Copyright Board
Canada

Commission du droit d'auteur
Canada

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Regime	Public Performance of Music *Copyright Act*, Section 67.2
Members	Ms. Adrian Burns Mr. Andrew E. Fenus Michel Hétu, Q.C.
Proposed Tariffs Considered	2.A — Commercial television stations in 1994, 1995, 1996 and 1997

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

Reasons for decision

I. INTRODUCTION

Pursuant to section 67 of the *Copyright Act* (the *Act*), the Society of Composers, Authors and Publishers of Music of Canada (SOCAN) filed with the Board statements of proposed royalties for the public performance, or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works for the years 1994 to 1997. These statements were published in the *Canada Gazette* of October 9, 1993, September 24, 1994, September 30, 1995 and October 19, 1996 respectively. At the same time, the Board gave notice to users of their right to file objections to the proposed tariffs.

The Canadian Association of Broadcasters (CAB), the CTV Television Network (CTV) and others filed timely objections to proposed Tariff 2.A (Commercial Television Stations) for each of the years 1994 to 1997. The Board granted intervenor status to the *Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada* (SODRAC), who wished to argue against the Board's ability, in these proceedings, to receive and consider evidence about the fees paid to SODRAC by Quebec television broadcasters.

The history of Tariff 2.A up to 1989 is set out in the Board's decision of December 6, 1993.[1] For the years 1990 to 1993, CAB had asked that the Board reduce the amount of royalties, change the tariff formula and implement a "per-program licence" (PPL).[2] CAB also argued that a broadcaster should not pay royalties on account of viewers who received its signal through cable. The Board rejected CAB's arguments and maintained the *status quo ante*. CAB's challenge of the Board's decision before the Federal Court of Appeal was dismissed on October 24, 1994.

SOCAN's proposed Tariff 2.A for the years 1994 to 1997 targets both television stations and television networks. This approach raised a number of issues which the Board decided to address first. This process led to the Board certifying a tariff applicable to CTV.[3] This process also postponed the consideration of the proposed statement as it applied to commercial television stations until late 1996.

The following are the Board's reasons for its decision in respect of Tariff 2.A for the years 1994 to 1997. The hearings dealing with this matter required fourteen days, between April 8 to 24, 1997 and on June 6, 1997. Filing of arguments and replies was completed on July 11, 1997.

II. THE PARTIES' POSITIONS AND ARGUMENTS

SOCAN asks that the Board maintain the *status quo ante*. For its part, CAB wants the rate base to remain a station's "gross income", but asks that the rate be reduced from 2.1 per cent to between 0.86 per cent and 1.63 per cent. CAB also asks for a "modified blanket licence" (MBL) that would allow stations to further reduce the amount of royalties they pay to SOCAN when they air programs for which they do not need a SOCAN licence.

A. SOCAN

In support of its position, SOCAN invokes a number of arguments. First, there is presently a balance between the (unregulated) front-end and (regulated) back-end markets.[4] It may not be the best balance, but chances of discovering a better one are very low, since this would require more information than the Board would ever be able to collect. It is best to let the front-end market make the small changes required to reflect market conditions. Second, any reduction in the rate would increase the widening gap between performing rights and other creative inputs. Third, the

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[1] See *Statement of Royalties to be Collected for the Performance in Canada of Musical and Dramatico-musical Works in 1990, 1991, 1992 and 1993* (1993), Copyright Board Reports, 1990-1994, 345, pp. 355-6. [Hereafter *Public Performance, 1993*]

[2] To call the American licence a "per program" licence is problematic, since it still allows broadcasters full access to the music societies' repertoire, and even covers incidental music and music in commercials contained in programs in respect of which the broadcaster has "opted out". Fortunately, CAB opted for the less troublesome name of "modified blanket licence".

[3] The Board's decision of December 21, 1996 contains a detailed description of the sequence of events which led to the certification of the CTV tariff.

[4] "Front end" refers to dealings that occur before a program is broadcast, such as contract negotiations for composition services, or the purchase of performing rights at the time the program is produced or purchased. "Back end" refers to dealings that occur at the time a program is broadcast or thereafter, such as the purchase of SOCAN's blanket licence.

proposed MBL is flawed in principle as well as in practice. It constitutes a frontal assault on the very notion of collective administration, would force composers to either leave SOCAN or seek changes to SOCAN's internal operations and structure, and would favour foreign composers, namely members of the American Society of Composers, Authors and Publishers (ASCAP). The MBL would favour buyout arrangements, as opposed to remuneration for use. The MBL as proposed by CAB would generate unnecessary disputes about reporting and acquisition of rights. Finally, the approach put forward by CAB would encourage cherry-picking: broadcasters would be able to derive large discounts by clearing music in programs which generate important revenues but use little SOCAN music.

