, filed<sup>5</sup> with the Copyright Appeal Board tariffs that recognized the two components that comprise the non-broadcasting system. Such a scheme is as valid today as it was then since nothing has been altered between the transmitters and the services. I subscribe to the insight exhibited by SOCAN's predecessors and endorse a dual licensing approach.

### **III. TARIFF STRUCTURE**

The tariff structure I propose has the following elements:

- a price per service;
- a price based on the services' revenues (or programming expenditures in the case of cable originated services);
- a rate that reflects the relative importance of music for each service;
- a preferential rate for small transmission systems; and
- co-debtors' contributions.

#### **A. A PRICE PER SERVICE**

I reject the portfolio approach set out in the majority decision for several reasons. First, it makes sense only if the transmitters are the sole licensees. As I have stated, both the services and the transmitters should be licensed under the tariff. Second, the approach relies on broad "groupings", "averages", "adjustments", and "exceptions", to justify a valuation rather than treating each service as a distinct entity. Third, it leaves the transmitters and the services with an omelette they may find difficult to unscramble when the time comes to determine their respective contributions. And finally, assessments made on the basis of the general rate of 1.7 per cent of revenues overvalue the majority of services for their use of music. This "equal" treatment injects elements of unfairness and unreasonableness in the tariff.

A price per service approach has general application, is more precise, is fairer, and yet can be

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<sup>5</sup> On September 1, 1988, Tariff No. 17 and Tariff No. 19 were filed by CAPAC and PROCAN and these were subsequently certified by the Copyright Appeal Board on December 17, 1988. Each society's Tariff No. 17 targeted cable operators and such other transmitters as licensees and the licence fee was set at "1/2 of 1 per cent of the gross annual amount paid by or for each subscriber to the service". With respect to their Tariff No. 19, a flat licence fee totalling \$250,000 was levied at MuchMusic/*MusiquePlus*, two non-broadcasting services. (See MuchMusic-29)

simple to administer. It also makes it possible to adopt different royalty rates for different types of services.

### **B. A PRICE BASED ON THE SERVICES' REVENUES**

SOCAN opted for a tariff aimed at the transmitters which gave rise to the need for a portfolio approach. Professor Liebowitz's ideal tariff was one that took into account the number of signals each subscriber received and the tier on which the signals were received. However, he concluded: "Although accurate, I believe it would be difficult to implement." <sup>6</sup> A tariff calculated as a function of the total revenues of the services including grants and contributions and as a function of payments made by transmitters to the services produces a more accurate tariff.

SOCAN argued that collecting royalties from American services may prove difficult. I disagree. I expect that the CRTC would remove from its eligibility list any service that did not meet its obligations to Canadian creators. Furthermore, SOCAN always could seek payment from transmitters, who could then set off the service's contribution against any outstanding affiliation payments.

The tariff base for the American speciality services should be increased to reflect the additional benefit to them of their advertising being viewed in the Canadian market, whether or not they actually received advertising revenues from Canadian sources. For the period 1989 to 1993, advertising revenues of Canadian specialty services represented 43 per cent of their affiliation revenues. I would apply that same ratio to the American services' affiliation revenues from Canadian transmitters and add the resulting amount to the tariff base for American services. The argument of TNN illustrates that the ratio of net advertising revenues to affiliation revenues of American services in the United States is much higher, and would have resulted in a substantially higher gross up factor.<sup>7</sup>

With respect to cable originated services, I would treat programming expenditures here as revenues. The CRTC's "guideline" budget of 5 per cent of basic subscriptions allotted to community channels approximates the transmitters' programming expenditures. The data is publicly available and they form an appropriate base on which to calculate a royalty.

