

Copyright Board
Canada



Commission du droit d'auteur
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Regime Retransmission of Distant Radio and Television Signals
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Members Michel Hétu, Q.C.
Mrs. Adrian Burns
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Statement of Royalties to be collected for the retransmission of distant radio and television signals, in Canada, in 1998, 1999 and 2000

Reasons for decision

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I. INTRODUCTION

A. THE PROCEEDINGS

On March 31, 1997, the eight collective societies who filed tariff proposals in the previous retransmission proceedings (for 1995-1997) ¹ filed, for the first time, joint statements of proposed royalties for the retransmission of distant radio and television signals for the years 1998, 1999 and 2000. A ninth society, the *Société des auteurs et compositeurs dramatiques* (SACD), filed a statement for distant television signals but withdrew it upon reaching an agreement with the Canadian Retransmission Collective (CRC) for the representation of SACD's works.

These statements were published in the *Canada Gazette* on June 21, 1997. They included a first set of rates, identical to the 1995-1997 certified tariffs, and a second set of higher rates to account for the value of compilations claimed by certain collectives. ²

Objections were received from the Canadian Cable Television Association (CCTA), ExpressVu Inc. (now Bell ExpressVu) and Star Choice Television Network Incorporated (Star Choice). Star Choice did not participate in the hearings.

The collectives represent program suppliers, broadcasters, major sports leagues and music rights owners as follows:

the Copyright Collective of Canada (CCC) and the Canadian Retransmission Collective (CRC) for the program suppliers;

the Canadian Retransmission Right Association (CRRRA), the Canadian Broadcasters Rights Agency (CBRA), the Border Broadcasters (BBC) and the Canadian Retransmission Collective (CRC) for the broadcasters;

the FWS Joint Sports Claimants (FWS) and the Major League Baseball Collective of Canada (MLB) for the major sports leagues; and

the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the music rights owners.

The objectors represent terrestrial cable operators (CCTA) and direct-to-home ["DTH"] systems (Bell ExpressVu and Star Choice).

On October 6, 1998, CCTA and the collectives reached an agreement concerning the television

¹ For television signals: the Border Broadcasters (BBC), the Canadian Broadcasters Rights Agency (CBRA), the Canadian Retransmission Collective (CRC), the Canadian Retransmission Right Association (CRRRA), the Copyright Collective of Canada (CCC), the Major League Baseball Collective of Canada (MLB), FWS Joint Sports Claimants (FWS) and the Society of Composers, Authors and Music Publishers of Canada (SOCAN). For radio signals: CBRA, CRRRA and SOCAN.

² The compilers' collectives eventually withdrew their request for an increased rate on account of compilations.

signals which carried forward the 1995-1997 rates applicable to terrestrial retransmitters, subject to the Board's determination of the value of the compilation claim. A separate agreement was reached for radio signals (see section II.J below).

The Board held 12 days of hearings between October 6 and 23, 1998. Submissions were completed on December 22, 1998.

On February 12, 1999, the Canadian Radio-television and Telecommunications Commission (CRTC) ordered that all Canadian retransmitters carry the French-language network TVA. As a result, CCTA asked on February 26, 1999 that the retransmission proceedings be reopened. This resulted in lengthy exchanges between the Board and participants, which culminated on October 22, 1999 in final filings of evidence and arguments.

B. THE ISSUES

The issues in the current proceedings were as follows:

1. Should DTH systems be entitled to a Francophone market discount, as terrestrial systems are?
2. Should Bell ExpressVu pay less to account for payments made to local broadcasters in consideration of their waiving their right to require programming deletions?
3. What are the value and legal status of compilations? Are compilations protected works entitled to compensation under the retransmission regime? Should they attract an increase in the rates? Are they worth more than what has been paid on account of them in the past?
4. Should the Board change its royalty allocation methodology, as requested by FWS?
5. Is the TVA service a "signal" within the meaning of section 31 of the *Copyright Act* (the "Act")? If so, should retransmitters who carry it as their only distant signal as a result of a recent order from the CRTC be excused from paying royalties or be entitled to a discount?
6. Should SOCAN's share be revised downward?

II. ANALYSIS

A. DISCOUNT FOR DTH SYSTEMS IN FRANCOPHONE MARKETS

Retransmitters that serve "Francophone markets" as defined by the CRTC are entitled to a 50 per cent discount. The discount takes into account, among other things, that Quebec subscribers receive on average fewer distant signals, that most of those signals are in the English language and that distant signal viewing in Quebec is significantly lower than in the rest of Canada.

As the Board stated in its first retransmission decision, the wording of section 3 of the *Local Signal and Distant Signal Regulations* makes it clear that all the signals a DTH system retransmits are distant to all their subscribers. Notwithstanding this fact, Bell ExpressVu asks that DTH systems be entitled to a similar discount for all subscribers who take the basic Francophone package without also taking one of the optional packages said to target Anglophone or bilingual subscribers.

