

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**Date** 2001-06-15

**Citation** Public Performance of Musical Works 1998, 1999, 2000, 2001, 2002

**Regime** Public Performance of Musical Works  
*Copyright Act*, par. 67.1(5)

**Members** Justice John H. Gomery  
Mr. Stephen J. Callary  
Ms. Sylvie Charron

**Proposed Tariffs Considered** 4.A, 4.B.1, 4.B.3, 5.B – CONCERTS IN 1998, 1999, 2000, 2001 AND 2002

**Statement of Royalties to be collected by SOCAN for the public performance or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works**

**Reasons for decision**

**I. INTRODUCTION**

These reasons deal with paragraphs A, B.1 and B.3 of Tariff 4 (Concerts) and Tariff 5.B (Concerts at Exhibitions and Fairs) of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the years 1998 to 2002.<sup>1</sup> A proposed statement of royalties was filed and published in the *Canada Gazette* and a notice concerning the right to object to the draft was issued in accordance with section 67.1 of the *Copyright Act* (the *Act*).

Stardust on Duke (Stardust), VIACOM Entertainment Canada Inc. (Viacom) and the Canadian Arts Presenting Association (CAPACOA) filed timely objections. As Stardust failed to respond to various requests within the prescribed time periods, the Board deemed it to have abandoned its

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<sup>1</sup> Tariff 4.B.2, dealing with classical music concerts given by orchestras, was certified on July 30, 1999: *Statement of royalties to be collected for the performance or communication by telecommunication in Canada of musical or dramatico-musical works in 1997, 1998, 1999, 2000, 2001, 2002 and 2003*, [http://www.cb-cda.gc.ca/decisions/m300719\\_99-b.pdf](http://www.cb-cda.gc.ca/decisions/m300719_99-b.pdf); (1999) 87 C.P.R. (3<sup>d</sup>) 527.

objection. Subsequently, Viacom and SOCAN concluded an agreement that will be discussed later. As a result, only SOCAN and CAPACOA participated in the hearing, which took place over three days ending on March 8, 2001.

## A. HISTORICAL OVERVIEW

Two earlier decisions provide a detailed historical overview of the tariff.<sup>2</sup> Highlighting some of its characteristics will help better understand the issues at stake in these proceedings.

The tariff dates back to 1939. Essentially, it has always targeted specific events. At first, it reflected primarily the number of people a venue could accommodate. In 1983, it became solely a function of box-office receipts.

In that year, the combined rate<sup>3</sup> was 2 per cent for popular music concerts. In 1985, a lower rate was set for large-scale concerts; this measure was abandoned in the following year. The tariff remained unchanged until 1992, despite several requests for increases. The 1994 and 1996 decisions gradually increased the rate from 2.1 to 2.5 per cent. In 1994, the Board intimated that a rate of 5 per cent would be more in line with other tariffs. However, in 1996 it refused to implement this rate because of an agreement concluded between SOCAN and the Canadian Alliance of Music Presenters (CAMP), representing concert presenters who paid almost two-thirds of the concert royalties. Although the agreement was not legally binding, SOCAN indicated its intention to comply with it. Noting this, the Board refused to allow similarly situated concert presenters to pay different prices for their performing rights.

In 1983, the combined rate for classical music concerts was at 0.5 per cent. The 1994 decision increased it to 1.3 per cent to reflect, among other things, a greater use of protected music. This tariff has remained unchanged since then, so as to reflect the Board's intention that "the link between the classical and popular music concert tariffs should be loosened".<sup>4</sup>

In that same decision, the Board certified a tariff whereby classical music orchestras pay a fixed sum for each event, which increases with the overall budget of the ensemble (paragraph B.2). This tariff has increased over the years and will continue to do so until 2002 in line with the agreements concluded between SOCAN and the Association of Canadian Orchestras.

