Copyright Board Canada

Commission du droit d'auteur Canada

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Regime Public Performance of Sound Recordings
Copyright Act, section 68(3)

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Proposed Tariff(s) Considered 1.A – COMMERCIAL RADIO IN 1998, 1999, 2000, 2001 AND 2002

Statement of Royalties to be collected by NRCC for the public performance or the communication to the public by telecommunication, in Canada, of published sound recordings embodying musical works and performer's performances of such works

Reasons for decision

I. INTRODUCTION

Pursuant to section 67 of the *Copyright Act* [the *Act*] and section 53.1 of the *Act to amend the Copyright Act* [S.C. 1997, ch. 24], the Neighbouring Rights Collective of Canada (NRCC) and the *Société de gestion des droits des artistes-musiciens* (SOGEDAM) filed with the Board on or before September 1, 1997, statements of proposed royalties for the public performance, or the communication to the public by telecommunication in Canada, of performer's performances of musical works, or of sound recordings embodying such performer's performances, with an effective date of January 1, 1998. The statements were published in the *Canada Gazette* on October 18, 1997. At the same time, the Board gave notice to users of their right to file objections to the proposed tariffs.

The following are the Board's reasons dealing with Tariff 1.A (Commercial Radio). Other tariffs will be disposed of later.

The Canadian Association of Broadcasters (CAB), Shaw Radio Limited and Radiomutuel Inc. filed timely objections to Tariff 1.A. Shaw eventually withdrew its objection whereas Radiomutuel informed the Board it would be represented by CAB. Hearings took place over 16

days in June, July and August 1998. Participants filed their final arguments on November 16, 1998.

II. LEGISLATIVE FRAMEWORK

This is the first time the Board is called upon to deal with the so-called neighbouring rights regime set up in 1997, when Bill C-32 [now S.C. 1997, ch. 24] came into force. Consequently, it would be appropriate to outline the legislative evolution of the protection afforded to performers and makers of sound recordings under Canadian copyright legislation as well as some of the essential elements of the new regime.

Makers of sound recordings have long enjoyed the exclusive right to authorize their reproduction. They also enjoyed the right to authorize their public performance until 1971. They lost that right shortly after the Copyright Appeal Board certified a number of tariffs for such performances. In 1994, as a result of the North American Free Trade Agreement, makers were granted the exclusive right to rent their sound recordings.

Performers have until recently enjoyed little, if any rights under Canadian copyright legislation. Only in 1994 did legislation implementing some of Canada's obligations resulting from its adhesion to the World Trade Organization grant performers certain exclusive rights over their live performances.

The adoption of Bill C-32 allowed Canada to become a party to the *Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*. On June 4, 1998, Canada joined 56 other countries. The United States is not a party to the Rome Convention.

New and pre-existing rights of performers, makers of sound recordings and broadcasters are all addressed in Part II of the *Act*. Sections 15, 18, 21 and 26 now describe the exclusive rights they enjoy, all of which are included in the definition of "copyright" which is introduced in the *Act* for the first time. Section 19 also grants to makers and performers a right of equitable remuneration for the public performance and communication to the public by telecommunication of eligible published sound recordings. This new right has several characteristics, some of which have a direct effect on this decision.

First, the right benefits jointly makers and performers of eligible sound recordings. [s. 19(1)]

Second, a recording is eligible not only if the maker was, at the date of the first fixation, a citizen or permanent resident of Canada or a Rome Convention country, but also if all the fixations done for the sound recording occurred in Canada or a Rome Convention country. [s. 20(1)] As a result, performers and makers who are not citizens or permanent residents of Canada or a Rome Convention country may be entitled to remuneration.

Third, the manner in which royalties are collected varies according to the nature of the underlying work. In the case of recorded music, users pay royalties to the collective society authorized under Part VII to collect them. In the case of recorded literary or dramatic works, users pay royalties to either the maker or the performer. [s. 19(2)]

Fourth, once they have been paid, royalties are always divided equally between the maker or makers and the performer or performers, irrespective of who received the payment. [s. 19(3)]

Fifth, even though performers and makers are entitled to an equal share of the remuneration, what triggers the remuneration is the performance or telecommunication of the maker's recording. [s. 19(1) *in limine*]

Finally, in the case of sound recordings of musical works, the right to remuneration must be exercised through a collective society. [ss. 19(2)(*a*), 67.1(1), 67.1(4)(*b*)] Societies are subject to the rate regulation regime already in place for the performance or telecommunication of musical works. All must answer information requests about their repertoire. All must file proposed tariffs or lose their right to sue for payment of royalties without the written consent of the Minister. All tariffs are subject to essentially the same examination and certification process.

A few differences exist. The *Act* sets out three limits on the Board's power to decide the amount and terms of the royalties to be paid on account of the remuneration right.[1] The tariff must apply only in respect of eligible recordings. It must not put certain users that are subject to different linguistic and content requirements as a result of Canada's broadcasting policy at a financial disadvantage. Finally, it must provide for the payment of royalties in a single payment.

The *Act* also sets out special conditions that apply to radio stations or "wireless transmission systems" notwithstanding the tariffs approved by the Board. Community systems pay only $100 a year. Systems other than community systems and public transmission systems pay only $100 on their first 1.25 million dollars of annual advertising revenues. All other royalties are to be phased in, with systems paying one-third of the royalties set out in the approved tariff in 1998, two-thirds in 1999 and the full amount in 2000 and thereafter. [s. 68.1(1)]

Finally, the *Act* provides for the adoption of a number of regulatory definitions. The Board can define "advertising revenues",[2] while the Governor in Council may define "community system", "public transmission system" and "wireless transmission system".[3]

Other characteristics of the remuneration right which do not have a direct impact on this decision include the following. First, the remuneration right is not a copyright as defined in the *Act*. Consequently, a person who violates the right does not infringe copyright. Second, the Minister may limit the scope and duration of the protection granted to sound recordings of Rome Convention countries who do not grant rights similar to those afforded in section 19 of the *Act*.

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[1] Paragraph 68(2)(*a*). Paragraph 68(2)(*b*), which provides that the Board may also "take into account any factor that it considers appropriate", adds nothing to the Board's already wide discretionary powers. See, for example, *SOCAN* v. *Canadian Association of Broadcasters* (C.A.), [1999] F.C.J. 389; *Réseaux Premier Choix Inc.* v. *Canadian Cable Television Assn.* [1997], 80 C.P.R. (3d) 208 (F.C.A.); *FWS Joint Sports Claimant* v. *Canada (Copyright Board)* (C.A.) [1992] 1 F.C. 487.

[2] Subsection 68.1(3). See *Regulations Defining "Advertising Revenues"*, SOR/98-447, *Canada Gazette* Part II, Vol. 132, No.19, p. 2589.

[3] Subsection 68.1(5). Only the last expression has been defined. See *Definition of "Wireless Transmission System" Regulations*, SOR/98-307, *Canada Gazette* Part II, Vol. 132, No. 12, p. 1817.

This was done on March 23, 1999.[4] However, the practical impact of the statement on the size of the repertoire actually used by commercial radio stations is negligible. Third, the Minister may also grant the right to remuneration to the performers and makers of sound recordings of a country other than a Rome Convention country if that country grants Canadian performers and makers of sound recordings rights substantially equivalent to those conferred by Canadian legislation. [s. 22] However, this has not been done yet.

III. THE PARTICIPANTS' CONCLUSIONS

The details of the participants' arguments are outlined in the relevant parts of the decision. In a nutshell, their conclusions are as follows.

NRCC is asking for a five-year tariff, to be phased in over five years instead of the three mandated by the *Act*. In the fifth year, stations would pay from 4.68 per cent for advertising revenues between 1.25 and 1.5 million dollars, to 9.78 per cent on revenues in excess of five million dollars. NRCC agreed to account for low-use stations in the final tariff. It also asked that it be the collective designated for the purposes of collecting all royalties, including royalties for rights holders it may not represent.