B. CAB

For its part, CAB suggests that new market realities, including the increased pace of competition, a new public policy framework and the increased pace of technological and business change, as well as new expert evidence presented to the Board which supplemented and complemented evidence provided in 1993, all combine into a powerful case in support of its request for a reduction in the rate and the introduction of a MBL. A rate reduction would be responsive to new competitive pressures, while the MBL would recognize the ability of producers to deal with music in the up-front markets. Both changes would encourage greater reliance on negotiated arrangements, which in turn would increase the efficiency of the system and benefit Canadian composers as well as broadcasters. CAB also maintains that composers are able to wield effective bargaining power in the front-end markets, if only because they can resort to collective bargaining. Finally, CAB argues that the MBL is totally compatible with collective administration.

CAB also asks that the rate be reduced to specifically account for: the fact that CTV now pays royalties; the fact that CTV affiliates pay royalties on the amounts they receive from CTV; and the fact that television stations in the province of Quebec pay reproduction royalties to SODRAC.

III. EVIDENCE

The following witnesses testified for SOCAN.

Composers Glenn Morley, François Dompierre and Pierre-Daniel Rheault discussed the role of creators, their social importance and the role of performing rights societies. They also spoke to the importance of music in television and to the nature of the relationship between composers, producers and broadcasters.

Messrs. Paul Hoffert, a composer and professor, and Michael Horner, an American film music agent, discussed the differences between the Canadian and American television music industries, the relative bargaining positions of composers and producers, the role of music agencies in the United States and the reasons for their absence in Canada.

Mr. Alexander Crawley, National President, Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), gave evidence on the role of collective bargaining in the artistic community and outlined the regime which has evolved in negotiations between performing artists and

television producers.

Mr. David Ellis, a communications consultant, provided an overview of the Canadian conventional television broadcasting industry and the regulatory framework within which it operates. For his part, Mr. Tim Casey, a financial analyst, provided an overview of the financial performance of that industry over the last decade and offered a few comments on its short and medium-term perspectives.

Mr. Barry Kiefl, Director of Research for the Canadian Broadcasting Corporation (CBC), provided extensive evidence on the various available viewing data, their evolution over the last decade and the changes in the relative importance of viewing to Canadian conventional television broadcasters over the same period.

The testimony of Mr. Jean-Loup Tournier, *président du directoire, Société des auteurs, compositeurs et éditeurs de musique* (SACEM), related to the collective administration of performing rights at the international level, the role of blanket licensing in those regimes, the rates being practised in various countries and the potential effects of source licensing on composers. Mr. Richard Reimer, ASCAP's Director of Legal Affairs and Managing Attorney, gave evidence on the American regime, the American PPL, the manner in which it came into existence and the difficulties currently raised by its implementation.

Professor Stanley Liebowitz presented SOCAN's economic argument. He testified on the relative appropriateness of SOCAN's proposed tariff and CAB's proposed tariff formula.

Messrs. Victor Perkins and Michael Rock from SOCAN provided evidence on the history of Tariff 2.A and the operations of SOCAN. They also offered their views on CAB's proposals.

The following witnesses testified for CAB.

Mr. Ken Goldstein, a consultant on the economics of mass media, presented an overview of the television broadcasting industry and of its responses to the competitive challenges currently confronting it. Messrs. James Macdonald, Michael McCabe, Peter Miller and Rob Scarth, all of whom work for the CAB or in the broadcasting industry, presented the broadcaster's point of view on the situation and challenges outlined by Mr. Goldstein.

Professors Steven Globerman and William Stanbury presented CAB's economic evidence in support of a change in the *status quo*. They discussed the effects of a lower rate and the introduction of a MBL on the efficiency and equity of the market for television music performing rights.

Mr. Jack Zwaska is Executive Director of the American broadcasters' Television Music Licence Committee. Mr. Ronald Gertz is president of a corporation which provides per program reporting services to American television stations. They both testified on the evolution of the American television performing rights royalties and the operation of the PPL.

Messrs. Tony Scapillati and Robert Fillingham provided explanations and answered questions about CAB's proposed MBL.