### **C. A RELATIVE RATE**

While the commercial television tariff formula is the proper starting point, I believe the prevailing rate of 2.1 per cent may be "out of whack" with current market conditions. Since no one argued this in these proceedings I feel bound to use it.<sup>8</sup>

Applying the 2.1 per cent rate, or any single rate, to every service is not fitting. It fails to account

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<sup>6</sup> SOCAN-8, p.18

<sup>7</sup> *Gaylord* Argument, Schedule 6.B.2, p.3

<sup>8</sup> The approach I take to arrive at a tariff formula lends itself to any adjustment that may become necessary as a result of a review of the commercial television tariff rate. I also take the view that the adoption of the 2.1 per cent rate for Tariff 17 does not in any way ratify or entrench the 2.1 per cent rate for Tariff 2.A forever.

for the differences between services and over-the-air stations. Services, by the conditions of their licences, target niche markets. These same conditions impose on them restrictions when it comes to raising advertising revenues. Moreover, the programming patterns are dissimilar. Any relative similarity between them can be made only when one looks at the "average compilation" of all programming in each system. The broad range of programming in the over-the-air system is substantially different from that of any single service.

A single rate also fails to be fair to the services amongst themselves, if only because it fails to respect the unique qualities among the different services.<sup>9</sup> My colleagues' portfolio signals do use on average the same amount of music as over-the-air broadcasters. This reliance on "averages" unnecessarily distorts reality in this case. Over-the-air broadcasters' use of music tends to be fairly close to the average; this is not true of individual signals in the portfolio.

Each service is unique. The mandate, programming offerings, and music use patterns of each are vastly different. Not all services are alike and they should not be treated alike.

Having said this, I resist any attempt to utilize any one determinant to categorize the services. To do so can lead to abuse. I also feel that setting straight music use ratios to draw the line between low, medium and high intensity music users is inappropriate: services may very well request a change in category based on a one per cent change in their use of music. Tools such as music use studies are blunt instruments and should not be used in surgical exercises. A more sensible and equitable approach would be to place each service in an appropriate category that best suits its genre. Four categories are set out: (I) music intensive services, (II) general entertainment services, (III) news, weather, and sports services, and (IV) cable originated services.<sup>10</sup>

Appropriate rates for each category can be determined by modifying the method of allocation proposed by Showcase:<sup>11</sup>

31. Showcase submits that, in the absence of a more acceptable formula for the Canadian market, the relative weight which should be applied to the different categories of music use should be the same as that used in the United States for similar allocation purposes, namely:

Low:	0.364%
Medium:	0.545%
High:	1.270%

I find that the American rates<sup>12</sup> are not relevant for the Canadian experience. These rates reflect the regulatory environment and market conditions in the United States. They appear to have been set as a function of the royalty payments by American over-the-air stations to the American Society of Composers, Authors & Publishers (ASCAP) and Broadcast Music Inc. (BMI). Adopting such rates for the Canadian services would result in inequitable treatment between

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<sup>9</sup> I do not subscribe to the implication that a blanket licence necessitates a blanket rate applicable to all.

<sup>10</sup> I would deal with educational services in the same manner as with TVOntario or *Radio- Québec*.

<sup>11</sup> Showcase - Argument, p.7

<sup>12</sup> Response to Interrogatory - 40

them and over-the-air broadcasters.

What is pertinent here is the "relative weighting" of the American rates. These factors are not affected by differences in regulatory regimes or market conditions. When applied to the Canadian commercial television rate<sup>13</sup>, these factors produce viable and satisfactory rates for the Canadian environment. But the rate of 2.1 per cent needs to be adjusted to reflect the difference in programming costs structures between the over-the-air and non-broadcasting services. The ratio of programming expense to revenue for Canadian pay and specialty services for the period 1989-1993 is 47.7 per cent. Thus, the starting point should be 14 per cent below the commercial television tariff rate, or 1.8 per cent.<sup>14</sup> The resulting category rates and the comparable American rates are set out in Table 1. In both regimes, music intensive services pay more than the over-the-air broadcasters. This is inevitable since the unique nature of their programming would warrant such treatment.

#### **D. PREFERENTIAL RATE**

Small transmission systems are entitled to a preferential rate. This is not a scientific exercise, as the Federal Court of Appeal pointed out in *FWS Joint Sports Claimants v. Canada (Copyright Board)*<sup>15</sup>. In its first retransmission decision, the Board pursued three objectives which the court found to be acceptable: reducing the administrative and reporting burden, making the royalty burden significantly lighter and recognizing the obligation of the small system to pay for the use of distant signals.