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<sup>2</sup> For the period prior to 1991, see *Statement of royalties to be collected for the performance or communication by telecommunication in Canada of musical or dramatico-musical works in 1992, 1993 and 1994*, August 12, 1994, (1990-1994) C.B.R. 385, 402-407, [http://www.cb-cda.gc.ca/decisions/m120819\\_94-b.pdf](http://www.cb-cda.gc.ca/decisions/m120819_94-b.pdf), 402-407; (1994) 58 C.P.R. (3<sup>d</sup>) 79, 95e-99a. [the 1994 decision]. For the period from 1991 to 1996, see *Statement of royalties to be collected for the performance or communication by telecommunication in Canada of musical or dramatico-musical works in 1994, 1995, 1996 and 1997*, September 20, 1996, [http://www.cb-cda.gc.ca/decisions/m200919\\_96-b.pdf](http://www.cb-cda.gc.ca/decisions/m200919_96-b.pdf), 10-11; (1996) 71 C.P.R. (3<sup>d</sup>) 196, 205. [the 1996 decision]. The Board issued another relevant decision in 1997: *Statement of royalties to be collected for the communication by telecommunication in Canada of musical and dramatico-musical works in 1996 and 1997*, decision of May 23, 1997, [http://www.cb-cda.gc.ca/decisions/m230519\\_97-b.pdf](http://www.cb-cda.gc.ca/decisions/m230519_97-b.pdf); (1997) 81 C.P.R. (3<sup>d</sup>) 315. [the 1997 decision].

<sup>3</sup> At the time there were two collective societies, CAPAC and PROCAN.

<sup>4</sup> 1996 decision, *supra* note 2, p. 21 (C.B.R. and Internet), at 213e (C.P.R.).

Also in 1994, the Board allowed concert presenters to pay 0.8 per cent of a season's receipts, regardless of the number of events in which protected music was used (paragraph B.3). This rate has not changed, for the reasons given with respect to the general tariff.

At first, free concerts were subject to the minimum tariff. The rate base became the cost of producing the concert starting in 1992, and then the fees paid to artists starting in 1995. The minimum per event tariff was set at \$50 in 1983, gradually increased to \$66 in 1989 only to be reduced to \$20 in 1990. It has not changed since then. Concert presenters who opt for Tariff 4.B.3 are not subject to the minimum tariff.

Royalties payable to SOCAN under the concert tariff, using the accrual method, were approximately \$ 4.05 million in 1996, \$4.10 million in 1997, \$5.02 million in 1998 and \$5.01 million in 1999. The number of licensed events has fluctuated substantially from 16,049 in 1996, 12,771 in 1997, 17,861 in 1998 to 18,561 in 1999. In 1999, popular music concerts produced royalties of \$4.56 million. Royalties attributable to classical music concerts were \$160,000 for Tariff 4.B.1, \$282,000 for Tariff 4.B.2 and \$5,000 for Tariff 4.B.3.

## **B. THE PARTIES' SUBMISSIONS**

SOCAN asks that all tariffs under review be gradually increased by approximately 20 per cent over five years, from 2.5 to 3 per cent for popular music concerts, from 1.3 to 1.56 per cent for classical music concerts and from 0.8 to 0.96 per cent for presenters whose licences apply to an entire season. It justifies this increase by referring to earlier decisions of the Board and by its witnesses' statements concerning the value of music to a concert and the relative lack of elasticity in demand for concert tickets.

CAPACOA concurs that rights holders must be paid for the use of their works. However, it maintains that nothing justifies an increase in the rate. SOCAN's revenues have increased substantially as a result, among other factors, of an important increase in ticket prices, even though the rate has remained unchanged. CAPACOA adds that account should be taken of the competitive context in North America, especially for large-scale events, and of the precarious financial situation of a number of concert presenters. It raises concerns about SOCAN's enforcement practices, which may work to the benefit of those who neglect to pay royalties.

## **C. TESTIMONIES**

The following witnesses appeared for SOCAN.

Mr. Paul Hoffert has worked in various capacities in the concert industry for some thirty years. Relying on three hypothetical scenarios, he concludes that an increase is justified, would have a minimal effect on audiences and presenters, and be beneficial to the rights holders. In his view, music (which includes the performer's performance) is what attracts the audience to a concert. Mr. Hoffert's testimony offered a useful introduction to the subject, although it later became clear that some of his views concerning the concert industry, such as the typical budget of a concert, were to some extent dated.

Messrs. John Burge and Marc Chabot testified respectively as a composer of serious music and

as a songwriter. They explained the difficulties faced by Canadian authors, especially those who rely on small or niche markets such as that for classical music or the Canadian Francophone market. Their testimony highlighted market differences that exist for serious and popular music, the main one undoubtedly being the fact that composers of serious music have access to sources of income other than copyright royalties (payments to composers in residence, commissioned works).

Mr. Dan Greenwood works in the royalty distribution department at SOCAN. His testimony shed considerable light on the distribution rules as they apply to the concert pool, the sources of money that go into the pool and to whom they are paid.