SOGEDAM asked for a three-year tariff set at five per cent of advertising revenues. It argued that phasing-in provisions in the tariff are unnecessary, since the *Act* already provides for this. It also asked that it be granted 2.88 per cent of total royalties payable under the tariff as compensation for the repertoire it represents.

CAB asked for a three-year tariff of 0.7 per cent of advertising revenues, a low-use tariff of 0.3 per cent and a flat royalty of $1,000 per year for all-talk stations. It also found no need to add to the statutory phasing-in provisions.

IV. GUIDING PRINCIPLES FOR FIXING THE ROYALTIES

The Board finds it useful to outline at the outset the principles that it intends to keep in mind in reaching its decision. Some have already been stated elsewhere; others flow from the terms of the *Act*. They will be fleshed out as required in the rest of the decision.

The *Act* requires that the Board take into account the following principles. First, the royalties must satisfy the performers' and makers' right to equitable remuneration as set out in subsection 19(1) of the *Act*. Second, the tariff must address only the use of the properly represented eligible repertoire. Third, the tariff must not place some users at a greater financial disadvantage than others because of different linguistic and content requirements of the *Broadcasting Act*. Finally, the tariff must provide that the payment of royalties by users is made in a single payment.

The Board also intends to rely on other principles already expressed in previous decisions. Thus, the tariff should reflect Canadian circumstances. It should be simple to administer, transparent

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[4] Section 20(2). See *Limitation of the Right to Remuneration of Certain Rome Convention Countries Statement*, SOR/99-143, *Canada Gazette* Part II, Vol. 133, No. 8, p. 1020.

and comprehensible. It should be based on a set of statistics for a test period.

The Board adds that by its nature, the tariff is prospective. Only by looking at the past can the Board determine the extent of the eligible repertoire or the use made of it by commercial radio stations. Should major changes occur during the life of the tariff, collectives and users are free to ask that the tariff be varied pursuant to section 66.52 of the *Act*.

V. THE ISSUES

The major issues the Board needs to address in order to reach a decision in this matter can be reduced to the following:

- What is meant by "equitable remuneration"?
- What is the properly represented eligible repertoire and what use do commercial radio stations make of it?
- What account should be taken of the Canadian broadcasting policy?
- How much should radio stations pay for their use of the properly represented eligible repertoire?
- How should royalties be allocated?

A. WHAT IS MEANT BY "EQUITABLE" REMUNERATION?

Participants attempted to interpret the notion of equitable remuneration in various ways. For NRCC, the level of remuneration should be determined by focussing solely on the entitlements of rights holders. For its part, CAB insists that equitable remuneration ought to also take into account fairness to users as well as a number of other factors including certainty as to the remunerated repertoire and the benefits rights holders derive from the use of eligible sound recordings. In the end, the Board's task is no different here than it is, and has always been, in other rate regulation regimes. Therefore, setting an equitable remuneration requires a tariff that is fair and equitable to both rights holders and users, given all the circumstances of the case.

B. WHAT IS THE PROPERLY REPRESENTED ELIGIBLE REPERTOIRE AND WHAT USE DO COMMERCIAL RADIO STATIONS MAKE OF IT?

The right to remuneration attaching to sound recordings of musical works is contingent on the recording being eligible. Essentially, this requires that the recording be published, qualify under section 20 of the *Act* and be less than 50 years old. That right is also contingent on eligible recordings being part of the repertoire of a collective society that has filed for a tariff.

As a result, it is incumbent on the collectives who claim royalties for the use of sound recordings to show that they do represent the repertoire they claim. The need to establish which recordings are eligible and which are not is made all the more important by the fact that almost all American recordings, which represent an important proportion of music played on radio, are not eligible. This does not mean that collectives actually bear the burden of making a case for each and every title they claim: they are clearly entitled to remuneration once they have established that they do represent those they say they do.

The determination of which recordings are before the Board requires an answer to two questions. Are NRCC and SOGEDAM collective societies? Do they represent those they say they represent? It will then be necessary to determine the extent to which commercial radio stations use the eligible repertoire.

i. Are NRCC and SOGEDAM collective societies?

NRCC is a collective of collectives. Its membership is limited to organisations and collectives that represent a significant number of holders of remuneration rights. It was constituted to collect the monies owing to those entitled to neighbouring rights payments. It acts on behalf of five sub-collectives: ACTRA Performers' Rights Society (APRS), the American Federation of Musicians (AFM), the *Société de gestion collective de l'Union des artistes* (ArtistI), AVLA Audio-Video Licensing Agency Inc. (AVLA) and the *Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec* (SOPROQ).

SOGEDAM is a more traditional collective whose repertoire flows from two sources. It represents a small number of Canadian recording musicians who have authorized it to act for them by way of assignment. Most importantly, SOGEDAM has signed a reciprocal representation agreement with SPEDIDAM, the collective society empowered under French law to represent the rights of all performers whose names do not appear in the credits accompanying a sound recording.[5]

There is no doubt that NRCC and SOGEDAM are collective societies. Their objects are clearly those outlined in the definition of this term as set out in the *Act*. Moreover, and contrary to what CAB seemed to assert, the fact that some of NRCC's sub-collectives may not be corporate entities is a non issue. The *Act* clearly contemplates the possibility of an unincorporated association acting as a collective. Such an association can, through agency rules, secure remuneration rights and pass them on to another person to collect them, as long as the conditions imposed by statutes or private law for such transfers are met.

The real issue is the extent, if any, to which NRCC and SOGEDAM represent the eligible repertoire. This in turn requires looking at the status of NRCC's own "sub-collectives".

ii. Do NRCC and SOGEDAM represent the rights holders they claim to represent?

As stated earlier, it is incumbent on the collectives who claim royalties for the use of sound recordings to show that they do represent the repertoire they claim. CAB argues that both collectives have fallen short in this respect. It maintains that NRCC failed to establish that it represents any Canadian performers as well as any non-Canadian rights holders. It also argues that SOGEDAM failed to demonstrate the extent to which it represents any repertoire actually played by Canadian commercial radio stations. Consequently, CAB claims that the repertoire properly before the Board, consisting only of the Canadian makers' share of the remuneration

[5] "Named" performers are represented in France by ADAMI, with which NRCC was negotiating a reciprocal agreement at the time of the hearing.

right, represents only 15 per cent of all sound recordings played by radio stations, or half the 30 per cent Canadian content requirement currently imposed by the CRTC on commercial radio stations.

CAB's challenge focussed on NRCC's entitlement to represent Canadian as well as foreign performers: the former, because of the instrument used by AFM and APRS to acquire the rights, and the latter, because NRCC (through ArtistI) had not yet entered into reciprocal agreements with foreign societies.

There is little doubt that SOGEDAM administers the repertoire it says it does. The problem was more with NRCC and the way it claimed to have secured rights.

a. Makers' rights and NRCC

According to the uncontradicted testimony of Mrs. Lucie Beauchemin, AVLA and SOPROQ represent virtually all Canadian producers. Members of AVLA have signed non-exclusive agency agreements, while members of SOPROQ have authorized it to act for them by way of assignment. In turn, NRCC holds its rights as a result of AVLA and SOPROQ having become members of NRCC.

The uncontradicted testimony of several witnesses also establishes that Canadian producers bring to their collectives not only the rights to their own recordings, but also those to most foreign recordings. Most, if not all foreign masters reach the Canadian market through Canadian producers, who exploit these records in Canada. Canadian independent producers enter into licencing agreements with foreign producers, while the repertoire of the six "majors" is represented in Canada through intercorporate agreements between Canadian and foreign affiliates. There may be a few foreign producers who are not represented according to either model. In their case, NRCC or its members must enter into agreements with foreign collective societies if they intend to represent them in Canada. However, the evidence in these proceedings, and especially NRCC's music use study (NRCC-21), confirms that the unrepresented repertoire represents no more than five per cent (and probably less) of the eligible repertoire.