In this instance, there is no need to modify the tariff structure for small systems. Retransmitters do not pay for their distant over-the-air signals; any formula other than a flat fee imposes an additional administrative burden on them. This is not the case here. Small systems, just as larger ones, already have accounting procedures in place to address affiliation fees, which are the base on which their contribution is determined. The argument for "ease of administration" is therefore not an issue. A flat fee is not appropriate; it discriminates against the very small transmitters and unduly advantages the larger (though still small) ones. Fairness again dictates that a system with 1,950 subscribers should pay more than one with 250 subscribers.

The percentage method with a preferred rate is an equitable one to apply in this situation. I would determine the relative contributions of the services and the transmitters so as to let the small systems bear only one-tenth of the burden they would otherwise face under the formula I propose. I would not reduce the burden of the services for small systems. The *Act* does not require that the benefits to which the small systems are entitled pass through to the services as well.

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<sup>13</sup> The rate for the Canadian commercial television tariff has American roots. The Copyright Appeal Board in 1958 used the comparable rate of 2.05 per cent established in the United States at that time to determine the appropriate rates for the two tariffs filed by PROCAN and CAPAC.

<sup>14</sup> Had relevant and reliable Kagan statistics for the American services been made available, the rate may have been further adjusted downwards.

<sup>15</sup> [1992] 1 F.C. 487 (C.A.).

## **E. THE TARIFF**

As a final result then, SOCAN would be entitled to receive royalties totalling 2.3 per cent of a Category I service's revenues, 1.0 per cent of a Category II service's revenues, 0.7 per cent of a Category III service's revenues, and 0.4 per cent of the programming expenditures of cable originated services, Category IV. Estimates of the royalties generated by this tariff are set out in Table 3.

## **F. CONTRIBUTIONS**

The Federal Court has generally taken a broad view of the Board's jurisdiction to set a tariff and its "related terms and conditions". I believe that the Board can and should, as a necessary incident to the exercise of that jurisdiction, set the ultimate contribution of transmitters and services to the royalties for which they are jointly and severally liable. Telling SOCAN how much it will be paid is only half the issue in this case: the joint debtors must know their final share of the royalty burden once SOCAN has been paid.

I agree with the Regulatory Impact Analysis Statement attached to the *Programming Undertaking Regulations* according to which all participants in the communication chain share responsibility for payment of royalties for the transmission of musical and other works to the public by telecommunication. This cannot be done without apportioning liabilities. In my view, the record of these proceedings clearly shows that not doing so will create confusion and disruption in the market.

Of course, SOCAN remains entitled to exact payment from either the transmitter or the service for the whole amount. That right is intrinsic to any sort of joint and several liability. Since this results from the words of the statute or decisions of the courts, the Board cannot curtail it. Only SOCAN can do so through its actions.

Setting the joint debtors' relative contributions is quite a separate issue. The law of restitution is clear. The contributions of joint debtors are not cast in stone; rather, they are to be set in each case as a function of the relative benefits they each derive from the joint activity. I cannot see how a tariff would be fair without setting out to determine what those benefits are.

I believe all revenue sources represent value to the services, while the affiliation payments<sup>16</sup> represent the value of those services to the transmitters. The transmitters see nothing of the other revenues and should not bear any share of the royalty burden attributable to those revenues.

As a result, each service and transmitter should pay for what each offers or consumes in the market. The contribution formula is straightforward:<sup>17</sup>

- Each service pays a tariff royalty based on (i) 50 per cent of its total affiliation revenue plus (ii) 100 per cent of its other revenue, including the gross up applicable to American

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<sup>16</sup> Whether freely negotiated or set by the CRTC.

<sup>17</sup> See Figure 1, Table 2 and Table 3.

- services, times (iii) the service's category rate;
- Each transmitter pays a tariff royalty based on 50 per cent of each service's affiliation payments times the service's category rate;
  - Each "small" transmitter pays a tariff royalty on 5 per cent of each service's affiliation payments times the service's category rate;
  - Since there is no joint liability in the case of cable originated services, the transmitters would both pay the royalties and bear the burden attributable to those services based on programming expenditures times the service's category rate.<sup>18</sup>

I believe this approach would be easy to administer for all parties. Each has the data available to determine what its liability is without having to resort to information in the hands of a third party. If SOCAN collects all the fees from one of them, that person is able to determine the contribution of the other using a simple mathematical operation, what one pays minus one's contribution.