The testimony of Mr. Paul Spurgeon, General Counsel for SOCAN, addressed concert tariff revenues, the impact of rate increases during the 1990s, the importance of minimum rates, the reasons why SOCAN filed the proposed statements as they stand, the Viacom agreement and SOCAN's enforcement practices. He also commented on theoretical aspects of the general licence as interpreted by SOCAN.

Professor Abraham Hollander, an economist, sought to assess the effects of an increase in the tariff on attendance at popular music concerts on the basis of various studies on the elasticity of attendance at classical music concerts. All these studies, conducted at different times in different countries, conclude that an increase in ticket prices has little impact on attendance. Mr. Hollander next attempted to compare classical with popular concerts and concludes that elasticity of demand for the latter is slightly greater than for the former. He added that even if attendance at popular concerts were much more affected than he assumed by an increase in ticket prices, the tariff increase being considered still would have only a minimum impact on demand.

Messrs. Don Simpson and Charles Cutts as well as Ms. Catherine O'Grady testified for CAPACOA.

Mr. Simpson is Vice-President and Director of House of Blues, a company that produces hundreds of concerts across Canada every year in venues capable of holding between 200 and 50,000 people. In his testimony he sought to highlight certain factors that, in his view, tend to make the task of concert producers increasingly difficult. First, performers now have unprecedented bargaining power in the concert market. In the past, producers could expect to receive 40 per cent of net revenues after retaining a percentage of gate receipts to cover operating expenditures. Today, contracts no longer include these terms and producers must in effect pay such expenditures out of their share of the revenues. A star performer is able to demand up to 90 per cent of net revenues as well as substantial guarantees.<sup>5</sup> Second, touring has evolved from being an advertising vehicle for sound recordings, to become a major source of revenues; for some performers, sound recordings have become a promotional vehicle for the tour. Third, producers play a major role in promoting new talent, and tours by international stars help to provide visibility for local talent.

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<sup>5</sup> At least in the English-language market. No evidence was adduced concerning the French-language market.

Mr. Cutts is President and COO for the Corporation of Massey Hall and Roy Thomson Hall. His testimony focussed on the following points. First, the power enjoyed by certain performers can be explained in part by the surplus number of venues with a certain capacity, whether they be traditional halls or large-scale clubs. Second, as a result of fierce competition, some producers have ceased operations at the same time as certain venues are abandoning all production activities. Venues at which concerts are still given depend increasingly on what used to be regarded as secondary revenues such as parking charges.

The testimony of Messrs. Simpson and Cutts helped the Board to better understand the concert market and the competition for large-scale concerts offered by American venues located within about 500 km of major Canadian centres. They also highlighted the substantial risks involved in producing and presenting concerts and managing concert halls.

Ms. O'Grady is Executive Producer of the Ottawa International Jazz Festival. She spoke passionately about her interest in the rights of artists and her fears about a possible unequal enforcement of the tariff. Whereas SOCAN lists some 74 Canadian jazz or folk festivals that hold a licence, Ms. O'Grady stated that she knows of at least six jazz festivals that do not pay royalties.

## **II. ANALYSIS AND REASONS**

### **A. THE REQUESTED INCREASE**

This matter highlights once again the confusion between the aesthetic "value" of the music and the loss of time available for other activities involved in the composition of a work, on the one hand, and the economic contribution made by a protected work to a concert as "product", on the other. The price that a concert presenter or a performer is prepared to pay in order to be able to use a work depends on a number of factors. Among these, aesthetic value or the investment required to complete a work play a secondary role. Even the fact that the music and its performance are the focus of the event does not, in itself, provide a basis to evaluate this contribution.

Many reasons explain why even well-known artists cannot live from their art or at least from their copyright revenues. Revenues derived from the use of a work in a limited market will always be modest, even though the work is of very great aesthetic or cultural value. Not many lyricists can expect to derive a decent income from copyright in the Quebec market alone, but this does not mean that the situation can be rectified by increasing royalties. If, as some would argue, North American culture tends to undervalue the economic contribution of cultural industries, the overall solution lies in actions to be taken by government and other parties.