To support its conclusion, Bell ExpressVu relies essentially on the argument that the four Montreal-based stations offered in the basic Francophone package are “virtual” local signals to most Quebec subscribers. In that province, French-language networks already have over-the-air penetration levels ranging from 80 to 98 per cent. Furthermore, regional stations duplicate close to 100 per cent of the Montreal signal. As these signals are basically local to cable subscribers, both their value to Bell ExpressVu and the harm to program owners are reduced. Bell ExpressVu argued that any benefit it obtains from the retransmission of “virtual” local signals is no greater than that which a cable system obtains from retransmitting local signals.

Responding for the collectives, CCC argued that the “virtually local” characterization of the subject distant signals is not a valid consideration. The fact that all signals retransmitted by DTH operators are distant is the result of a regulatory definition. If Bell ExpressVu wants the Regulations changed, it should address itself to the Governor-in-Council.

CCC also underlined that any discounts allowed in the past have been based either on evidence of higher operating costs of certain cable systems (mid-sized systems) or on evidence indicating that retransmitted signals have a lower value due to (1) lower usage levels (hospitals, nursing homes, hotels, schools); (2) duplicate programming on local signals; or (3) preponderance of English-language distant signals in Francophone markets.

CCC added that Bell ExpressVu’s argument incorrectly focusses on the harm to copyright owners, a factor which has never been applied by the Board in setting the overall royalty rate or in providing discounts.

Finally, CCC pointed out that cable systems in Quebec carry on average fewer than one French-language distant signal. That, in its view, explains why in granting the discount to Francophone market cable operators, the Board focussed on the value of the English language distant signals in those markets. CCC adds that such a focus makes no sense in the case of DTH systems, which carry four French-language distant signals in those same markets.

All signals retransmitted by DTH systems are distant as a result of regulatory policy. Consequently, these signals should trigger full remuneration unless a case can be made for a discount. In the Board’s view, that case cannot be made, for two reasons.

First, the tariff already ensures that systems carrying many distant signals are not prejudiced. DTH systems, which carry only distant signals, benefit greatly from this tariff structure.

Second, the basic package DTH subscribers must purchase is more limited (and cheaper) than that offered to cable subscribers, who must purchase all basic services, including local and distant French and English-language Canadian signals and the American networks. All other signals offered by DTH systems, whether purchased as packages or on a signal-by-signal basis, are offered on an optional basis. Accordingly, it is fair to say that DTH subscribers, including those who purchase only the basic package, subscribe to packages that contain mainly signals that are valuable to them. The fact that these signals may be characterised as “virtually local” clearly does not reduce their value to Bell ExpressVu and its subscribers.

B. RATE REDUCTION OF 5.5¢ FOR DTH SYSTEMS

Bell ExpressVu has agreed to pay to local broadcasters certain amounts so as to be relieved from having to comply with programming substitution and deletion obligations imposed on DTH systems by the CRTC. Bell ExpressVu therefore asks for a rate reduction of 5.5¢ to account for the value of those payments.

The purpose of these payments is to compensate local broadcasters for their loss of programming exclusivity. Their effect is not to reduce distant signal value but rather to maintain it, by ensuring the non-deletion of the programs they carry. Accordingly, the Board rejects the proposal.

C. BROADCASTERS' COMPILATION

In its last decision of June 28, 1996, the Board ruled that the broadcast day is a compilation of dramatic works, protected under the *Act*. The Board also decided to recognize the value of compilations through a reallocation of the royalty rather than through an increase in the royalty rate, and set their share of royalties at 0.67 per cent. Nevertheless, the full range of issues raised at the time was revisited in these proceedings. CCC and CCTA challenged the legal validity of the compilation claim. The compilers (BBC, CBRA and CRRRA) put forward a new approach to valuation which would increase their share to between 10 and 15 per cent of the total royalty, while CCC and CCTA argued that the value previously established by the Board was appropriate and even generous. CCC also asked that any compilation value be added to the rate rather than through reallocation, while CCTA proposed that the value be recognized through reallocation without increasing the rate.

i. Legal Entitlement

Participants asked that the evidence adduced in this respect in the proceedings dealing with the tariffs for the years 1995 to 1997 should form part of the record of these proceedings.

CCTA and CCC argued that changes brought about by Bill C-32 deprived broadcasters from claiming retransmission royalties for their broadcasts. In their view, the *Act* now expressly limits broadcasters' rights over their signals to what is set out in its section 21.

In short, the Board agrees with the compilers who submit that Bill C-32 simply grants broadcasters new rights over their signals. Those rights are distinct from the rights that they had, and continue to have, over their works, whether such works are programs or compilations of programs. By extending to broadcasters limited rights over their signals, Parliament cannot have meant to affect the broadcasters' rights over their works.

CCTA also submitted that broadcast compilations are not "works" within the meaning of the *Act* and therefore cannot found a claim for royalties. The same argument was made in the previous proceedings. There have been no changes in fact or law. For the reasons set out in its previous decision, the Board dismisses this argument.

Consequently, broadcast compilations are protected works and entitled to remuneration under the retransmission regime.

ii. Royalty Increase or Re-Allocation

CCC's arguments in favour of accounting for the value of compilations through an increase in the rates are similar to those made in the last proceedings. For the reasons set out in its previous decision, the Board dismisses them.

iii. Valuation

In its previous decision, the Board declined to value compilation based on total expenses attributable to compilation.³ Instead, it developed its own formula, based on the average amount of distant signal viewing.⁴ The Board's approach was intended to grant compilations the same value as other works: since compilations receive little viewing as works, it followed that they should receive only a small share of the royalties.