The law of contribution almost systematically allows co-debtors to sort out their final shares of the debt through contracts. The marketplace should be allowed to play its role here. The tariff can be formulated in such a way that contractual agreements between services and transmitters which deal with issues of contribution have their full effect.

#### **IV. LEGAL FOUNDATION**

A fair and equitable tariff should target both the transmitters and the services. Holding the transmitters liable raises no difficulties; doing so for services requires a little more thought. Before September 1, 1993, services are liable for the transmitters' public performances either because they authorized the performances or because they were joint performers.

##### **A. AUTHORIZATION**

"Authorization" constitutes a separate protected use under the *Act*.<sup>19</sup> To "authorize" is to "sanction, approve and countenance".<sup>20</sup> Only the authorization of a protected use constitutes a protected use. The act of authorization is not, however, limited to granting or purporting to grant the right to perform. Where certain relationships exist between a person and the actual performer, or where the person's conduct displays certain characteristics, an "authorization" will have occurred.<sup>21</sup>

The likelihood of such an occurrence increases with the degree of control exercised by a person over the actual performer, the extent to which her commercial interests are linked to the performance, and the knowledge she has, or should have, that a public performance of a protected work might take place. That likelihood decreases when the tools or means supplied to

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<sup>18</sup> Category IV rates.

<sup>19</sup> See H.G. Fox, *The Canadian Law of Copyright and Industrial Designs*, (2d. ed.) 1967, Carswell, at 334.

<sup>20</sup> See, for example, *Underwriters' Survey Bureau Ltd. v. Massie & Renwick Ltd.*, [1938] 2 D.L.R. 31 at p. 46, quoted in *de Tervagne v. Beloeil (Town)* (T.D.), [1993] 3 C.F. 227, at p. 237 h- i.[*de Tervagne*]

<sup>21</sup> *de Tervagne*, at 245g.

the actual performer can be used to effect either the performance of unprotected works or unprotected performances. I find that services authorize the transmitters' performances.

The services dictate the musical works transmitters perform in public.<sup>22</sup> They know and expect that their signals will be used to effect a protected use for which they have not cleared the rights: their contractual arrangements "clearly contemplate that the sole use of the [signal] is to be the production of audible and visual messages from the subscriber's television set".<sup>23</sup> Their financial success depends on these transactions. The essential consideration of their contractual relationship with transmitters is that the signal, in its entirety and without alterations,<sup>24</sup> be supplied by the transmitter to its subscribers. This, to me, constitutes "authorization".

This is quite different from other situations outlined in the decisions of Canadian courts. These focused on the lack of control exercised by the person alleged to have authorized a protected use. In *Vigneux*, the person renting out a record playing machine had no control over its use, and "no voice as to whether at any particular time it was to be available to the restaurant customers or not."<sup>25</sup> Muzak authorized the use of its recordings in performances, but did not authorize the performances.<sup>26</sup> In *de Tervagne*, the person who leased a theatre in which an infringing performance had taken place exercised no control on the use of the theatre.

The *CTV* decision and the earlier decision in *CAPAC v. CTV*<sup>27</sup> are of no use in this respect. They do not address authorization as a separate use within the meaning of subsection 3(1) of the *Act*. These decisions do hold that a person cannot be held liable for facilitating a protected use already authorized by the owner of the rights in the work. However, cable operators are not yet licensed by SOCAN for the purposes of Tariff 17.

## **B. JOINT PERFORMERS**

In the alternative, I find that the services are joint performers with the transmitters. Services and transmitters "act in concert with one another pursuant to a common design":<sup>28</sup> to reach the audience. They cannot achieve their individual objectives without the cooperation of the other.

It is incorrect to state that liability flowing from a joint performance cannot exist without an actual infringement. The proposition that a person who procures a breach of copyright is liable jointly and severally with the infringer is only a corollary of the proposition that the person who procures a protected use is jointly and severally liable with the user for any royalties that may be owed. The essence of the joint act is that it involves persons acting in concert with one another

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<sup>22</sup> The transmitter's situation is analogous to that of a band whose contract would specify which works will be performed during an engagement: I have no doubt that in such a case, the person who hired the band would be found to have authorized the band's performance, or even to be the actual performer of the works.