The evidence adduced by CAPACOA tends to overestimate the problems facing presenters and operators of venues, and especially the extent to which an increase in the concert tariff may exacerbate them. Competition is fierce in this particular market. If commercial producers are still active there, it is probably because they derive some sort of benefit from doing so. An increase in the concert tariff has the same impact for everyone in the Canadian market. Even American venues should not derive a substantial competitive benefit from this. Were it true that the proposed increase would have a major impact, one would expect that a fluctuation of less than

half a cent in the exchange rate for the Canadian dollar would lead to an exodus of concerts in one direction or a substantial increase in the other. In any event, it has to be recognized that the market has absorbed a large increase in ticket prices; under these circumstances, and in the absence of compelling evidence showing that this increase has led to a decline in the number of tickets sold,<sup>6</sup> it may be assumed that the demand for these tickets is somewhat inelastic.

The fact that some businesses that manage concert venues have become integrated corporations relying on various income sources other than box-office revenues is not in itself a sign that the concert industry is experiencing problems. Integration of this kind is a phenomenon in many markets; moreover, it is on the basis of all of its activities that the profitability of a business must then be assessed. If new venues emerge (e.g., clubs) capable of competing with traditional venues by relying on a variety of sources of income, it is certainly not by tinkering with a tariff that targets traditional venues that the situation will be remedied.

In the final analysis, in the market as it currently exists, certain factors tend to justify a price increase whereas others tend to promote a certain degree of stability.

The fact that performers are earning larger fees tends to favour a rate increase, to the extent that one seeks to maintain an equitable division of revenues flowing to the creative inputs in a concert.<sup>7</sup> The fact that SOCAN derives a direct benefit from an increase in ticket prices is not enough; the rate itself must be corrected.

The fact that the majority of Canadian performers use their own material in concerts<sup>8</sup> is an argument for greater stability. The greater the share of revenues paid to performers, the more they bear the cost of the licence. Under that hypothesis, any payment of royalties only delays the payment of remuneration to its ultimate recipient.

SOCAN filed the agreement it reached with Viacom covering the public performance of music, including concerts, at Canada's Wonderland theme park. Pursuant to the agreement, the concert tariff increases from 2.5 per cent in 2000 to 3 per cent in 2005. Obviously, this contract is not as significant as the CAMP agreement; the role which Canada's Wonderland plays as concert presenter is modest, since fewer than a dozen concerts are given there each year. Nevertheless, it

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<sup>6</sup> In this context, the evidence available to the Board is contradictory, to say the least: see, for example, exhibits CAPACOA-5 and CAPACOA-9.

<sup>7</sup> See, for example, the Board's decisions concerning SOCAN Tariff 17: *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*, April 19, 1996, [http://www.cb-cda.gc.ca/decisions/m190419\\_96-b.pdf](http://www.cb-cda.gc.ca/decisions/m190419_96-b.pdf), 20-21; (1996) 70 C.P.R. (3<sup>d</sup>) 501, 519f-520c; *Statement of royalties to be collected by SOCAN for the public performance or the communication by telecommunication, in Canada, of musical or dramatico-musical works [Tariff 17.A in 1996, 1997, 1998, 1999 and 2000]*, February 16, 2001, [www.cb-cda.gc.ca/decisions/m16022001-b.pdf](http://www.cb-cda.gc.ca/decisions/m16022001-b.pdf), 7. See also the Board's decisions concerning retransmission: *Statements of royalties to be paid for the retransmission of distant radio and television signals in 1992, 1993 and 1994*, January 14, 1993, (1990-1994), C.B.R. 135, 189-190, [http://www.cb-cda.gc.ca/decisions/r1401199\\_3-b.pdf](http://www.cb-cda.gc.ca/decisions/r1401199_3-b.pdf), 189-190; (1993) 47 C.P.R. (3<sup>d</sup>) 327, 373d-374f.

<sup>8</sup> According to the 1994 decision (note 2), this would be true of between 85 and 90 per cent of concerts in English Canada and between 70 and 75 per cent of concerts in French Canada.

is a further indication that the market is able to absorb the increase sought by SOCAN.

To conclude, and for the purpose of these proceedings, it suffices to say that the record and a comparison with the other SOCAN tariffs fully justify the increase requested for popular concerts. The rate of the tariff will accordingly rise from 2.5 to 3 per cent over a five-year period.