It is safe to assume, therefore, that NRCC brings with it to these proceedings almost all of the makers' rights pursuant to section 19 of the *Act*. The situation is far from that simple, however, with respect to performers' rights.

b. Performers' rights and NRCC

NRCC has in its repertoire what its members and affiliates have authorized it to manage by way of assignment, grant of licence, appointment as agent or otherwise. Its members and affiliates must themselves have secured the rights from the makers or performers through similar means. Put another way, AFM, APRS and ArtistI can bring to NRCC the rights of their members only if they have secured from them valid authorizations within the meaning of the *Act*. Therefore, it is necessary to look at how they claim to have brought these rights into their repertoires.

ArtistI was set up by the *Union des artistes* (UDA), which represents mostly French speaking performers, with a view to managing the rights of its singer members. Only it has systematically

secured assignments of the remuneration right from the performers it represents.

AFM can claim as members a very large share of Canadian performing musicians. It purports to bring its members' remuneration rights as a result of amendments to its by-laws, intended to give it the power to manage the remuneration right and to acquire such rights from its members. Article 12, which deals with the rights and duties of members, now provides in its paragraph 20(c), that "The Federation is authorized to act as the representative of musicians for the purpose of collecting and distributing government mandated or other compulsory royalties or remuneration payable to musicians under the laws of the United States, Canada and other countries." Everyone who applies for membership agrees to be bound by the by-laws as they may exist from time to time. AFM argues that this commitment constitutes sufficient authority for it to manage the remuneration right, without having to secure individual contracts of assignment or agency.

ACTRA is an association representing English speaking actors and performers. Its "affiliate", APRS, relies on three amendments to its "parent's" by-laws as foundation for its right to claim status as a collective. The ACTRA membership application form now contains a provision similar to that found in the AFM membership application, whereby the applicant agrees to comply with the by-laws and membership agreements as they may read from time to time. The form also contains a clause purporting to irrevocably assign the remuneration right to ACTRA Performers Guild (APG) and to its collective society, APRS. Finally, the amending by-law states that "Every current Guild member, as a condition of continued membership, shall be deemed to have executed the Application form as amended ... or as otherwise amended from time to time." Contrary to AFM, APRS has sought (and in some cases, obtained) exclusive and irrevocable five-year agency contracts from its members.[6]

For the following reasons, NRCC's title is deficient with respect to most of the purported repertoires of APRS and AFM.

Purported acquisition of performers' rights through by-laws does not constitute authorization by way of assignment or grant of licence, given that some of the conditions set out by the *Act*, notably at paragraph 13(4), have not been met.

On the other hand, the *Act* sets out no conditions for authorization by way of appointment as one's agent. Therefore, the general conditions of common law and *droit civil* apply and the validity of the appointment will be assessed according to general rules of private law. Having

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[6] Mention should be made here of three issues which are of great importance to the participants but of little relevance, if any, to these proceedings. First, makers have agreed not to claw back royalties paid to performers through contract terms or otherwise. Second, AFM, ArtistI and APRS have agreed that non-members will be allowed to use the services of one of the societies by signing an agency agreement (in the case of AFM or APRS) or an assignment agreement (in the case of ArtistI) without having to become members of the "parent union". Third, members of AFM and ACTRA can be represented by another of the performers' collectives that are members of NRCC, thereby allowing them to be represented by one entity for the purposes of collective bargaining while asking another to administer their performing rights. The relationship between ArtistI and UDA is such that the issue does not arise for members of UDA.

looked at those rules, the Board concludes that purported acquisition of performers' rights through by-laws does not constitute authorization by way of appointment as one's agent.[7]

The forms of agency that could apply under the circumstances are agency by contract or by ratification. Agency by contract can be express, implied, usual or customary. There is no express agency where title is claimed through a simple amendment to by-laws. Whether there may be an implied contractual agency will depend on whether managing remuneration rights is necessary for, and ordinarily incidental to carrying out APG's or AFM's express authority according to the usual way in which such authority is executed. This is doubtful, at least as far as those members who have not signed the new application forms: the previous forms contained no allusion to management of performing rights. Finally, there is no usual or customary agency here, since these concepts refer to special rules dealing with either agents in a specific trade, profession or business or agency flowing from special rules in a specific market.

Agency by ratification requires two conditions. First, before ratification occurs, the principal must be aware of all the material facts; assuming that AFM and APRS may have notified their members of their actions through various bulletins, this is hardly satisfactory. Second, the agent must purport to act on behalf of an identified, or identifiable principal and only that principal can ratify the act. NRCC offered no evidence that performers were beating a path to ratify the decision of AFM or APRS to "secure" their members' remuneration rights and to ask NRCC to administer them.

APRS and AFM may also have been authorized by their members to administer their neighbouring rights through other means. This is an obvious reference to all other ways in which common law and *droit civil* allow a person to transfer rights. These would include subrogation, gift, transfer through wills, etc. None of these apply here.

The issue of whether an association can, through its by-laws, appropriate its members' neighbouring rights will be determined according to applicable rules governing associations.[8] NRCC stated that it was not aware of any principle in the law of agency preventing an association from obtaining, through a change in its by-laws, and without consulting its members individually, the agency for all its members' remuneration rights. In the Board's view, NRCC is approaching the issue from the wrong end. When one is dealing with a right to income flowing from statute, the redirection of that income requires express consent of the interested party or, at least, a clear principle of law. NRCC pointed to none.

By-laws normally deal with the pursuit of the association's common goals. What may be acceptable when dealing with payments (such as residuals) which have accrued as a matter of contract through the efforts of the association in the pursuit of its goals is not acceptable when dealing with the management or acquisition of specific entitlements in the nature of property

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[7] On issues of agency, see generally GHL Fridman, *The Law of Agency* (7th ed.) 1996 Butterworths.

[8] The rules applicable in Quebec may be different, since article 2186 of the *Civil Code of Quebec* provides that "A contract of association is a contract by which the parties agree to pursue a common goal other than the making of pecuniary profits to be shared between the members of the association."

rights accrued by the effect of law to an association's members. AFM and APRS can no more take possession of the remuneration right in the way they purport to have done than they can in the same manner declare that they own other property of their members.

It may be possible to secure administration of performers' rights through a specifically worded clause in an association's membership contract. This can be distinguished from a mere statement that members are bound by the association's by-laws, which is not specific enough to allow the association to secure such administration. By contrast, provisions that clearly put potential members on notice that their neighbouring rights will be managed by the association ought to be acceptable under the *Act*, although they may very well constitute a questionable practice under competition legislation. This APRS and AFM have done with respect to some, but not most, of their members.

In these matters, it is important to understand the distinction between the powers ACTRA and AFM enjoy as a bargaining agent and those they have as simple associations of persons. Bargaining agents are not automatically collective societies. Moreover, when before the Board, collective societies do not bring with them the powers and privileges they may enjoy as bargaining agents pursuant to labour or status of the artist legislation. There may be some crossover points. Thus, ACTRA or AFM may be able to sanction members who refuse to let them manage their rights or who have already authorized others to act on their behalf. In doing so, they would be acting as bargaining agents, not as collective societies. In the end, the fact remains that they have not successfully secured the necessary authorizations in the first place.

Given what has been said, there is no need to go into the various arguments CAB raised with respect to incorporation by reference of unsigned documents into a contract and other related issues. Neither is there any need to discuss the obvious proposition that SOGEDAM does properly represent those AFM members who have authorized it to act on their behalf by way of assignment.

Consequently, the Board finds that the only performers' rights that NRCC has secured through APRS and AFM are those of persons who have executed an instrument (be it an assignment or a membership form) which expressly deals with the remuneration right.

This does not, however, dispose of the issue of what is included in NRCC's repertoire.

c. Is NRCC nevertheless authorized to manage the remuneration rights of performers who have not chosen it as their collective society?

To determine which performers' performances are in NRCC's repertoire requires an examination of the nature of the rights granted to makers and performers pursuant to section 19 of the *Act*. Two persons (or groups of persons) are granted a remuneration right on account of a single act, the performance or telecommunication of a sound recording. In all cases, the remuneration is paid to one person, and one person only. Once paid, royalties are always split equally between the performers and makers. These are all the markings of a legal relationship involving a single

debt owned by two groups of joint and several creditors.[9] Knowing this, it becomes easier to determine what happens when not all those who are entitled to share in the remuneration right in a sound recording are properly represented by a collective society that has filed a proposed tariff.