<sup>23</sup> This is a paraphrase of the *CCTA* decision on the issue of authorization, at 155e-156a.

<sup>24</sup> Even alterations that would prevent a copyright infringement.

<sup>25</sup> *Vigneux v. Canadian Performing Rights Society Ltd.*, [1945] A.C. 108 (P.C.), at 123.

<sup>26</sup> *Muzak Corporation v. Composers, Authors & Publishers Association of Canada Ltd.* (1953), 19 C.P.R. 1. (S.C.C.)

<sup>27</sup> [1968] S.C.R. 676. [ *CAPAC* ]

<sup>28</sup> *CBS Songs Ltd. v. Amstrad plc* [1988] 2 All.E.R. 485, at 495-6.

pursuant to a common design. An act can be legal and constitute joint use.

### **C. PROPER NOTICE**

Some services maintain that since they had not been named in SOCAN's proposed statement, they could not be targeted in the proposed tariff. I reject this argument. Not being named in a proposed statement does not deprive a person of adequate notice of the proceedings. Liability flows from the *Act*, irrespective of the language of the tariff. As long as the uses for which a person may be liable are clearly set out in the proposed statement, it is that person's responsibility to determine which of those uses he may be liable for, and to object accordingly.<sup>29</sup>

### **V. THE TARIFF FOR 1995**

I would have no problem with setting the tariff for 1995 if the approach I am putting forward were used. The self-adjusting nature of the formula would ensure that the new services would be appropriately taken into account.

Since this is not the case, I am opposed to dealing with the 1995 application right away. The lack of available data, the arrival of new services, the redesigning of the extended basic tier, and the market reaction to the marketing efforts of the new services all lead me to think that under the formula set out in the majority decision, the 1995 tariff warrants special, separate consideration.

### **VI. CONCLUSION**

The words of Thorson J. (former Chairman of the Copyright Appeal Board) are as valid today as they were in 1958 when the Board used the American rate of 2.05 per cent to set the PROCAN and CAPAC tariff rates for commercial television:

"...But perhaps the United States model is the best one which we have got. There would be differences, and therefore the Board should take matters into account.

...And the Board is not wedded to any American pattern. But it has used the American pattern in order to arrive at what the Board considers a fair tariff. After all, that is the first consideration, and really the only one."<sup>30</sup>

### **FIGURE AND TABLES**

Figure 1

#### **Revenue Flow and Royalty Calculation**

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<sup>29</sup> I doubt if anyone would argue, for example, that legion halls are not liable under Tariff No. 8 for the sole reason that legion halls are not sufficiently singled out in that particular tariff.

<sup>30</sup> Transcripts, p. 139, Commercial Television Tariff Hearings, 1958.