The compilers urge the Board to abandon its 1996 formula in favour of a completely new approach which they argue will more adequately reflect the relative value of compilations to programs. The CCC and CCTA counter that compilations have little or no value; however, they do not find the Board's formula unreasonable nor do they object to the 0.67 per cent allocation.

a. Compilers' critique of the Board's formula

The compilers submit that the Board's current formula fails to measure compilations on the same basis and against the same standard as works, confuses individual value with aggregate value, and is grossly lopsided in favour of programs. The Board disagrees.

First, the compilers argue that, since compilation viewing and program viewing are coextensive, if 0.67 per cent of the available (supplied) compilations are being consumed (viewed), then only 0.67 per cent of the available programs are also being consumed. This would lead to the conclusion that the total value of all programs equals the total value of all compilations. Since the conclusion is obviously incorrect, the compilers argue that the information is of no assistance in comparative analysis, and that the Board's formula fails to measure compilations on the same basis and against the same standard as works.

The compilers also challenge the Board's premise that the consumption of compilations is different from the consumption of programs (compilations being viewed only in small portions, while works are generally viewed in their entirety). They argue that the allocation of viewing credits to programs is done without taking into consideration whether they are watched in part or in whole; and that, therefore, there are no grounds for treating compilations differently.

³ Paragraph 4 on page 10 of the 1996 decision sets out the reasons why such method is inappropriate and uncertain.

⁴ The compilers' allocation was calculated as follows: cable subscribers receive an average of 4.35 distant signals, with a total of 609 hours per week of BBM-monitored programming on distant signals; the average viewer spends 17.56 per cent of his weekly viewing (i.e. 4.09 hours out of 23.3 hours) viewing distant signals; therefore, subscribers spend 4.09 hours out of 609 hours (or 0.67 per cent) viewing distant signal compilations. As a result, the compilers were allocated 0.67 per cent of the tariff rate.

This argument fails to take into account the fact that even the simplest of daily compilations comprises dozens of individual programs. Any retransmitter supplies to its subscribers, in a given year, thousands of programs. The average subscriber will also view more than a thousand programs in that year. By contrast, in a given year, that same subscriber only has access to a handful of distant signal compilations, and normally watches only one such compilation at any given time. Compilations are different in nature from programs and are small in number: as a result, compilations and programs cannot be compared and assessed on the same basis.

Second, the compilers submit that the Board's formula confuses individual value with aggregate value. They complain that, as the number of compilations increases, the share attributable to compilers as a whole decreases, even if distant signal viewing remains constant. By contrast, the aggregate value of programs remains virtually constant (in fact, it increases marginally at the expense of compilations).

While this may be a purely arithmetical function of the formula, the Board is not uncomfortable with the result. As the number of available compilations increases, their importance to viewers relative to programs diminishes. As we approach a 200-channel universe, the viewers' attention becomes more and more focussed on individual programs, and less and less on the way in which they are assembled.

The compilers also submit that the Board's formula is flawed, since it measures only the percentage of each distant signal compilation consumed, as opposed to the percentage of all distant signal compilations supplied. They assert that the 0.67 per cent value should have been multiplied by 4.35 (the average number of distant signals) to obtain a share of 2.95 per cent. The assertion is unfounded. The number of distant signals available is already factored into the denominator (609 hours or 4.35×140 hours); and the numerator represents the number of hours spent viewing all distant signals during an average week (4.09 hours). The Board's formula is based on the ratio of distant signal viewing to distant signal supply.

Finally, the Board rejects the compilers' third argument, according to which its formula fails the "reality check" test because the ratio of 148 to 1 in favour of the value of programs is lopsided. Such a result is to be expected, given the high number of works received and viewed by a subscriber on a monthly basis, relative to the low number of compilations involved.

b. Compilers' new valuation approach

The compilers did not simply comment on the Board's own valuation approach, they also offered one of their own. That approach, which was articulated by Mr. Ken Goldstein, a Canadian expert in media economics and media trends, and Professor Susan Eastman, an expert in television programming and promotion, must be examined on its own merits.

Mr. Goldstein asserted that, since there is no "control sample" of randomly selected programs to which compiled programs can be compared, a proxy has to be used to measure the value of the two key components of broadcast compilations: selection and scheduling.

That proxy was derived from Professor Eastman's research into the effect of inheritance and promotion on individual program ratings. "Inheritance" refers to the contribution of lead-in

viewers to the ratings of the next program in the schedule. It reflects both the intrinsic value of the programs and the broadcasters' compilation activities of selecting and arranging those programs. The difficulty lies in determining the extent of inheritance which is accounted for by the compilation activities rather than by the intrinsic value of the programs. Accordingly, Professor Eastman submitted that promotion should be used as a proxy indicator of the value of selection and scheduling.

Based on a multiple regression analysis conducted in the US in 1996 of all programs broadcast on the six major US networks during a four-week period, Professor Eastman (and her co-author Professor Newton) had concluded that inheritance explained 55 per cent of the variance in the program ratings, and that on-air promotion accounted for an additional 5 per cent.