Messrs. Paul Gratton, Bill Mustos and André Provencher offered their views on the nature and importance of the Canadian television programming industry and the place of music in that industry. Finally, Mr. Mark Lewis, Ms. Tandy Greer Yull, Ms. Grace Shafran and Mr. Philippe Labelle testified on the evolution in the use of music in television and manner in which television music rights are negotiated. They also spoke about the roles that broadcasters play in their music publishing subsidiaries.

Three witnesses testified at the request of the Board. Ms. Francine Bertrand-Venne and Colette Matteau, testifying for the *Société professionnelle des auteurs et compositeurs du Québec* (SPACQ), explained their view on the role of the *Status of the Artist Act* (*SAA*)[5] and its relationship to collective administration of performing rights. Mr. Paul Spurgeon, General Counsel, SOCAN, was asked to address a number of issues pertaining to the legal and contractual relationships between composers, publishers, producers and broadcasters.

IV. PRELIMINARY ISSUE

SODRAC objected to the production in evidence of contracts documenting the amounts paid to SODRAC by two Quebec broadcasters on account of synchronization rights. SODRAC maintains that the information cannot be relevant to setting the price to be paid for other, separate rights and that, as a result, the Board is powerless to order its production.

The Board has stated repeatedly that the price paid for any input by a user of performing rights is *prima facie* relevant to the task of setting a performing rights tariff, if only because this can affect the user's ability to pay. Relevant inputs include components of copyright other than the performing right. The contracts are therefore relevant to the matter at hand. The fact that the Board, having looked at the contracts, may decide to ignore them in setting the final price does not make them any less relevant. The Board must look at them before deciding whether they should have any impact on the final result.

SODRAC's objection to the production of evidence is dismissed.

V. ANALYSIS

A. THE BOARD'S MANDATE

As was stated when dealing with Tariff 2.A for the period 1990 to 1993, the Board's mandate is:

> to set tariffs on a "reasonable and suitable" or "rational" basis. The Board regulates the balance of market power between copyright owners and users; this does not mean that the royalties must be set by recourse to a freely negotiated price in a non-competitive or even a competitive market.[6]

This interpretation of the Board's mandate has now been expressly endorsed by the Federal

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[5] S.C. 1992, c. 33, R.S.C. c. 19.6

[6] *Public Performance, 1993*, p. 358 (notes omitted).

Court of Appeal.[7] It bears repeating here for two reasons. First, it disposes once and for all the notion that the Board exists to protect the interests of either users or rights owners, to the exclusion of the others. Second, it flows clearly from this and other decisions that while a price structure that does not reflect market practices may be rational, a price structure that reflects the market is rational.[8]

B. THE RATE BASE

Both SOCAN and CAB agree that the rate base should remain a station's "gross income" as is currently defined in Tariff 2.A. During the course of the hearings, however, some mention was made of the possibility of using programming costs as the rate base.

In its 1993 decision, when dealing with the commercial radio tariff, the Board set out its reasons against using programming costs as a rate base for that tariff. One of those reasons was that any link between performing rights and other programming expenses whose price is not regulated incorrectly assumes that the relative share of those production inputs does not change significantly over time.[9] The Board agrees with this line of reasoning, and finds it relevant to the television industry today.

C. THE LEVEL OF ROYALTIES

The Board agrees with CAB's conclusion that the rate should be lowered. A combination of reasons, rather than any single, compelling argument, leads the Board to believe that the rate is too high in the environment in which Canadian broadcasters currently operate.

i. The Environment Has Changed

The environment in which conventional broadcasters operate today is quite different from what it was 15 or 20 years ago. Most importantly, the competition they face has increased considerably and a new public policy framework has evolved.

a. Competition

The environment in which conventional broadcasters operate is more competitive than in the past. Competition has increased at an accelerated rate. The sources of that competition are also more diverse.

Fragmentation has occurred, with the introduction of 19 new Canadian programming pay and specialty services over the last decade alone and 15 Canadian new ones in the Fall. The television advertising pie may be getting slightly larger, but more players are taking a slice out of

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[7] *Canadian Association of Broadcasters* v. *SOCAN* (1994), 58 C.P.R. (3d) 190, 196g (F.C.A.)
[8] *Canadian Association of Broadcasters*, *supra*, note 7, 196c; *Public Performance, 1993*, p. 358; *Canadian Broadcasting Corp*. v. *Canada (Copyright Board)* (1993), 47 C.P.R. (3d) 426, 429h (F.C.A)
[9] *Public Performance, 1993*, p. 352

it.[10] At the same time, new information and entertainment alternatives, including direct broadcast satellites and the ubiquitous Internet, have started to emerge, generating further competition and fragmentation. Nothing indicates that the pace of change may slow down in the years to come; the evidence is to the contrary.