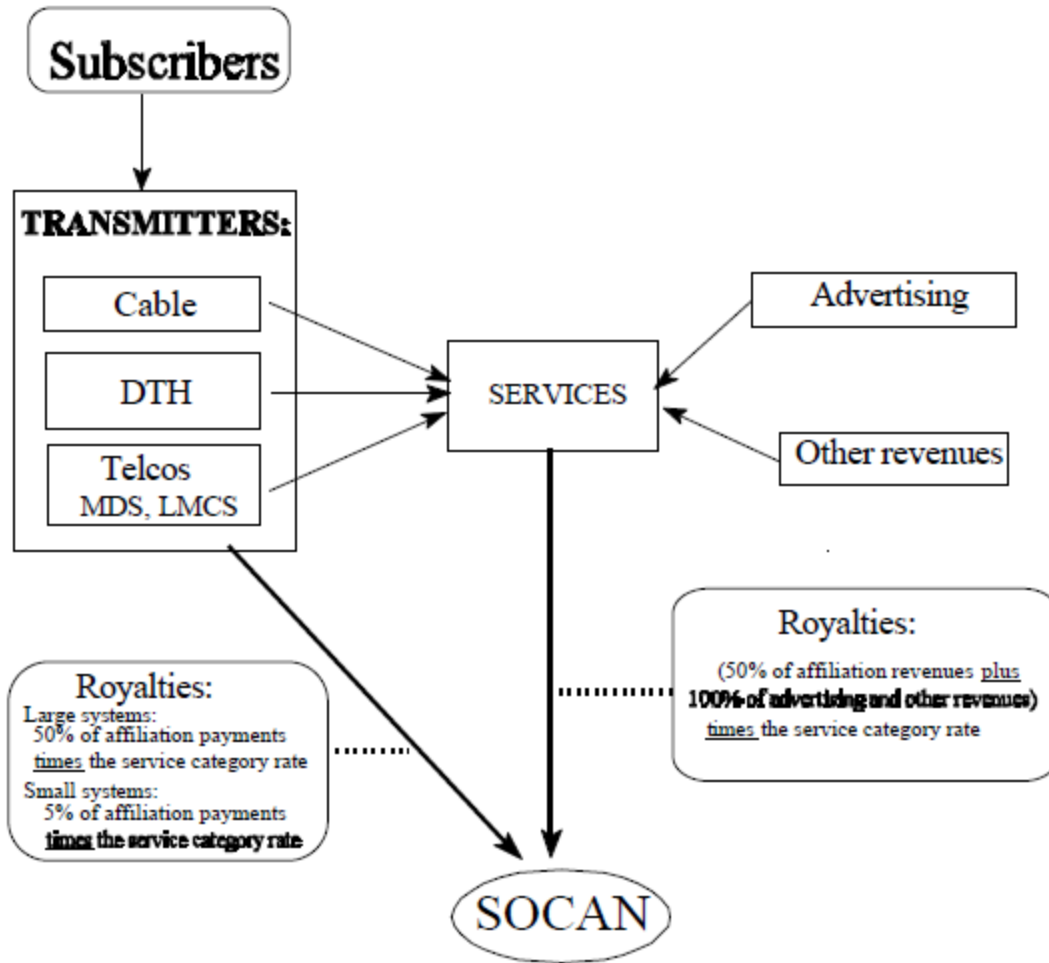


TABLE 1 / TABLEAU 1			
Category Rates / Taux selon la catégorie			
Service Category Catégorie de service	Weighting Factor to Apply to the Adjusted Commercial Television Rate	Canadian Rate for Services Taux canadiens ([1]*.018)	American Comparable Rate Taux américain comparable ([1]*.011)
	Facteur de pondération à appliquer au tarif ajusté de télévision commerciale [1]		[2]
Music Intensive Services de musique [3]	1.270	2.3%	1.4%
General Entertainment Services d'intérêt général [4]	0.545	1.0%	0.6%
News, Weather, Sports	0.364	0.7%	0.4%

<b>Information, météo et sports</b> [5]			
<b>Cable Originated</b>	0.195	0.4%	0.2%
<b>Services produits par les télédiffuseurs</b> [6]	[7]		[8]

[1] The weighting factor to be applied to the adjusted commercial television tariff to obtain the rate applicable to services subject to Tariff 17./ Facteur de pondération qui, multiplié par le tarif ajusté de la télévision commerciale, donne le taux applicable aux services assujettis au tarif 17.

[2] These reflect the combined ASCAP and BMI rates attributed to the various services./ Il s'agit des taux combinés de ASCAP et BMI appliqués aux différents services.

[3] MuchMusic, MusiquePlus, TNN, CMT, Country Music Network.

[4] A&E, YTV, Discovery Channel, Super Channel, TMN, Super Écran, Family Channel, Cathay, Learning Channel, Vision TV, Canal D, MovieMax!, Bravo!, Home Theatre, Classic Channel, Silent Network, TV5, Viewers' Choice, Black Entertainment TV, Life Network, Chinavision, Teletatino, ASN, Showcase, WTN, Comedy Central, Lifetime Television, USA Network, Canal Famille.

[5] RDI, Newsworld, Météomedia/Weather, (CNN-2), CNBC/FNN, Weather Channel, TSN, RDS, CNN.

[6] These include community channels, Barker and alphanumeric services. / Le canal communautaire, les canaux d'autopublicité et les services alphanumériques sont inclus.