Mr. Goldstein noted that promotion was inextricably linked to the compilation process. Moreover, unlike selection and scheduling (which account for some portion of inheritance), its impact on program ratings (and therefore its value to viewers) can be and had been separately measured. Accordingly, he used the 5 per cent value of promotion as a reasonable indicator of the value of each of selection and scheduling. Since promotion itself accounts for an additional 5 per cent, and increases the value of compilations, he concluded that compilations should be valued at between 10 and 15 per cent.

The opponents pointed to several weaknesses in the compilers' proposed valuation approach. The Board agrees that some of these are significant deficiencies.

First, the data used for the regression analysis relates only to prime-time programs, in the United States, on local and distant signals carrying the six US networks. The Board must establish a value for the entire broadcast day, in Canada, on distant signals only, which include US and Canadian network and non-network signals.

Second, the data does not measure the value of compilations directly, as it is impossible to extract separate values for selection and scheduling from the intrinsic value of the programs. Mr. Goldstein himself admitted that "... the most reasonable conclusion one can draw from this analysis [of inheritance] is that the value added by the compiler's selection and scheduling might range from a minimum of zero to a maximum of 55%...".

Third, if inheritance has a value, it begs the question of whether that value should accrue to the first program, to the second program or to the compilation.

Fourth, while Mr. Goldstein used promotion as a proxy because it both supports and flows from selection and scheduling, both he and Professor Eastman admitted that promotion is also inseparably linked to the intrinsic qualities of programs. Professor Eastman also admitted that no one has done an empirical study to suggest that promotion is of the same value as either selection or scheduling.

Fifth, the analysis did not take into account the effect of inheritance and promotion on ratings when a program is subject to simultaneous substitution. Simultaneous substitution is regularly practised in Canada, particularly in prime time when viewing is at its peak. The on-air promotion contained in a substituted program is not seen by the viewer and cannot possibly affect the

ratings of the promoted program.

Sixth, the analysis does not examine the impact of inheritance and promotion on cable rates, subscriber turnover or overall viewing. Viewership has for years remained more or less constant as a proportion of the population, notwithstanding the best efforts of broadcasters. Any impact that a compiler's efforts may have is first and foremost at the detriment of another compiler's efforts as it is reflected in the movement of viewers from channel to channel – something that is completely immaterial to cable operators carrying a multiplicity of channels.

The failure of the compilers' proposal to take into account the impact of simultaneous substitution is a sufficient reason to reject it. The other weaknesses convince the Board that the compilers' valuation approach does not offer a worthwhile alternative.

D. FWS' PROPOSAL FOR A NEW ALLOCATION METHODOLOGY

i. Historical Overview

To date, the Board has adopted a "hybrid approach" to the allocation of retransmission royalties among the collectives. Using distant signal programming data for a test year, the Board first divides the royalty into two pools, based on the supply of Canadian and American distant signals respectively. It then apportions royalties within the pools among the collectives based on the share of viewing attributable to their respective programs. There are two exceptions to this. First, since viewing MLB programs is underreported in most test periods, its share is imputed based on certain adjustments. Second, since SOCAN's repertoire does not consist of programs, its share is set using a different methodology.

Over the years, attempts have been made to convince the Board that certain programs should be allocated a premium for "value-beyond-viewing". Thus, in the 1990 hearings, FWS attempted to show that certain programs have a value added that is not fully compensated by the hybrid approach. FWS adduced as evidence a survey of cable operators and cable subscribers. The FWS proposal was rejected because the survey methodology was flawed and because the method itself was not useful as a mechanism for determining allocation. "The questionnaires asked about types of programs rather than programs belonging to specific collectives. Furthermore, the subscriber survey did not appear to be restricted to programming on distant signals."⁵

In the same hearing, FWS and MLB also submitted cost and revenue data intended to establish the premium value of their programs. However, the data pertained only to their own programs and was not useful for establishing a universal allocation scheme. Moreover, given the high correlation between program revenues and viewing, it seemed unproductive to use a valuation approach that required so much aggregation and adjustment when relatively transparent viewing statistics were readily available. The Board also found that the high costs and prices for sports programming are a function of several economic factors and have little to do with the right to be

⁵ 1990 Retransmission Decision, *Copyright Board Reports 1990-1994*, at 59.

remunerated for the retransmission of programs on distant signals.⁶

In the 1993 hearings, CRC introduced constant sum survey evidence to support the argument that PBS' share should be allocated based on supply rather than viewing. The argument was rejected because it would have been unfair to owners of programs on other US distant signals whose works attracted more viewing than works on PBS.⁷

Also in the 1993 hearings, FWS submitted an approach based on the prices actually paid by broadcasters for sports programs and by cable operators for sports services. The Board remained unconvinced of the premium value of sports in the distant signal market. Firstly, sports programs attract a premium price because they deliver viewers in the local, not distant market. Indeed, if sports programs carried on distant signals had equal value in the local market, local broadcasters would purchase the rights to carry them. Secondly, sports programs attract premium prices because they deliver a coveted demographic to certain advertisers; it does not follow that advertisers' marketing decisions should govern allocation. Finally, while sports services command premium prices as specialty services, the reasons are linked to economic factors that have little to do with the right to be remunerated for the retransmission of pro-grams on distant signals.