CAB argues that users should pay only on account of performers and makers who have duly authorized a collective society that has filed a proposed tariff. As a result, where the maker is duly represented but the performer is not, only half the appropriate royalty would be payable. This approach is incompatible with the notion that we are dealing with joint and several creditors. It also creates a conundrum in the application of subsection 19(3) of the *Act*, which provides for the division of any payment once it has been made.

At the other end of the spectrum, one finds the approach favoured by NRCC. According to this, all qualifying sound recordings could be the object of a tariff, even those for which all of the underlying remuneration rights were outside the repertoire of a collective that has filed a tariff. This solution can be discarded because it makes subsection 67.1(4) of the *Act* and the statutory imposition of collective administration of performing rights in sound recordings nugatory. Only represented recordings are entitled to remuneration.

The correct interpretation is that a sound recording is properly before the Board as long as a collective society that has filed a proposed tariff represents at least one person entitled to share in the remuneration for the performance or telecommunication of that recording. This interpretation is based on the proposition that a joint and several creditor normally enjoys three complementary rights: the right to seek payment of the debt in its entirety, the right to keep his share of the proceeds and to hold that of his co-creditors if he obtains payment of the debt, and the right to claim his share of the proceeds, where the debt has been paid to his co-creditors. This interpretation clearly meets all the requirements set out in the *Act*. It also conforms to usual notions involved with joint and several creditors.

First, it gives meaning to the statutory imposition of collective administration of performing rights in sound recordings. It requires that a tariff be filed by one of the joint creditors in order for a recording to be properly before the Board.

Second, it allows one of the joint creditors to act as a sort of agent of the other. Joint and several creditors commonly act in this way for one another.

Third, this interpretation explains in part the wording of subparagraph 68(2)(*a*)(iii) of the *Act*, which imposes the single payment obligation when "examining a proposed tariff for the [performance or communication] of performer's performances of musical works, or of sound recordings embodying such performer's performances". If one accepts that a society administering performers' rights acquires the right to collect the makers' share of the royalties, the society that files a tariff for the performer's right also files a tariff for the right to collect the maker's share, subject to the duty to remit that share to the maker, and vice versa.

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[9] See J.-L. Baudouin, *Les Obligations*, (4e éd), paragraph 864; GHL Fridman, *The Law of Contracts* (2d ed.) pp. 168-170.

Consequently, a sound recording is properly before the Board in these proceedings as long as either the maker or the performer is duly represented by NRCC or SOGEDAM. Timely filing of a proposed tariff on account of either of the joint creditors is sufficient to trigger liability for the whole of the debt, irrespective of what the other creditor did. Consequently, NRCC can claim the entire remuneration for the use of a sound recording whose maker it represents even if the performers are not represented, either because of some defect in the appointment (e.g. AFM) or simply because agreements with foreign societies are still being negotiated (e.g. ADAMI). The very nature of the rights vesting in makers and performers as a result of section 19 of the *Act* makes it possible that a recording be entitled to remuneration even though some of the persons entitled to share in the remuneration may not themselves have authorized a collective to represent them.[10]

Given the Board's earlier finding that NRCC brings with it the makers' share of virtually all the eligible recordings, it can safely be stated that the performers' share of this repertoire is equally properly before the Board in these proceedings.

iii. To what extent do commercial radio stations use the eligible repertoire?

In order to help the Board establish the importance of the use made by radio stations of the eligible repertoire, NRCC filed a music use study on which it relies for its conclusion that eligible sound recordings account for 49.3 per cent of all use of sound recordings by commercial radio stations. The study involved identifying the sound recordings used by a weighted, stratified sample of radio stations over a test period. The music use data provided with the report identifies, with respect to each recording, the station on which it was aired, the name of the artist(s), the title of the song, the number of plays and the source (name of label). It also indicates whether, according to NRCC, the recording is eligible or not.

Producer members of AVLA and SOPROQ carried out most of the task of identifying titles, although in some cases, labels and independent artists were asked to help. In this respect, the study is not as complete as one might have hoped. It does not indicate the country of origin or the age of the recording. Neither does it allow the reader to establish whether a sound recording was determined to be eligible because of the nationality of the maker or because of the country in which it was made. Finally, the eligibility status of some 4.9 per cent of titles could not be ascertained. These include so-called "imports" from non-Rome countries, but also some recordings that appeared to have been made in Rome countries and were therefore probably eligible, but whose status could not be defined. These titles were attributed to each category in the same proportion that was observed among classified titles. On the whole, however, the identification process appears to have been done seriously and conservatively.

CAB did not conduct its own music use study, and opted instead to review and critique NRCC's

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[10] Persons whose rights are represented here through a joint creditor are not "orphans" as this word is sometimes used in the context of section 76 of the *Act*, since their rights are indeed represented. The only true orphans are persons having rights in sound recordings for which neither the maker nor the performer is represented and in that case, no royalties are payable.

study. The critique addressed such issues as the choice of stratification system and the weighting of stations in the determination of the random sample. CAB did not succeed in discrediting NRCC's methodology and findings. Furthermore, its own analysis proved to be flawed in several respects which were correctly identified in NRCC's argument and need not be repeated here. Consequently, CAB's analysis was of little use.

For its part, in an attempt to identify the importance of the French repertoire on radio stations, SOGEDAM used a number of sets of data to determine, first, the percentage of airtime dedicated to non-Canadian, French selections, and then the proportion of those recordings that are part of its repertoire.[11] For reasons that will become clear later, there is no need to analyse in detail SOGEDAM's claim. Suffice it to say that SOGEDAM's analysis is not very reliable, and involves some miscalculations. As a result, it cannot be used to determine the percentage of sound recordings used on Canadian commercial radio stations that are part of the French repertoire.

The Board accepts NRCC's conclusion that qualifying sound recordings account for 49.3 per cent of all use of sound recordings by commercial radio stations. The Board also accepts NRCC's evidence that it represents the makers' share of at least 95 per cent of these recordings. Given NRCC's willingness to accept a ruling according to which NRCC's repertoire accounts for 45 per cent of all use of sound recordings by commercial radio stations, the Board so finds.

C. WHAT ACCOUNT SHOULD BE TAKEN OF THE CANADIAN BROADCASTING POLICY?

Subparagraph 68(2)(*a*)(ii) of the *Act* requires that "the tariff does not, because of linguistic and content requirements of Canada's broadcasting policy set out in section 3 of the *Broadcasting Act*, place some users that are subject to that Act at a greater financial disadvantage than others". Based on the record of these proceedings, it appears that French language radio stations use the eligible repertoire for more than three-quarters of their airtime, while their English counterparts do so for less than half of the time. Absent this statutory requirement, a case could be made for a tariff that is significantly higher for the first stations than for the second. The issue is how to apply this requirement in a manner that is fair to both users and rights owners.

The relevant parts of section 3 of the *Broadcasting Act* read as follows:

> 3. (1) It is hereby declared as the broadcasting policy for Canada that
>
> ...
>
> (b) the Canadian broadcasting system, operating primarily in the English and French languages ... provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

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[11] SOGEDAM's claim was limited to the French repertoire; it did not attempt to demonstrate the use made of sound recordings embedding performances of its 31 or so Canadian members.

> (c) English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements;
>
> ...
>
> (k) a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available;
>
> ...
>
> (2) It is further declared that the Canadian broadcasting system constitutes a single system...

CAB argued that the only way to address subparagraph 68(2)(*a*)(ii) of the *Act* is to discount any incremental use of the eligible repertoire due to the different application of Canadian broadcasting policy to French- and English-language stations. Put another way, CAB would have the Board letting stations use the eligible repertoire for free when they use more than other stations in order to comply with that policy. For this, CAB relies on two propositions. First, French-language broadcasters cannot suffer financial disadvantage simply because of the linguistic requirements of the *Broadcasting Act*. Second, the solution cannot lie in all stations paying at the same rate based on the whole industry's use of the eligible repertoire, as this would result in English-language stations paying a tariff which reflects a level of use higher than theirs.