The record as it relates to classical music concerts is, to say the least, superficial. Nevertheless, the analysis offered with respect to popular concerts also applies to classical concerts and accordingly, the adjustment requested is justified. The rate in paragraph 4.B.1 will therefore increase gradually to 1.56 per cent, and that in paragraph 4.B.3 to 0.96 per cent. As stated in its 1996 decision, the Board nevertheless hopes that the link established to date between the classical and popular music concerts can eventually be loosened, thus enabling it to establish the fee to be paid for classical music in a more independent manner.

In the interest of simplicity, the Board considered adjusting the timetable of the tariff to the one set out in the Viacom agreement. It abandoned that idea. Unlike the CAMP agreement, the Viacom agreement applies only to a specific presenter in a specific market. It involves fewer than a dozen shows each year. It should be added however, that even though they are not binding, agreements concluded with SOCAN reflect a form of market activity that should be encouraged. Allowing all concert presenters to enjoy the benefits that Viacom has obtained in exchange for waiving its right to object to the tariff would remove all incentive to settle.

## **B. TARIFF WORDING**

In paragraph 13 of its statement of case, SOCAN maintains that aside from certain minor adjustments, the wording of the proposed statement of royalties is identical to that of the tariff approved for 1997. Yet, some of the suggested adjustments seem important.

For example, it is expressly stated that institutions subject to Tariff 3.A may not rely on the concert tariff. Based on what little information the Board has gleaned over the years about the commercial practices of bars and clubs that present concerts, it is entitled to presume that 3 per cent of the artist's fee amounts to more than 3 per cent of the cover charge. Witnesses for CAPACOA stated that some of these establishments are in direct competition with concert presenters. It would have been preferable for SOCAN to provide further evidence on this question. However, since we are dealing here primarily with a clarification that goes some way toward recognizing a difference in the commercial structure of two different although related industries, the Board will grant the request for the change.

Similarly, a section dealing with a series of free concerts is added to paragraph 4.B.3. SOCAN should have provided an explanation of this change, if only to illustrate how it might impact on the royalties to be paid by festivals. This being said, most of the suggested changes are a step toward greater fairness or favour users. CAPACOA did not raise any questions in this regard. The Board will accordingly make the changes requested, pending further explanations of the impact of these measures in upcoming hearings.

### **III. QUESTIONS TO BE BORNE IN MIND CONCERNING THE NEXT CONCERT TARIFF**

This tariff will expire at the end of next year. SOCAN will accordingly have to file a further proposed statement of royalties in March 2002. The Board finds it useful to repeat some of the questions raised in the 1996 decision and during the hearing in the present case. These questions relate to possible changes in behaviour or in business practices or the implementation of a system for collecting data. In so doing, the Board is seeking to outline the kind of evidence that might influence its next decision. It is not making a final judgment on the relevance of such evidence or indicating whether its expectations for the compilation of data are realistic. It is precisely because the Board admits that it does not know how to deal with these issues that it considers it important to highlight them, so as to ensure that interested parties are able to address these issues knowledgeably.

#### **A. TARIFF STRUCTURE**

At the hearing leading to the 1996 decision, several witnesses “outlined a number of seemingly endemic problems with the current tariff structure which could raise serious doubts as to its long-term appropriateness.”<sup>9</sup> It is possible that some of these problems persist while others have faded away.

The Board is still concerned that a per event tariff may be inefficient. SOCAN also appears to recognize this since the lion’s share of concert royalties is paid by presenters who report to it periodically and not after each event. The Board understands why SOCAN strives to maintain a link between royalties and the event: the laudable efforts it makes to pay those whose works have been used during a particular concert would be to no avail if this link did not exist. The Board’s objective is a tariff formula that would allow SOCAN to continue to distribute concert royalties as at present while eliminating some of the administrative expenses which end up being borne by members of SOCAN as well as by users.

The rate base applicable to concerts at which tickets are sold takes no account of sponsorships or grants.<sup>10</sup> This raises the issue of fairness to authors. It may be that a tariff under which the rate base would be the greater of box-office receipts and the artists’ fees should be considered.

Finally, the question remains of how to deal with authors who do not perform their own works. An increase in the tariff necessarily has a greater impact on them than on those who do; the greater the performing author’s share of net revenues, the greater the share of SOCAN royalties he or she actually pays, assuming the show is successful. This question does not appear to unduly concern SOCAN’s members. It would no doubt be useful to have better information in this regard.

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<sup>9</sup> 1996 decision, *supra* note 2, (Internet) at p. 15, at 208h (C.P.R.).