ii. The FWS Proposal

FWS returns with survey evidence intended to show that the Board's hybrid approach does not properly reflect the value of sports programming to cable operators. The evidence addresses deficiencies noted by the Board concerning the earlier surveys, notably their absence of focus on distant signal programming and their incompleteness for purposes of establishing a comprehensive allocation scheme. As a result, FWS proposes that royalties be divided up into pools representing each program genre, in accordance with the results of a survey of cable operators on the relative values of various programming genres on distant signals. Each pool, with the exception of sports, would be divided among the collectives owning the programs within it, based on viewing data for the 1993 fall sweeps period. For the sports pool, the shares of FWS and MLB would be allocated in accordance with the relative values each professional sport obtained under the survey. Under that methodology, the share of CRC, FWS and MLB would increase, while the share of all others would decline. For example, CBRA would receive 40 per cent less royalties while FWS' share would be approximately 14 times higher.

With the exception of CRC and MLB, the other collectives opposed the adoption of FWS' proposed valuation approach. CRC proposed a "blended" approach to valuation, assigning a weight of 50 per cent to viewing and 50 per cent to the survey results. MLB's position was that the value of major league sports programming to cable operators and subscribers is not adequately measured by viewing, and that the Board should either adopt FWS' proposed allocation or, in the alternative, adjust the viewing shares upward by an unspecified factor.

⁶ 1993 Retransmission Decision, *Copyright Board Reports 1990-1994*, at 199.

⁷ 1993 Retransmission Decision, *Copyright Board Reports 1990-1994*, at 198.

FWS' expert witnesses were Dr. Corbin, who conducted the survey, and Dr. Mathewson, who explained how the results could be used to allocate the royalties by program genre. Dr. Corbin's survey was conducted in 1998 among Canadian cable operators. The 27 per cent response rate yielded 107 responses from cable operators serving 73 per cent of Canadian cable subscribers. The survey consisted of four questions of which three were qualitative in nature and one was quantitative. The qualitative questions were intended to provide insight into the value that cable operators place on different programs without quantifying that value. All questions related to programming on distant signals.

The quantitative question used the constant sum method to determine the relative value of the 11 program genres defined by Statistics Canada as well as 7 different sports within the sports genre. The results showed sports programs as garnering 27.2 per cent of the total value. When the responses were weighted by the number of subscribers in the respondents' systems, sports programs' share increased to 32.7 per cent.

To corroborate the results of the Corbin study, FWS submitted evidence of the relatively higher prices that sports programs command in other markets (including broadcasting, cable specialty services, pay-per-view). FWS also asserted that the flood of cable operators' applications to the CRTC to carry the FOX network was due to FOX's acquisition of the National Football League (NFL) rights for 1994 and, as such, supported the evidence that cable operators value sports more than other programs. Finally, FWS urged the Board to take into account the US Copyright Arbitration Royalty Panel (CARP) decision, which allocated to sports a value higher than its share of viewing.

Dr. Murray, who conducted CRC's 1993 survey of cable subscribers in support of the use of supply data, rather than viewing, testified for CRC in support of the Corbin survey.

iii. The Board's Conclusions

The Board has considered and rejected FWS' objections to the viewing method on previous occasions and no purpose would be served by revisiting them here. The Board was no more swayed by the criticisms than in the past. What remains to be done is to assess FWS' alternative proposal on its own merits.

The opponents challenged the survey and its results on a number of fronts, including the following, which the Board accepts as valid. First, cable operators do not engage in this sort of valuation in their day-to-day operations, and have virtually no choice over which signals to carry on the basic tier. Second, the survey is based on invalid assumptions, including that cable operators know which distant signals they carry and their value to subscribers, and that cable operators know the relative value that their subscribers place on program types on those distant signals. Only if those assumptions are valid can FWS assert that the survey provides more accurate and compelling evidence of distant signal program value than does actual viewer behaviour. Third, confusion among distant signals, local signals and specialty services was apparent in some of the responses. No mention was made during the survey of simultaneous substitution requirements nor was the phenomenon taken into account in the analysis of the results.

The opponents were also correct in pointing out that by failing to take into account the relative supply (or viewing) of the different genres of programs being valued by the respondents, the survey generated some clearly absurd results. Thus, for the same amount of viewing of drama, academic programs would generate 5 times the royalties, religious programs 20 times the royalties, and “other” programs 156 times, while basketball would receive 17.5 times the royalties of hockey.

The evidence put forward to corroborate FWS’ theory of allocation was also unconvincing. The Board has rejected in the past evidence of prices paid for programming as a factor to be considered in the allocation exercise, and there is nothing new in the evidence presented in the current hearing that persuades the Board to change its position. The same reasons militate against the use of evidence dealing with the impact of the purchase of NFL rights by FOX in 1994; moreover, in the Board’s view, the record does not allow it to draw the conclusion proffered by FWS. Finally, American experience is of little use if only because of the fundamental differences between the American and Canadian retransmission regimes. For example, the American regime provides no compensation for network programming; consequently, sports programming is not measured against first-run, network programming.