CAB's interpretation is incorrect. The *Act* does not require that the Board ignore or discount the impact of the regulatory environment on use patterns. Instead, it mandates that users not be put at a *greater* financial disadvantage *than others* because of requirements of Canada's broadcasting policy. This is achieved if all users in a given group share equally the financial burden imposed as a result of the policy, as long as imposing that burden is fair. The cost of the equalization exercise required by this provision can be imposed on the industry, especially where the very policy that the Board is asked to consider treats all members of that industry as part of a "single system".

CAB's interpretation is also dangerous. Subparagraph 68(2)(*a*)(ii) of the *Act* speaks not only of linguistic, but also of content requirements. Pushed to its logical conclusion, CAB's approach would require that the Board provide commercial radio stations with a rebate on account of that part of the eligible repertoire they play not as a matter of choice, but to comply with Canadian content requirements. The regime does not require that rights owners subsidize the radio industry on account of regulatory requirements; in fact, to do so would be unfair, especially given the provisions made in the *Act* to cushion the impact of the new royalties.

Consequently, the appropriate way to take into account the Canadian broadcasting policy in this instance is to charge all radio stations the same price, irrespective of the amount of eligible sound recordings used by each individual station, except for two exceptions which will be outlined later.

D. HOW MUCH SHOULD RADIO STATIONS PAY FOR THEIR USE OF THE PROPERLY REPRESENTED ELIGIBLE REPERTOIRE?

The *Act* requires the Board to fix an "equitable remuneration" for the use of recorded music by radio stations, for the benefit of makers and performers. If, as stated earlier, the tariff is to be fair and equitable to both rights holders and users, fixing the tariff calls for an examination of the value rights holders provide and the benefit users derive from it.

SOGEDAM did not offer any particular rationale for its proposed rate of five per cent. In its final argument, it also supported NRCC's approach and conclusions. Consequently, the following analysis deals only with the arguments put forward by NRCC and by CAB.

i. The approach favoured by NRCC

In developing the models which it offers as support for its proposals, NRCC relied on a number of assumptions. First, the price for neighbouring rights should be that to which a willing seller and a willing buyer would agree. Second, commercial stations make little use of live music or public domain recordings. Third, royalties should account for the rights of both makers and performers. Fourth, equitable remuneration should provide a fair return to rights holders for their investment of talent and financial resources, and should reflect the value that broadcasters, as commercial enterprises, derive from making use of sound recordings to earn revenue.

With respect to rights holders' financial commitments, NRCC insisted especially on the costs incurred in producing and promoting an album and on the risks involved in developing a recording artist. NRCC's witnesses also testified that the industry's primary business is to earn revenue from its copyrights, not only to generate record sales.

On the issue of the value radio stations derive from their use of sound recordings, NRCC relied on a number of assertions which it says support the view that advertising revenues of radio stations are dependent on those recordings. This, it says, provides an indication of the essential value of the use of sound recordings to the industry. The "facts" NRCC relied upon include the following. First, music format stations account for the vast majority of radio listening in Canada. Second, music is the engine that drives most commercial radio stations; a majority of people give music as the main reason for listening to radio; most say they would listen less if radio did not play sound recordings. Third, advertisers pay for audiences, and music draws audiences. Fourth, performers provide stations with more value than composers do; stations are star driven and want to be associated with known artists. Fifth, music represents 78.4 per cent of total broadcast time and 88.2 per cent of total program time. Sixth, the royalties of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) represent about 10 per cent of program expenses.

NRCC then examined a number of pricing models to support the assertion that authors, performers and makers should receive between 18 and 23 per cent of commercial radio stations' advertising revenues, and that the combined value of rights in sound recordings is, at a minimum, 12 per cent. NRCC concluded that, after adjustments to account for the use of non eligible sound recordings and the blanket character of the regime, radio stations should pay 6.06 per cent of their advertising revenues for their use of sound recordings of musical works.

NRCC looked at a number of possible approaches to determine the appropriate royalties. Congruent with its starting proposition on valuation, it offered proxies that all refer to situations where the level of payment for the use of sound recordings is based on mutual agreement between a willing seller and a willing buyer. Each of them is commented upon in turn.

NRCC first noted that music stations spend 29 per cent of their revenues on programming, compared to 49 per cent for low music use stations. Based on this comparison, NRCC argued that suppliers of sound recordings should be able to claim 20 per cent of music stations' revenues. CAB objected to the use of this comparison. Scarcity creates value; talk programming is almost always acquired on an exclusive basis, while music is available to all stations. Moreover, the approach relies on two false assumptions. The first is that the value of an input can be determined by the value of possible, but more costly, substitutes. The second is that all inputs make an equal contribution to the generation of revenue. The Board agrees with CAB, if only because the notion that the value of non-exclusive recorded music would be close to the value of talk and information programming, if negotiated in a market situation, is unsustainable. Any comparison with television programming costs must also be set aside for the same reason.

NRCC then offered two approaches which yield similar results. Performers and makers receive 15 per cent or more of the retail price of compilation CDs or cassettes on account of the use of pre-recorded performances, while those who supply recorded music to disc jockeys, restaurants and others pay 15 per cent of their gross revenues for a blanket licence to reproduce AVLA's repertoire. NRCC believes that these are particularly relevant comparisons, because they are examples of a commercial exploitation of recorded performances, in a market where there is a willing seller and a willing buyer. CAB objected to these approaches for reasons which need not be repeated here. The Board rejects these proxies; its task is to value the right to broadcast, not the right to reproduce.

Subsidiarily, and even though it did not support using SOCAN's Tariff 1.A as a proxy, NRCC commented on the relative value of neighbouring rights and authors' rights, coming to the conclusion that, all other things being equal, NRCC's royalties should be higher than SOCAN's. In support of this proposition, NRCC provided evidence tending to show that making a sound recording costs approximately 4.5 times what it costs to make a song. The Board agrees with CAB that the cost of making a recording is of little help in establishing the value of a right to play it. Furthermore, the Board is far from convinced that such cost can be established or that the methodology NRCC used in this case was the right one. Finally, SOCAN's own tariff has never been based on the cost of creating a song.

NRCC also filed evidence tending to establish that royalties paid to performers and makers of sound recordings in free market transactions are approximately 2.5 times higher than royalties paid to authors. This issue is discussed later in these reasons.

ii. The approach favoured by CAB

CAB supports the view that SOCAN's tariff represents the most useful starting point. In both cases, royalties are payable on account of the same rights flowing from the use of the same input. Although separate and distinct, the fact situations are as close as the Board will ever find. Finally, authors' rights were also originally decided by this Board and recently extended as the

result of an agreement.

Having said this, CAB would reduce the rate to 0.7 per cent for several reasons, all of which ought to be rejected.

a. The importance of the represented repertoire

CAB claims that not all of the eligible repertoire is properly before the Board in these proceedings. This has already been addressed and rejected.

b. Neighbouring rights are intrinsically less valuable than copyright

This argument is based on two assumptions, both of which the Board rejects.

Thus, CAB relies on the fact that the Rome Convention and the *Act* protect neighbouring rights less than authors' rights, even though some experts, including its own, recognize that there is no formal hierarchy between them. The argument ignores a number of realities. First, the *Act* does not prioritize traditional copyright rights over neighbouring rights. To the contrary, the *Act* includes in its definition of copyright all exclusive rights granted to performers, makers of sound recordings and broadcasters. Second, section 19 rights do not differ substantially from those enjoyed by SOCAN: in both cases, there is no right to prohibit use, and the price for use is set by the Board. Third, the fact that authors enjoy more rights than performers, makers and broadcasters does not mean that their rights are more valuable; each right should be valued on its own merits, using proper valuation methodologies. Fourth, the fact that a performer retains the right to prevent certain uses of his or her performance even where the author consents to the use of the work is incompatible with the prioritization of authors' rights over those of performers.