[7] The decrease in the American weights is not constant. The decrease is greater from music intensive to general entertainment than it is from the latter to news, weather and sports. In order to derive the cable originated weight, I have calculated a constant decreasing rate using the two end points. This rate is 46.5%. Thus, decreasing the music intensive weight by 46.5% twice gives the news, weather and sports weight of 0.364. Decreasing that weight by 46.5% generates the 0.195 weight. / La réduction entre les facteurs de pondération américains n'est pas constante. Elle est plus importante entre les services de musique et les services d'intérêt général qu'entre ces derniers et les services d'information, météo et sports. Le facteur applicable aux services produits par les télédiffuseurs est dérivé en présumant un taux de réduction constant entre les deux points extrêmes. Donc en réduisant deux fois de 46,5% le facteur de pondération des services de musique, on obtient le facteur des services d'information, météo et sports, 0,364. En réduisant celui-là de 46,5%, on obtient le facteur de 0,195.

[8] This rate does not exist in the American scheme. It is placed here for comparable purposes only. / Ce taux n'existe pas aux États Unis. Il est mentionné uniquement à titre de comparaison.

TABLE 2 / TABLEAU 2					
Detail of the Estimation of Royalties Generated in 1993 / Calcul détaillé de l'estimation des redevances pour 1993					
Services	Affiliation	Other revenue	Category Transmitters'	Services'	Total

<b>Category Catégorie du service</b>	<b>payments Paiements d'affiliation [1]</b>	<b>Autres revenus [2]</b>	<b>rate Taux de la catégorie [3]</b>	<b>royalties Redevances des transmetteurs [4]</b>	<b>royalties Redevances des services [5]</b>	
<b>I - Music Intensive / Services de musique</b>						
MusiquePlus	\$2,090,739	\$7,890,541	0.023	\$24,043	\$205,526	\$229,569
MuchMusic	\$7,774,998	\$15,106,883	0.023	\$89,412	\$436,871	\$526,283
TNN	\$17,427,635	\$7,493,883	0.023	\$200,418	\$372,777	\$573,195
CMT	\$2,013,780	\$865,925	0.023	\$23,158	\$43,075	\$66,233
<b>II - General Entertainment / Services d'intérêt général</b>						
Family Channel	\$16,978,590	\$27,417	0.010	\$84,893	\$85,167	\$170,060
Super Channel	\$22,547,507	\$0	0.010	\$112,738	\$112,738	\$225,475
First Choice	\$46,414,508	\$61,560	0.010	\$232,073	\$232,688	\$464,761
Viewers Choice	\$7,984,657	\$0	0.010	\$39,923	\$39,923	\$79,847
Home Theatre	\$1,767,017	\$0	0.010	\$8,835	\$8,835	\$17,670
Super Écran	\$20,783,660	\$0	0.010	\$103,918	\$103,918	\$207,837
Telelatino	\$1,333,743	\$1,586,868	0.010	\$6,669	\$22,537	\$29,206
Chinavision	\$1,977,170	\$1,713,562	0.010	\$9,886	\$27,021	\$36,907
Cathay	\$2,369,287	\$1,761,057	0.010	\$11,846	\$29,457	\$41,303
Vision TV	\$0	\$6,578,436	0.010	\$0	\$65,784	\$65,784
YTV	\$22,339,865	\$12,315,583	0.010	\$111,699	\$234,855	\$346,554
TV5	\$6,676,658	\$7,004,307	0.010	\$33,383	\$103,426	\$136,810
Canal famille	\$12,402,857	\$0	0.010	\$62,014	\$62,014	\$124,029
ASN	\$0	\$6,973,155	0.010	\$0	\$69,732	\$69,732
A&E	\$19,059,599	\$8,195,628	0.010	\$95,298	\$177,254	\$272,552
<b>III - News, Weather, Sports / Information, Météo, Sports</b>						
Réseau des sports	\$25,062,428	\$6,761,017	0.007	\$87,718	\$135,046	\$222,764
Météomédia	\$19,253,693	\$1,411,687	0.007	\$67,388	\$77,270	\$144,658
The Sports Network	\$76,822,470	\$42,615,879	0.007	\$268,879	\$567,190	\$836,068
CBC Newsworld	\$30,474,000	\$8,742,000	0.007	\$106,659	\$167,853	\$274,512
CNN	\$12,516,242	\$5,381,984	0.007	\$43,807	\$81,481	\$125,288
<b>IV - Cable Originated Services programmés par les télédistributeurs</b>		\$75,145,411	0.004	\$300,582	\$0	\$300,582
<b>GRAND TOTAL</b>				\$2,125,240	\$3,462,439	\$5,587,679