As for Dr. Murray’s evidence, most of it was directed at criticizing the viewing approach. However, her choice of external validators of the FWS approach was largely made up of viewing data or of the expressions of viewers’ program preferences. BBC noted that this supports, rather than undermines, the proposition that viewing behaviour constitutes better evidence of program value than the opinions of cable operators.

FWS’ proposal is rejected. The Board continues to favour its hybrid approach to the allocation of royalties. It measures actual viewing of programs carried on distant signals in Canada; it is an objective and equitable way of allocating royalties among rights holders; and it avoids the pitfalls and potential inaccuracies of attempting to measure cable operators’ subjective valuation of these programs. The Board also continues to be of the opinion that, within the two pools of Canadian and US distant signals, viewing represents the most equitable measure of use and thus of value and is therefore an appropriate tool for determining allocation among the program rights holders.

Efforts aimed at allocating retransmission royalties based on the value of distant signal programming to cable operators may flow from a misunderstanding of a passage in the Board’s 1990 decision that may leave the impression that viewing is a “next best approach” and that ideally, value of distant signal programming to cable operators ought to be the measure of choice.⁸ To the contrary, the Board believes that, for purposes of allocation, subscriber valuation is the most appropriate measure. Indeed, it is the subscribers who “use” the cable service and who are in the best position to indicate the extent of actual use of its various components. Moreover, while the cable operator is responsible for paying the total royalty, its allocation among the various program owners is of little interest to the cable operator, as evidenced by CCTA’s consistent lack of participation in that aspect of the hearings.

⁸ 1990 Retransmission Decision, *Copyright Board Reports 1990-1994*, at 58.

In the end, the whole of FWS' valuation approach, as well as any other similar to it must be rejected for reasons of principle, rather than methodology. Some of these principles, which are not new, bear repeating here. First, the price paid for sports programming is a function of economic factors that have little to do with retransmission rights. Second, sports programs attract a premium price because they deliver viewers in the local, not distant market, and because they deliver a coveted demographic to certain advertisers. Third, viewers' purchasing power is not an appropriate way of allocating royalties; viewing by all demographics should count equally. The Board would have to abandon each and every one of those principles if it were to recognize any value beyond viewing.

E. TVA SIGNAL DISCOUNT

The tariff structure that has been in place since the beginning requires that retransmission systems pay the same royalties whether they carry one or a multiplicity of distant signals. Adding TVA to the signals they offer will not increase the royalties these systems have to pay. Exceptionally, systems that carry one or more duplicate network signals and no other distant signals pay a reduced rate.⁹ And of course, systems pay no royalties on account of premises to which all signals are local. To these last two categories of systems, having to carry TVA may have a significant financial impact.

According to the record of these proceedings, some twelve systems, all in regions of Ontario with nominal Francophone populations, face an increase in their retransmission royalties. By reason of their geographical location, these systems have avoided either entirely or to a significant extent the full royalty, either because all the signals they carry are local or because the only distant signals carried are duplicates of local network signals.

It is this situation that the Board is being asked to address.

i. Is TVA a "Signal" Within the Meaning of the Act?

Most Canadian viewers now receive the TVA service. Most of them, including viewers in local markets, rely on a retransmitter (cable, satellite, microwave). These retransmitters obtain the TVA service in one of five ways. Firstly, they can harvest the signal over the air. Secondly, they can obtain the unaltered local service directly from TVA through land lines. Thirdly, they can obtain that same service through a satellite uplink, which can be provided using one of the two previous methods. These three methods have been in use for some time and have never caused difficulties in the context of the retransmission regime.

The fourth and fifth methods are the ones with which CCTA and SOCAN take issue. Some operators, including all affected retransmitters, receive the so-called TVA East signal. That service is essentially CFTM's terrestrial signal, modified by TVA only at the request of

⁹ While the Francophone market discount allows systems in designated Francophone markets to pay 50 per cent of the rate otherwise payable, the discount is a function of the market, as opposed to the type of signal(s) carried. The same can be said of discounts for service provided to hotels and institutional premises.

advertisers who do not wish their advertisements to be received outside Quebec and to change some public service announcements.¹⁰ Western Canadian cable systems can opt for the so-called TVA West signal which is identical to the TVA East signal but delayed three hours.

In all five scenarios, cable operators retransmit the signal that they receive simultaneously and in its entirety without themselves manipulating it, other than to comply with CRTC requirements (e.g., simultaneous substitution).

CCC, CBRA, BBC and CRRA rely on the Board's earlier decision dealing with the status of superstations under SOCAN's Tariff 17, to argue that the TVA service being offered to the affected retransmitters is indeed a "signal".¹¹ In that decision, the Board ruled on four aspects of the retransmission regime that are relevant here.

Firstly, a distant signal must be available for free reception by the public in its local market.

Secondly, a signal does not cease to be a signal because it is also provided outside that market using different technologies; in fact, a signal never ceases to be a signal. It is irrelevant that the signal may be provided by a third party, that the third party may obtain the signal from the terrestrial broadcaster, or that viewers may be required to pay a subscription fee to receive it.

Thirdly, it is also irrelevant that the signal retransmitted outside the local market is not identical to the signal transmitted by the terrestrial station.