CAB also argues that quite apart from any formal hierarchy, neighbouring rights are generally valued at a lower level than authors' rights. Both CAB and NRCC presented expert evidence on the relative rates being paid in other countries. CAB's expert concluded that commercial and public broadcasters paid, in aggregate, less for neighbouring rights than for authors' rights, although the picture is significantly altered in favour of neighbouring rights if one only looks at commercial stations. NRCC's expert witness, for his part, tended to conclude that commercial radio stations pay more for the neighbouring rights. The evidence in this respect was disappointing. The Board was unable to determine the relative extent of the eligible repertoire or the relative level of use covered by these tariffs. Given the great difficulty of making meaningful comparisons with the Canadian situation, it would be inappropriate to rely on them in setting the Canadian rate. More importantly, any such comparisons are necessarily influenced by local market considerations and must be treated with great caution.

c. Performers and makers derive greater value than copyright owners from air play

CAB argued at length that a fair and equitable tariff should take into account the numerous benefits performers and makers derive from the air play their sound recordings receive. This is not a novel argument.

Radio does contribute to the sale of records. It has been and remains a very important vehicle for

the promotion of records sales. This being said, radio does not play records to promote their sale, but to support its business, which is to attract listeners and sell advertising spots. As the Board stated in the past with respect to performing rights for musical works, this is but one case of a symbiotic relationship between different industries with no direct bearing on the price.

d. Radio stations contribute to the record industry in several other ways

As in the past with respect to performing rights for musical works, CAB also asked the Board to take into account the various contributions, both direct and indirect, made by radio stations to the record industry. These include on-air promotion of performers, monetary contributions to local talent development, as well as CRTC's imposed talent development requirements and "significant benefit" payments required in connection with station ownership transfers.

These arguments remain unconvincing. If anything, Parliament's decision to introduce neighbouring rights may be a reason for reassessing those practices. As for CRTC policies, they serve a different purpose. Copyright protection is granted as a means of ensuring remuneration for the use of all qualifying recordings, while CRTC policies are in response to objectives of the *Broadcasting Act* and concern the creation of new material by Canadians. To discount the remuneration of rights holders because of them would be both improper and unfair.

iii. The approach favoured by the Board

Several reasons lead the Board to conclude that the best starting point is SOCAN's present tariff.

First, SOCAN's tariff applies, more often than not, to the use of recorded musical works, while neighbouring rights tariffs apply to the use of recorded performances of the same works. Therefore, they involve a similar use and a similar right in a similar market.

Second, SOCAN's tariff has been in place for a long time; even though it constitutes a regulated price, it is one that the Board simply cannot ignore. As the Board stated in another, similar context:

> ... there is less need to use a proxy when an existing price, even an administered price, can be used as a starting point. This is especially true where information is available to determine whether or not the existing price is appropriate, and whether or not any adjustments ought to be made to account for changes in circumstances.[12]

Third, even though SOCAN still maintains that the current rate is too low while CAB still argues that it is too high, they have agreed to maintain the *status quo* for five years. For whatever the reasons, the 3.2 per cent rate remains the going rate, and we need not speculate as to its correctness for our purposes.

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[12] *Retransmission of Distant Radio and Television Signals, 1992-1994,* (1990-1994) Copyright Board Reports, 135, 159.

Fourth, all other proxies offered by NRCC are deficient in some ways, and certainly much weaker than SOCAN's tariff.

Fifth, SOCAN'S licence is a blanket licence. Therefore, using SOCAN's rate as a starting point avoids the difficulty of having to determine which value, if any, ought to be attributed to the blanket character of the regime.

The only issue remaining, therefore, is whether 3.2 per cent is too much, enough or not enough to compensate fairly and equitably performers and makers of sound recordings. As stated earlier, the case put forward by CAB in favour of a reduced rate is not sustainable. Consequently, the only options left are to maintain a one-on-one relationship between the neighbouring rights and the authors' rights or to adjust the rate upwards.

NRCC filed evidence tending to establish that royalties paid to performers and makers of sound recordings in free market transactions are approximately 2.5 times higher than royalties paid to authors.[13] Establishing this sort of comparison requires making the assumption that if performers do better than composers in a free market, they should be able to do as well in the other, regulated market. That assumption is not supported by the record of these proceedings. The evidence that performers may provide radio stations with more value than authors is far from conclusive. What the Board was offered in this respect was a series of anecdotal, impressionistic statements that often pulled either way.

For example, Ms. Smith and Ms. Kondruk, who are experienced advertising executives, testified to the effect that music is very personal to people, that radio is a niche medium, that advertisers pay for audiences, who in turn are drawn by music format. Such statements, in so far as they establish anything useful, are hardly helpful to NRCC, who wishes to show the importance of individual performers by contrast to the overall music format. In the same vein, their assertion that stations advertise themselves using the music format and the artist's image does not mean that the artist's image has higher promotional value than the music format; the image is but a tool to help identify the format.

For their part, Messrs. Lefebvre and Stein-Sack, who have long worked in the area of records sales and distribution, offered the view that while a record starts with a song, the magic (in the form of a symbiosis between the song, the performance and the production) must be there for the record to sell, adding that the songwriter is the most fragile, least visible and least compensated contributor in the whole process of production and sales of records. Again, such impressionist statements, which in any event go to the relative contributions of participants in the records market, are of little help in determining the relative value of recordings to radio stations.

In the end, it was probably Mr. Reynolds, president of Universal Music Canada, who best stated the conundrum, when he expressed the view that establishing the relative value of the authors'

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[13] The ratio, were it to be used, would have to be reduced to account for two factors. First, so-called "producers'" royalties should be excluded from the equation. Those royalties are paid to artistic directors who do not share in the remuneration right. Second, it is reasonable to assume that composers' reproduction royalties would be higher if they did not derive revenues from SOCAN.

and performers' contribution in a successful recording "is the classic chicken and egg situation. I don't think you can extricate the two and say, this is more important than that."[14]

The Board prefers deciding on the basis that there is no reason to believe that the use of sound recordings on radio stations has any greater value than the use of the underlying works. Several reasons point to this solution. First, nothing requires the Board to look to the market (and especially a different market) for guidance; it is within its discretion to decide that this approach is reasonable.[15] Second, these are similar uses of the same recordings by the same broadcasters. Third, it can be readily argued that a pre-recorded performance is worth no more to broadcasters than a pre-recorded work: in both cases, one is dealing with something that has already been fixed. Fourth, it matters not that one party was paid more than the other for making the fixation in the first place; we are dealing with two different markets and two different rights: the right to make the recording and the right to communicate it.

iv. The tariff rate

For the foregoing reasons, the Board concludes that most commercial radio stations should pay 45 per cent of what they pay to SOCAN, or 1.44 per cent of their advertising revenues, for the neighbouring rights.

All participants agree that stations that qualify as low music use stations for the purposes of the SOCAN tariff should pay 43.75 per cent of the royalties payable by other stations. Consequently, the rate for low music use stations (as defined by the participants) is set at 0.63 per cent.

On the other hand, participants disagree on the need for an even lower rate for all-talk stations. NRCC opposes the concept on the basis that SOCAN's tariff does not allow for it, that CAB has offered no evidence as to the number of stations that might be in this category and that the concept lacks sufficient clarity to be workable. For the following reasons, the Board grants CAB's request. First, the Board is satisfied that stations which do not use any eligible sound recordings other than production music should pay little neighbouring right royalties, if any. Second, this approach makes sense in this context, while it may not in SOCAN's tariff, given the nature of the respective repertoires. Third, the number of stations that will fall in that category is probably very small. Consequently, there is little risk involved in trying the formula. Having said this, the rate is set on a monthly, rather than yearly basis so as to better harmonize with the structure of the tariff, as will be outlined later.

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[14] Tr. p. 673.