<sup>10</sup> It is reasonable to assume that these income streams tend to inflate artists’ fees, which are used to calculate the royalty for free concerts.



## **B. A TIERED TARIFF**

The Board wishes to express two concerns with respect to a tiered tariff. First, as the rate increases, so does the need to consider allowing a discount for the use of works that are not in SOCAN's repertoire.

Second, the larger the event, the more it becomes important to consider the competitive disadvantage faced by Canadian presenters as compared with American presenters. Although taxes and the exchange rate have more impact than SOCAN royalties on the decisions of foreign performers to perform in one country or the other, it may be that a tiered tariff for large-scale concerts is something that should be re-examined.<sup>11</sup>

## **C. MINIMUM LICENCE FEES**

Some of the comments made earlier concerning the tariff structure also apply to minimum licence fees. It may be useful to add the following.

Given the lack of any evidence on this issue and CAPACOA's apparent acquiescence on the subject, the Board agrees to maintain a minimum rate of \$20 per concert for the time being. Nevertheless, it remains concerned that one half of all licensed events pay the minimum for their SOCAN licence. As SOCAN already knows, it is often the case that the greater the percentage of minimum fee licences, the less the relevance of a tariff formula.<sup>12</sup>

One may therefore expect the Board to move to eliminate minimum licence fees if SOCAN is not able to establish that the tariff structures it proposes are efficient. That will be even truer if SOCAN tries to justify this minimum on the basis of the administrative cost to SOCAN to issue a licence. A user who bears that cost is entitled to expect that such expenditures will be reduced to a minimum.

On March 30, 2001, SOCAN filed a study on minimum prices. The Board did not find it necessary to take it into account for the purpose of this decision. It expects to distribute this study widely, as well as others, in a consultation process that remains to be determined.

## **D. CLASSICAL MUSIC CONCERTS**

The Board recognizes that the royalties attributable to all classical music concerts do not exceed \$500,000. This necessarily has an impact on how much SOCAN may reasonably spend to compile data. The evidence in these proceedings concerning the use of protected music in these concerts is nevertheless very superficial. The Board would have preferred to have more detailed

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<sup>11</sup> On the other hand, American artists clearly continue to tour Europe despite the fact that concert royalties are much higher there.

<sup>12</sup> *Statement of royalties to be collected by SOCAN for the public performance or communication to the public by telecommunication, in Canada, of musical or dramatico-musical works [Tariff 9 - Sports Events in 1998, 1999, 2000 and 2001]*, September 15, 2000, [http://www.cb-cda.gc.ca/decisions/m15092\\_000-b.pdf](http://www.cb-cda.gc.ca/decisions/m15092_000-b.pdf); (2000) 9 C.P.R. (4<sup>th</sup>) 36, at p. 45.

analyses that would allow it to make verifications in respect of each concert and that would include, for comparison purposes, events where only public domain music is used. It may be that the data concerning orchestras subject to Tariff 4.B.2 are sufficiently sound to be used as a starting point for these calculations.

#### **E. MUSIC FESTIVALS**

The testimony of Ms. O'Grady raised certain concerns. Are festivals confronted with reporting obligations that they are quite simply incapable of fulfilling? Would it be possible to report more efficiently the use that is made of SOCAN's repertoire during these events? Should festivals be subject to a simpler or more uniform tariff formula (e.g., one based solely on artists' fees)? The Board is not certain that it clearly understands how royalties are calculated, especially when purchasing a passport does not give access to all events; if the rate base for concerts which require both a passport and an additional payment is that payment, then it may not be enough.

#### **F. CAPPING THE RATES**

On more than one occasion, CAPACOA's representative and its witnesses wondered how far SOCAN would go in its requests for increases. Users can probably assume that even though nothing in the present circumstances, viewed as a whole, leads the Board to believe that a rate of 5 per cent, such as mentioned by the Board in its 1994 decision, would not be reasonable, the Board will need firm evidence concerning the financial situation of the industry and the impact of the increases granted in this decision before allowing further increases.

Users can therefore expect that any new increase will occur gradually. It should also be expected that any cycle of increases will be followed by a period of stability. Over the ten-year period that coincides with the end of the current tariff, the rate will have increased by 50 per cent. A pause would allow the Board to measure the impact of those increases; the underlying economic trends could then be expected to clearly emerge. The savings in resources achieved by avoiding repeated applications for increases would also make it possible to devote greater effort to the development of the best possible data given the available resources when the time came to review the situation.