[1] The affiliation revenue figures for the Canadian services are taken from SOCAN-8 and include DTH revenues. The US figures are from the joint submission on behalf of Opryland USA Inc., owners of TNN and CMT. / On trouve les revenus d'affiliation des services canadiens à la pièce SOCAN-8. Les revenus de SRD sont inclus. Les données sur les signaux américains proviennent de l'argumentation écrite de Opryland USA Inc., propriétaire de TNN et CMT.

[2] The other revenues for the Canadian services are taken from SOCAN-8. Advertising revenues are included in this data. The imputed advertising revenues for the American services are calculated on the basis of the average ratio of advertising revenue to affiliation revenue for

the period 1989-1993 applied to the affiliation payments to those four services. / Les données sur les revenus d'autres sources des services canadiens proviennent de la pièce SOCAN-8. Ils comprennent les recettes publicitaires. Les recettes publicitaires imputées aux services américains sont dérivées en multipliant les recettes d'abonnement par le rapport entre les recettes publicitaires des services canadiens et leurs revenus d'abonnement pour la période 1989-1993.

[3] See TABLE 1 / Voir TABLEAU 1

[4] The transmitters' share is 50% of the affiliation payments times the category rate. / La part du transmetteur est de 50% des paiements d'affiliation multiplié par le taux de la catégorie.

[5] The services' share is equal to 50% of the affiliation revenues added to the advertising and other revenues, times the category rate. / La part des services est de 50% des recettes d'affiliation plus les recettes publicitaires et autres revenus, multiplié par le taux de la catégorie.

TABLE 3 / TABLEAU 3					
Estimate Of Royalties Generated / Estimation des redevances					
1990-1994					
	1990	1991	1992	1993	1994*
Services	\$2,180,283	\$2,496,821	\$3,062,318	\$3,462,439	\$3,746,660
Services					
Transmitters	\$1,475,778	\$1,596,089	\$1,899,243	\$2,125,240	\$2,291,083
Transmetteurs					
Total	\$3,656,062	\$4,092,910	\$4,961,561	\$5,587,679	\$6,037,744

SOURCE: The data for 1990-1993 is from SOCAN-8 for the Canadian services and the community channel, from MuchMusic-36 for ASN, and from the Joint Submission on Behalf of Opryland USA Inc. for A&E, CMT, TNN and CNN. Les données pour 1990-1993 proviennent de SOCAN-8 pour les services canadiens et le canal communautaire, de MuchMusic-36 pour ASN, et de l'argumentation écrite de Opryland USA Inc., pour A&E, CMT, TNN et CNN.

\*For the 1994 estimate, the Canadian data is from CRTC. ASN is an extrapolation from the 1993 data using the average growth rate for the period 1990-1993. The US data is adjusted using the average increase in the monthly subscription rate for the period 1990-1993 to calculate a rate for 1994 and multiplying it by the number of subscribers to the services in 1993. / L'estimation pour les services canadiens en 1994 est faite à partir des données du CRTC. Les données de ASN sont une extrapolation des données de 1993 faite en se servant de l'augmentation moyenne de la période 1990-1993. Pour les services américains, on évalue le tarif d'abonnement pour 1994 en augmentant le tarif de 1993 par l'augmentation moyenne de ce tarif entre 1990 et 1993. Ce montant est ensuite multiplié par le nombre d'abonnés aux services en 1993.

Totals may not add due to rounding. These estimates do not take into account the preferential tariff for small systems.

Il est possible que les totaux du tableau ne soient pas exacts car les données sont arrondies. Ces estimations ne tiennent pas compte du taux préférentiel accordé aux petits systèmes.