[15] *Canadian Association of Broadcasters* v. *SOCAN* [1994], 58 C.P.R. (3d) 190 (F.C.A.). Interestingly enough, even American courts now seem to draw a distinction between market rates and reasonable rates: see *Recording Industry Association of America* v. *Librarian of Congress*, No. 98-1263, May 21, 1999 (U.S.C.A., D.C.)

v. The ability of the industry to pay the tariff

The tariff as certified by the Board would yield royalties of 11.29 million dollars per year[16] over the period of the tariff (1998 to 2002), if the 1997 figures on advertising revenues (the only figures available at the time of the hearing) were used and remained constant over that period. Yet, the application of subparagraph 68.1(1)(*a*)(i) of the *Act*, stipulating that commercial radio stations shall only pay $100 on their first 1.25 million dollars of annual advertising revenues, would reduce that amount to 5.68 million dollars. In addition, the phasing in of the regime over three years, would further reduce that amount to 1.89 million dollars in 1998 and to 3.78 million dollars in 1999.

The evidence provided by NRCC, and especially Exhibit NRCC-29, clearly established that the industry could have absorbed the full tariff, absent any special statutory provisions. Indeed, neither CAB nor its witnesses took issue with the validity or quality of NRCC's evidence on this point. Instead, CAB argued that NRCC's tariff as filed would deprive the industry of its recent hard-won profit margins, and would thereby deny it the investment capital needed to convert to digital technology and meet the competitive challenge posed by other major media.

The industry as a whole has come out of difficult years. Profit margins have grown and would have allowed the industry to absorb all of the tariff. Only small stations would have been put in difficulty; since Parliament has already addressed the issue, there is no need for the Board to do so. In the end, the fact that all stations will pay only $100 on account of their first 1.25 million dollars in advertising revenues, the level of the rate as set by the Board and the fact that there will not be a graduated tariff all combine to confirm that commercial radio stations will be able to afford the price they now have to pay for the neighbouring rights.

VI. ISSUES RELATED TO THE COLLECTION AND STRUCTURE OF THE TARIFF

A. WHO SHOULD COLLECT THE ROYALTIES?

NRCC wishes to collect all royalties payable under the tariff. SOGEDAM asks to receive the share attributable to its repertoire. Dealing with the issue of allocation raises two issues. What is the meaning of the single payment requirement set out in subparagraph 68(2)(*a*)(iii) of the *Act*? Can the Board direct users to pay SOGEDAM its share of the remuneration right?

i. The single payment requirement

In the Board's view, the arguments in favour of interpreting the single payment requirement as directing the Board to identify a single entity that will collect royalties on account of all the repertoire entitled to remuneration are overwhelming.

Thus, the requirement exists first and foremost for the benefit of users. Interpreting the single

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[16] The calculation was made using Statistics Canada data for 1997 advertising revenues filed into the record of these proceedings as Exhibit Board-3. [The total of 1.44% of $735.8M plus 0.63% of $109.9M]

payment requirement in this way is congruent with this benefit.

Second, this interpretation gives meaning to subparagraph 68(2)(*a*)(iii) of the *Act*. If the single payment requirement were to mean anything less, then subsection 19(2) of the *Act*, which already limits to one the payment to be made on account of any given recording, would have been sufficient.

Requiring that users make only one payment for the whole repertoire does not contradict the right of collectives to each file tariff proposals. The ability to ask for a tariff can readily be distinguished from the ability to act as collecting agent, as the home taping regime clearly demonstrates. Neither is it incompatible with a tariff that creates different structures for different parts of the repertoire. The Board could easily certify a tariff which has, say, a different price formula for SOGEDAM's repertoire than for NRCC's and still require that radio stations only pay at one designated place.

Consequently, the Board concludes that the single payment requirement entitles users to pay to a single collecting agent. Given that NRCC brings with it, through the makers it represents, all of the eligible repertoire that is properly before this Board, it is only logical to have it act as that collecting agent.

There are also practical reasons for selecting NRCC as the sole collecting agent for all royalties. First, NRCC controls all of the makers' rights in the repertoire entitled to remuneration. Second, this is the most efficient and practical way of dealing with the situation. NRCC is better placed than SOGEDAM to distribute royalties to all interested rights holders. Third, even in so far as French rights holders are concerned, SOGEDAM (who represents only some of the performers) has less at stake than NRCC, who represents all makers. Fourth, NRCC is likely to be better organized to manage the tariff for all concerned, including the monitoring of stations across the country, and the creation of appropriate databases for distribution purposes.

The Board is conscious that NRCC may be in a position to use its status as the only authorized collective in an attempt to force SOGEDAM to accept certain distribution practices which are the very reason why SOGEDAM was created in the first place. Unfortunately, the Board is there, first and foremost, to regulate the balance of market power between users and rights owners, and not, unless the *Act* says otherwise, between rights owners. SOGEDAM should direct any complaints it may have in this respect to the Commissioner of Competition.

ii. Can the Board direct users to pay SOGEDAM its share of the remuneration right?

Given the interpretation the Board makes of the single payment requirement, it is obviously impossible for it to direct users to pay SOGEDAM its share of the remuneration right in the recordings onto which its members' performances are embedded.

This interpretation is supported by subsection 19(3), according to which the division of royalties between performers and makers takes place once the royalties have been paid. The need for such a division, and the fact that it occurs after collection, applies to all equitable remuneration, whether or not it is subject to the SOCAN regime and whether or not the Board is involved in setting a tariff. If the division of royalties must occur after the payment is made, that division

cannot occur before.

This interpretation means that SOGEDAM's members cannot collect their remuneration right directly from the users through their society of choice. This is merely a facet of the economy of the statute, and is no worse than requiring the maker of a sound recording of a dramatic work to claim his share of the royalties from the performer if they were paid to the performer, or vice versa.

B. CAN THE BOARD DETERMINE THE SHARE SOGEDAM SHOULD RECEIVE?

SOGEDAM also would like that the Board set its share of the royalties. The Board is of the view that it cannot decide how co-creditors are to apportion the royalties among themselves.

Generally speaking, when the *Act* requires that the Board apportion royalties between collectives representing different groups of right owners, this is done expressly.[17] This is not the case here.

Furthermore, in regimes such as private copying, where such an apportionment is required, the *Act* does not establish in advance the shares attributable to the various colleges of rights owners; each group is entitled to claim the full value of its contribution, however established. By contrast, the neighbouring rights regime expressly provides for a single remuneration to be shared equally between performers and makers.

Moreover, nothing in the *Act* would allow the reader to infer a power of the Board to determine SOGEDAM's share of royalties as a necessary incident to setting the neighbouring rights tariff. As the regime is structured, the Board sets the royalties to be paid for the use of all sound recordings that are entitled to remuneration. Once this is done, the *Act* mandates equal sharing of the royalties between performers and makers. It is only once that split has occurred that the Board would come in if it were to determine SOGEDAM's share, that is, to determine how, as between those sharing in the performer's share, the entitlement to half the royalties should be divided. This is one step too far removed.

Finally, the Federal Court of Appeal has already ruled that the Board should not get involved in the allocation of liability between co-debtors:[18]

> the apportionment of the sums *payable ... between those who are*, by law, *... obliged to pay them* does not involve the determination of a royalty or of a term or condition relating to a royalty. *The sums that the various participants ... may owe to each other* are not royalties even though they are payable as a consequence of the payment of the royalties by one of them. The Board, therefore, was right in deciding that it lacked the jurisdiction to make that apportionment. [our emphasis]

One need only to substitute the word "share" for "pay" to make this statement applicable to the

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[17] See sections 73(1)(*b*), 83(8)(*c*) and (*d*) and 84.

[18] *Canadian Cable Television Association* v. *Society of Composers, Authors and Music Publishers of Canada* [1997], 75 C.P.R. (3d) 376.

issue at hand. That decision precludes the Board from getting into any division exercise that is not essential to the operation of the regime.

Consequently, it will be for SOGEDAM to claim its members' share from NRCC, as co-creditors of the royalties collected by NRCC.

C. TARIFF STRUCTURE

The following comments may help in understanding the tariff wording.

i. Phasing in

Given the nature of the tariff approved by the Board, there is no need to examine NRCC's proposal that the tariff be phased-in over five years instead of three.

ii. A graduated tariff

NRCC put forward several arguments in favour of a graduated tariff. Profit margins tend to increase rapidly with advertising revenues, so the structure is more sensitive to the financial circumstances of stations at various levels of revenue. Conversely, a flat rate would create an unnecessary burden to smaller, less profitable stations. Ability to pay is reflected in the entire tariff; all stations pay at the same rate for the same level of revenues.