Fourthly, the conditions specified in the retransmission regime relate to the retransmission of the signal by the cable operator and not to the condition of the signal at the time when it is received by the cable operator.

Despite arguments to the contrary, the Board still believes that its earlier analysis of the retransmission regime is correct. There is no need to repeat here what was said then. Terrestrial stations offered as distant signals are "signals" for the purposes of the retransmission regime, whether or not any alterations are made by anyone (including the broadcaster) to those signals, and whether or not the signal is received by the retransmitter at the same time as the original broadcast occurs.

CCTA and SOCAN raise a number of other arguments in favour of their position, arguments that the Board finds unconvincing. For example, they refer to the policy objectives of the retransmission regime, which they view as facilitating copyright clearance where the signal is being offered without the consent of the broadcaster. The Board agrees with the reasons given by CCC and CBRA as to why this argument is irrelevant. Under the regime, all works carried on a distant signal are entitled to compensation, whether or not the broadcaster holds the retransmission rights or is able to acquire them.

¹⁰ The CRTC does not require that the signal distributed nationally be identical in all respects to the over the air signal.

¹¹ See Tariff 17 Decision, *SOCAN Statement of Royalties, 1990-1995 (Tariff 17)*, (1996) 70 C.P.R. (3d), 501, 529-31.

CCTA also argues that the retransmission of the TVA service by a cable operator is not an infringement of copyright because it is mandated by the CRTC. The Board agrees with CCC that neither the *Broadcasting Act* nor the *Copyright Act* can be interpreted to give rise to an exemption from liability in such a case. This is even truer now that paragraphs 32.1(1)(d) of the *Act* provides certain exemptions for reproductions made in order to comply with the *Broadcasting Act* or any rule, regulation or other instrument made under it. The provision clearly does not extend to the retransmission of a distant signal.

CCTA finally asks that the Board have regard to the criteria adopted by Cabinet in interpreting the *Act*. Those criteria, including the one regarding Canadian broadcasting policy, may be useful in determining how much retransmitters should pay for the TVA signal.

However, being regulations made under the *Act*, they can be of little use in interpreting it.

Consequently, the TVA East and TVA West services are “signals” for the purpose of the retransmission regime.

ii. The Value of the TVA Signal to Affected Cable Operators

If the TVA service is indeed a signal, CCTA argues that those who carry it as a result of the CRTC order should pay little or nothing for it, as it is of no economic value to them. All but CRRA are willing to accept a 50 per cent discount.

Once the legal status of a thing or activity has been settled, “economic considerations become paramount.”¹² In these proceedings, it would appear that the economic consequences of the CRTC order are favourable for TVA, but not for the affected retransmitters. The manner in which the order came to be issued would tend to show this. It was issued at the request of TVA and is integral to TVA’s national network licence. The number of Francophones in most cable markets outside Quebec is small. Consequently, TVA could not establish local affiliates as the existing national networks have done. Instead, retransmitters (some of whom viewed the order with considerable misgivings) have been enlisted as surrogates. They are not compensated for their role. They do not have any choice in the matter.

In the Board’s view, the discount for carriage of TVA as the sole distant signal in non-Francophone markets should be significantly greater than the Francophone market discount of 50 per cent, for several reasons.

Firstly, the Francophone market discount is market, not signal, specific. Here, the discount applies only to the TVA signal.

Secondly, the population of a Francophone market, as defined in the tariff, can be up to 50 per cent non-Francophone. By contrast, Francophones represent two per cent or less of the

¹² 1993 Public Performance of Music Decision (SOCAN Tariff 2.A), *Copyright Board Reports 1990-1994*, at 366, as quoted in *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* (F.C.A.).

population in the affected areas. Viewership in those regions to the currently offered French-language signals and services is negligible. Viewership to TVA is also likely to be negligible.

Thirdly, since a significant amount of TVA's programming is produced and owned by TVA, it is not unreasonable to offset its value with the value that TVA obtains from having its signal distributed in its extended markets.

The Board does not deem it appropriate to award a discount of 100 per cent. However, taking all the above factors into account, the Board sets the discount at 95 per cent. Where a system benefits from the duplicate network discount as well, the cumulative discount will be 70 per cent in the case of a single duplicate network signal and 45 per cent for more than one duplicate network signal.

Although only twelve markets have been identified as affected by the imposed carriage of TVA, the Board sees no reason to restrict the application of the discount. There are no assurances that CCTA's list is comprehensive or current. Accordingly, the discount will be available in all non-Francophone markets where TVA is distributed as a result of the CRTC order.

F. SOCAN'S SHARE

SOCAN has agreed with the other collectives to a reduction of its share of royalty to 3.2 per cent from the previous 3.55 per cent.¹³ The reduction is consistent with the reduction in the rate under SOCAN Tariff 2.A (Commercial Television).

G. FINAL ALLOCATION

Apart from the change in SOCAN's share, there is no change in the comparative allocations among the other collectives. The data being used is the same as for the 1996 decision. The allocation process is the same as that applied in all previous decisions. There were no disputed programs.