#### **G. UNIFORM ENFORCEMENT AND RELATIONS WITH USERS**

Some licensees appear to be greatly concerned with the uniform enforcement of the tariff. It is not known whether the six festivals that, according to Ms. O'Grady, do not pay royalties are isolated instances or whether they represent a general trend. Knowing what proportion of users fulfil their obligations would be very useful, although one is forced to admit that this could prove to be difficult if not impossible: how may one learn of unsuspected uses when the users remain unknown? Having said this, it may be reasonable to assume that there are various ways of measuring the overall activity in this market.

Some users claim that they owe SOCAN nothing as they are charitable organizations. From the Board's point of view, it is not important whether they are right or wrong. What is important is that the issue be disposed of quickly. The uncertainty that prevails in this regard is unhealthy. SOCAN should concern itself with a more uniform enforcement of its tariffs or better explain the

efforts it is already making in this regard; the alternative is greater resistance to its collection efforts.

The need to have access to clear and accurate information concerning SOCAN's practices finds a particularly dramatic illustration in the case of the distribution rules that apply to the concert pool. The Board is left with the impression that concert presenters would be less reluctant to fulfil their obligations if they were aware of the efforts SOCAN makes to pay royalties to those whose music is actually used. Small concert and serious music concert presenters, more than anyone else, tend to use music to which they attach particular importance. If they realized that the sums paid to the composers of this music are much greater than the royalties collected (since SOCAN effectively subsidizes these events), presenters would quickly realize how important it is that they make payments, however modest, and report fully on the use of the music.

While SOCAN seeks above all to serve its members, it should remember that it serves two clients: authors and those who use their works. The evidence in these proceedings indicates that SOCAN is making certain efforts to be friendlier to users. These efforts are praiseworthy. The Board hopes to learn more in the future concerning initiatives such as on-line licences, reducing the burden on users who require multiple licences and other user-friendly innovations.

#### **H. ECONOMIC AND INDUSTRIAL DATA**

The economic evidence filed by SOCAN in these proceedings seems methodologically sound. However, it presents a number of deficiencies, probably as a result of limits imposed on the mandate of its experts. It is possible that these limits were imposed for valid financial reasons. All the same, a study of the elasticity of demand for concert tickets using a limited number of variables is of marginal use to the Board. To say that a small change in the cost of an element accounting for only a modest share of the operating budget of an event has little overall impact is self-evident.

More generally, the Board would hope to have more tangible economic data at its disposal to enable it to assess the impact of the tariff on the industry. Would it be reasonable to try to illustrate in detail changes in ticket prices, the number of events, revenues and the cost of inputs within a given region? Would it be possible to study changes in the promoters' other sources of income (grants, sponsorships, merchandising) and their impact on the industry's balance sheet? Would less costly data still allow the Board to reach enlightened conclusions? The Board would like the economic data on which it bases its decisions to be more informative.

During his arguments, CAPACOA's representative referred to the "ecology" of the concert industry. That is certainly an interesting way to describe the interconnections that influence the making of decisions in this industry. The Board would prefer to limit itself to an analysis of factual data such as the number of concerts by type, the number of paid seats in absolute terms and according to venue capacity and so on. The Board needs more precise data on various factors that, according to CAPACOA, have an impact on this ecology: American competition, taxes, subsidies from stars for young artists, the promotional value of a tour in terms of record sales, the relative importance of large-scale concerts, and characteristics of events that involve risk taking as compared with those that do not.

The Board would especially like precise data on the number of licences issued at the minimum tariff, broken down in terms of the number of such licences issued to the same person, with an indication of the number of licences for which the royalties are above the minimum level.

Those who say that a single participant cannot be expected to devote the necessary resources to compiling these data are probably right. Perhaps the time has come for all interested parties, whether they be SOCAN, concert presenters, CAPACOA, interested government departments (Canadian Heritage, Industry Canada, Statistics Canada, provincial departments with responsibility for cultural industries) and even the Board itself to consider joining forces in order to gain access to data that would allow all parties to be better informed.

#### **IV. CONCLUSION**

As the representative of CAPACOA noted during his oral submissions, the relations between his association and SOCAN are characterized by cooperation more than by confrontation. The Board intends to provide all possible assistance to the applications of interested parties to ensure that this continues to be the case.

A handwritten signature in cursive script that reads "Claude Majeau".

Claude Majeau  
Secretary General