These competitive pressures have taken their toll in at least three respects. First, private conventional television broadcasters lost more than 9 per cent of their audience share between 1991 and 1996.[11] Second, the financial performance of the industry has deteriorated. The industry has not recovered the profitability levels exhibited in the mid-1980's; SOCAN's own expert witness readily admitted that those levels are not being projected for the future.[12] Third, revenue growth is slower for conventional broadcasters than for new players in that market. Thus, over the last five years, air-time sales of conventional broadcasters increased at a compound annual growth rate of 3 per cent; during the same period, air-time sales of specialty services increased at a rate of 14 per cent.[13]

Meanwhile, SOCAN derives direct benefits from this arrival of new players who compete with conventional television broadcasters. For example, SOCAN should receive close to $9 million in royalties on account of music use on pay and specialty television services in 1995.

Increased competition necessarily brings about a re-examination of all expenses: only in this way can a player in a market remain competitive. In the case of expenses for which the price is set by an outside agency, such as SOCAN royalties, only the regulating agency can carry this re-examination, with the help of the affected players.

Increased competition also affects broadcasters' profitability and, with it, their ability to pay. Ability to pay is a factor which the Board has repeatedly held to be relevant, although not determinant, in deciding what constitutes a fair tariff under all the circumstances.

b. The Public Policy Framework

The public policy framework applicable to broadcasters has changed significantly. Most importantly, new Cabinet and Canadian Radio-television and Telecommunications Commission (CRTC) policies have resulted in an increasing reliance on market forces and an aggressive encouragement of Canadian programming.[14] This has profoundly affected the environment in which conventional broadcasters operate, as the evidence of Mr. Goldstein and of the CAB panel

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[10] Exhibit CAB-28, p. 3

[11] Exhibit CAB-31

[12] Cross-examination of Mr. Casey, tr. pp. 872-3

[13] Revenues of conventional television broadcasters have increased even though their audience share has dropped. This simply means that during the first phase of the introduction of new sources of competition for advertising dollars, the demand for advertising has increased faster than the supply of air-time. That phenomenon cannot continue indefinitely. Competition will increase even more sharply than it has to date. Obviously, if current or new players in the television market continue to increase the supply of advertising time, revenue growth will eventually slow or stop. This will inevitably result in lower revenues in constant dollar terms.

[14] Exhibit CAB-28, p. 2

clearly demonstrated.

The Board is not bound to take these changes in public policy into account unless required to do so in a directive issued pursuant to the *Act*. Nevertheless, these changes are relevant to the task of setting a fair and equitable tariff, so long as the policies which brought about the changes do not run counter to those which the Board is bound to promote. The Board considers that the relevant Cabinet and CRTC policies are consistent with the Board's constating statute, if only because they define, to a large extent, the "world" within which broadcasters operate. Just as it did in its first retransmission decision,[15] the Board finds that it should keep in mind the relevant areas of public policy, and the changes thereto, in setting the tariff.

ii. Americans Pay Less

American broadcasters pay a much smaller share of their revenues for music performing rights. SOCAN challenges the relevance of this fact, without disputing it. Thus, according to SOCAN, the rate is the product of a court ruling, and not, as CAB maintains, of arms' length negotiations. SOCAN also points to the testimony of Professor Liebowitz, who stated that the approach used by the U.S. rate court to derive the rate was "crazy",[16] as an argument to lessen the relevance of the rate.

For three reasons, the Board finds that the fact that American broadcasters pay a smaller share of their revenues than Canadian broadcasters for their music performing rights is relevant. First, over 60 per cent of Canadian broadcasters' royalties are paid on account of revenues generated by American programming primarily prepared for and used in the American market. Moreover, half of all the royalties paid by Canadian broadcasters are distributed to American composers in respect of that same programming. In other words, whether one looks at revenue-generation or distribution, ASCAP and Broadcast Music Inc. (BMI), through SOCAN, provide Canadian broadcasters with anywhere between 50 and 60 per cent of the "music" product they use. The Board finds that players with such an important share of a market must have influence on that market. More importantly, it is not unreasonable to expect that the price paid for a good in its principal market will determine, to an extent, the price paid for the same good in a secondary market.[17] Therefore, the price for American music in the American market can be relevant to the determination of the royalties to be paid for the same music, in the same programs, by similar users, in a secondary market.[18]

Second, and whatever its characteristics, the American price can be a relevant consideration, for the mere reason that it exists. That remains true regardless of whether the way it was reached is

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[15] See, e.g., *Statement of Royalties to be Paid for the Retransmission of Distant Radio and Television Signals in 1990 and 1991* (1990), Copyright Board Decisions, 1990-1994, 3, p. 60

[16] Tr. pp. 1446, 1705

[17] This would appear especially true in the case of public goods which are only inputs into other goods that are consumed simultaneously in both the primary and the secondary markets, as is the case for most, if not all, American prime-time programming.