Table I shows a comparison between the final allocation for the 1998-2000 tariff and the allocation under the previous tariff:

TABLE 1 / TABLEAU 1 FINAL ALLOCATION / RÉPARTITION FINALE in per cent / en pourcentage			
Collective society / Société de gestion	Allocation / Répartition 1995-1997	Final Allocation finale	Répartition
BBC/BBC	2.64		2.65
CBRA/ADRRC	6.03		6.05
CCC/SPDAC	56.66		56.86
CRC/SCR	11.92		11.96
CRRA/ADRC	16.15		16.21

¹³ Memorandum of Agreement dated October 16, 1998 between SOCAN and the other collectives.

FWS/FWS	1.46	1.47
MLB/LBM	1.59	1.60
SOCAN	3.55	3.20

H. TRANSITIONAL PROVISIONS

The main issue raised by the passage of time between January 1, 1998, the date the final tariff comes into force, and the date of this decision, is one of allocation. During that period, the collectives have been receiving payments from the retransmitters based on the 1995-1997 allocations, which in turn were based on SOCAN's higher share of total royalty.

The collectives asked the Board to respect their Memorandum of Agreement by requiring SOCAN to make compensation payments, without interest, to the other societies promptly after certification of the final tariff.¹⁴ In the event of disputes regarding the amount of these payments, the collectives will have until June 30, 2000 to file with the Board a motion requesting that the Board settle the disputes.

The retransmitters will be required, effective March 1, 2000, to make payments in accordance with the final allocations, as set forth in the certified tariff.

I. ADMINISTRATIVE PROVISIONS

i. Confidentiality Provisions

Bell ExpressVu expressed concern that the confidentiality provisions of the 1995-97 Tariff are not sufficiently strict to prevent confidential subscriber information from becoming publicly available.

It proposes that the tariff be amended to require confidentiality on the part of the collectives' members as well as the collectives; and to allow retransmitters to obtain from the Board a confidentiality order before confidential information received under the provisions of the tariff is introduced in any proceeding before the Board.

While it is unlikely that the information in question will be disclosed to royalty claimants other than in aggregate form, CCC indicates that it does not intend to use any confidential information in proceedings before the Board without giving DTH operators an opportunity to apply for a confidentiality order.

In the circumstances, the Board accepts the additional text proposed by Bell ExpressVu.

¹⁴ There was also a similar provision in the Memorandum of Agreement for a possible adjustment upwards in SOCAN's share in the event that SOCAN's commercial television tariff certified by the Board is increased pursuant to a non-appealable, final decision following judicial review.

ii. Changes to Tariff Wording

In a Memorandum entitled “Tariff Rate Structure”, dated December 22, 1998, CCC explains the reasoning behind certain proposed changes in wording between the last certified tariff for the period 1995-1997 and the proposed tariff for the period 1998-2000.

Although those changes were jointly submitted by all parties, the Board declines to make many of them at this time.

The parties point to the CRTC’s new *Broadcasting Distribution Regulations*¹⁵ as the reason for introducing the notion of “local licensed area”. The Board notes that those Regulations do not contain such a definition. Moreover, there was no evidence that the CRTC has received regional licence applications which would make the current wording of sections 7 or 10 problematic.

The parties also propose to introduce the notion of “terrestrial distribution system”. The Board notes that the definition of “small retransmission system” under the *Definition of Small Retransmission Systems Regulations*¹⁶ is imported into both the previous and the proposed tariffs; and that definition uses the terms “cable retransmission system” and “terrestrial retransmission system”.

The proposed definition of “terrestrial distribution system” specifically excludes a system using over the air transmission and so is identical to the notion of a “cable retransmission system”. Moreover, it is confusingly similar to the notion of a “terrestrial retransmission system” which includes a system using over the air transmission (Hertzian waves).

Accordingly, the proposed definition does not appear in the certified tariff and, where it would have appeared elsewhere in the tariff, it is replaced by the appropriate retransmission regime terminology.

The Board sees no reason to define a multi-point distribution system (MDS), as proposed by the parties, even though the certified tariff puts unscrambled MDS on the same footing as unscrambled LPTV (low power television stations).

There is also no need to define “compilation” and “CRTC”, since the tariff as certified makes no use of these expressions.

J. RADIO TARIFF

CBRA, CRRA and SOCAN and CCTA and Star Choice filed an agreement with the Board and have asked the Board to approve the 1998 interim tariff, subject to minor changes, for 1998 through 2000.

The only outstanding issues related to Bell ExpressVu’s proposals that any Francophone

¹⁵ CRTC Public Notice 1997-25 dated March 11, 1997, effective January 1, 1998.

¹⁶ SOR/89-255, as amended by SOR/94-754.

discount be extended to DTH radio signals and that the confidentiality provisions be amended as proposed for the television tariff.

As the Board decided against any Francophone discount to DTH systems for television, there will be no discount for radio. The confidentiality provisions are amended in the radio tariff to conform with the changes in the parallel provisions in the television tariff.

The allocations remain the same as in the Interim 1999 Tariff.

K. NEED FOR UPDATED DATA

The most recent set of comprehensive data dates back to 1993-1994. The Board urges the parties to provide the Board with an updated set of data on the supply and viewing of distant signals across the country in time for the next hearings.

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

Claude Majeau
Secretary to the Board