CAB is opposed to the proposal on a number of grounds. First, if, as NRCC seems to accept, the value of sound recordings as a percentage of revenue is constant for all stations regardless of size, a graduated tariff imposes on certain stations tariff obligations which exceed the value of the repertoire. Second, a flat rate tariff is the only way that equity can be assured to all participants, and is consistent with SOCAN's Tariff 1.A. Third, all CAB stations support a flat rate tariff.

The Board agrees with CAB's reasons for rejecting a graduated tariff, and adds the following.

First, cross-subsidization may be justified to avoid the predictable negative response to a tariff by those who have to pay it and the undesirable impact that this may have on well established public policies. Such was the case with the retransmission of distant radio and television signals, where the risk of signal dropping and the need to ensure the provision of similar television services in all regions of the country were significant factors in requiring all systems to pay the same price irrespective of the number of distant signals carried. It is not the case here.

Second, cross-subsidization may also be justified to ease the financial burden of less profitable entities. However, if smaller stations truly require a break, it need not be at the expense of larger stations. More importantly, in the present instance, Parliament has already taken care of the problem for stations with revenues below 1.25 million dollars.

Third, NRCC's proposed cross-subsidization is justified only because of the high price demanded for its repertoire. With the lower tariff that the Board certifies, the need to find ways to reduce the burden on smaller stations is simply not there.

Fourth, adopting similar tariff structures for musical works and sound recordings will facilitate comparisons between the two tariffs.

CAB is also correct in saying that NRCC's proposal, as filed, runs contrary to Parliament's intent that all stations pay only $100 on their first 1.25 million dollars of advertising revenues. NRCC applied its proposed average rate to all revenues, including those covered by the special rate, and then devised a grid that would generate the same total royalties. As a result, the industry ends up paying more than the average rate on revenues not covered by the special rate, which alone ought to be used in establishing the return offered by the tariff irrespective of the formula used.

iii. Duration of the tariff

For many reasons, the Board concludes that the tariff should be set for five years instead of three. First, given the relationship the Board establishes with SOCAN's rate of 3.2 per cent, and the fact that CAB and SOCAN have agreed to maintain that rate for the next five years, there would be no point in reopening the neighbouring rights tariffs before then. Second, a five-year tariff keeps open the possibility of a joint hearing when the two tariffs expire in 2002. Third, five years should allow the market to adjust to the new reality; it would also allow the Board to make more useful observations on its real impact before embarking on a revision; better databases could also be put in place during that time. No one's interest would be served by putting this tariff back on the front burner after only a few months of its approval.

iv. General structure of the tariff

The proposed statement NRCC filed was largely based on the Retransmission tariff. The Board has preferred following the model set out in SOCAN's Tariff 17 (Transmission of Pay, Specialty and Other Cable Services). In some cases, however, provisions are closer to the Retransmission tariff (ss. 12 and 13) or are added to deal with needs that are specific to the neighbouring rights regime (s. 4).

v. Qualifying for a lower rate

The definitions used are those proposed by participants. Thus, qualifying for the low-use rate is entirely a function of so qualifying for the purposes of SOCAN's tariff, and all-talk stations are defined using language proposed by CAB.

As in SOCAN's tariff, a station must, as a condition of the tariff, keep and make available complete recordings of its last 90 broadcast days in order to qualify for a lower rate. The importance of the benefit stations derive from these measures justify making it such a requirement.

vi. A monthly tariff

As indicated in section 3 and other provisions of the tariff, royalties are to be calculated and paid monthly. This presents several advantages. First, it means that all calculations can be made on the basis of the reference month, the definition of which reflects SOCAN's tariff structure.

Second, it avoids the need to estimate royalties and make corrections. Third, this allows a station to move from one format to another without having to take into account considerations that may be linked to the fact that the tariff is partly on a monthly basis, and partly on a yearly one.

For the same reasons, the rate for all-talk stations is set at $100 per month.

vii. Taking into account the special provisions of subsection 68.1(1) of the *Act*

The tariff structure takes no account of the special provisions contained in subsection 68.1(1) of the *Act*. Instead, reference is made to it in section 4 of the tariff. These provisions apply "notwithstanding the tariffs approved by the Board". It is therefore appropriate that the tariff reflect what the Board would have considered fair and equitable absent those provisions.

It is also not necessary to specify how the stations are to take advantage of subparagraph 68.1(1)(*a*)(i) of the *Act*. Stations pay $100 on their *first* 1.25 million dollars of advertising revenues. In the Board's view, this means that the payment obligations imposed in the tariff only come into operation once a station's revenues exceed that sum. Moreover, trying to build in the exception into the tariff would have made it unduly complicated. By contrast, if the exception is applied the way the Board thinks it ought to be, the structure is simple, as are the rules. Stations will simply have to take note of the point in the year where they cross the revenue threshold and conduct themselves accordingly. The fact that this will mean that NRCC will receive little during the first few months of the year is a direct result of clearly expressed parliamentary intent.

viii. Reporting requirements

The reporting requirements are more or less on line with what the participants agreed to. The following issues are worth mentioning.

A) The requirement to provide play lists is included in the tariff, even though this is done voluntarily in the case of SOCAN. The difficulties NRCC experienced in getting information from some stations (who may not be members of CAB) amply justify making this a compulsory aspect of the regime.

The number of days for which stations must provide the information is set at 14, as is customary with SOCAN, rather than the 21 asked by NRCC. The provision is drafted so as to allow NRCC to select individual days (rather than one or more blocks of days) if it so wishes. The Board strongly expects that NRCC will cooperate with SOCAN so as to minimize the reporting burden of radio stations, and will entertain a request for a more formal form of cooperation if needed.

There is no need to deal with CAB's request that the tariff reflect the value to NRCC of being provided with play lists. Given the blanket nature of the regime, collecting this sort of information is necessary. As stations derive benefits from such regime, it is only normal that they should carry part of the burden of its efficient operation.

B) The tariff does not specify the number of audits NRCC can conduct in a given year. Such a limit has never been imposed on SOCAN, who appears not to have abused of this right. The Board is confident that NRCC will behave in the same fashion.

C) Stations will be required to pay for an audit if royalties are under-reported by 10 per cent of any audited month. NRCC was proposing five per cent and CAB 20 per cent. Ten per cent seems a reasonable compromise.

D) The Board was surprised by the amount of controversy surrounding the confidentiality provisions. CAB expressed misgivings about allowing access to station financial information to persons other than NRCC, such as royalty claimants or other collectives for the purposes of establishing entitlements to payment. It asked that as much as possible, aggregate figures, as opposed to station specific data, be used for those purposes. The Board trusts that the provision included in the tariff will address the reasonable concerns of CAB in this respect.

CAB also stated that play list information was sensitive competitive information for broadcasters. NRCC ended up conceding that point. The provision included in the tariff draws no distinction between the two types of information.

E) All stations, including those whose royalty payment will only be $100 per year, will be required to comply with the tariff's reporting requirement. Only in this way can NRCC and, through it, the Board keep abreast of the use being made of the eligible repertoire by all of the industry.

ix. Interest on late payments

The Board used the (simpler) formulation found in SOCAN's Tariff 17 instead of the one used in the retransmission tariff. Given that the tariff as structured does not require interim payments and adjustments, there is no need to be more specific.

x. Transitional provisions

The tariff contains, as did the 1990-1992 Retransmission tariff and SOCAN's Tariff 17 for 1990 to 1995, certain transitional provisions made necessary because the tariff takes effect on January 1, 1998 even though they were approved much later. A table sets out interest factors or multipliers to be used on sums owed in a given month. These were derived by using the Bank of Canada rates. 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 Board hopes that this will greatly simplify the stations' calculations and NRCC's verifications.

Claude Majeau
Secretary to the Board