[18] This contrasts with the Board's position in 1993, when it refused to give any weight to that factor: see *Public Performance, 1993*, p. 362.

"better" or "worse", whether it is the result of negotiations, or whether the manner in which it was derived makes no sense to some economists. A price can be relevant without regard to the manner in which it was originally generated.[19] American border stations and the top U.S. channels are the Canadian broadcaster's main competitors for audience.[20] That, in itself, makes the American price a factor in a global, North American marketplace.

Conversely, this Board cannot simply overlook the fact that "when the current tariff was developed, the parties and the Copyright Appeal Board intended that there be a consonance between American and Canadian rates."[21] That correlation can, and should, play a role in setting the rate for the tariff.

iii. The Value Broadcasters Derive from SOCAN's Licence Has Declined over Time

Four years ago, the Board stated the following:

> ... important changes have occurred in the industry since 1959, when the television tariff was set at 2.1 per cent of a station's revenues. Television has developed from radio with pictures into a distinct medium. Taped programs have replaced live broadcasts. The use of existing musical works has declined, while the use of works composed for specific productions has increased. Variety shows no longer play a starring role in programming. However, ... these changes occurred long before 1986, when the Copyright Appeal Board set the rate at its present level. ... music use patterns have remained essentially unchanged since 1985.
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> The Board feels that comparisons, if any, should be made between the current situation and that in 1986, not in 1959. ... the evidence filed during the current proceedings merely confirms the state of affairs that existed at the time of the 1986 hearings. ... nothing in the evolution of the industry since 1986 justifies a change in approach.[22]

The Board respectfully disagrees with this previous position. It finds this interpretation restricted and limiting. A valuation of this sort should be set in relation to the whole time during which the tariff has existed. Some account should be taken of changes that occurred incrementally over that whole period in the use of music and, as a result, in the value of SOCAN's licence to broadcasters. The Board also finds that, to date, the account taken of these changes has been insufficient. The reduction in the rate manifests this broader approach.

iv. Reducing the Rate May Increase Composers' Revenues

A decrease in the rate paid by broadcasters will not necessarily have negative effects on composers' revenues. This is due to a combination of three factors: Canadian programming spending requirements which the CRTC imposes on broadcasters; the absolute necessity of

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[19] *Statement of Royalties to be Paid for the Retransmission of Distant Radio and Television Signals in 1992, 1993 and 1994* (1993), Copyright Board Reports, 1990-1994, 135, p. 159. [Hereafter *Retransmission, 1992*]
[20] See, for example, Mr. Goldstein's report, Exhibit CAB-3, pp. 3-4.
[21] See *Public Performance, 1993*, p. 360.
[22] *Public Performance, 1993,* p. 361 (notes omitted).

foreign sales for Canadian programming to be profitable; and the relative importance of foreign revenues to Canadian composers.

Payments to SOCAN are accounted for as part of the broadcasters' Canadian programming expenditures.[23] Therefore, any reduction in the tariff will result in more money being spent on Canadian programming. That programming, in order to make money, must generate foreign sales.[24] In turn, those sales lead to foreign broadcasts, which generate more revenues for the composers. Consequently, a reduction in the rate may very well, in the long term, benefit authors as well as broadcasters.

The record of these proceedings only serves to support this analysis. Foreign revenues in SOCAN's television pool are growing at a much faster pace than other revenues in that pool: in 1995, SOCAN received 75 per cent more foreign television royalties than it did in 1994.[25] Mr. Perkins confirmed that SOCAN expected these royalties to continue to grow. In fact, since 1993, SOCAN authors have received more in distribution from affiliated societies than from distributions on account of all domestic uses.[26]

v. The "Front-End - Back-End" Theory and the Relative Price of Programming Inputs

The Board finds that the alleged balance between the so-called "front-end" and "back-end" markets is irrelevant to the issue at hand. The Board deals with the valuation of music use in television programming only in so far as it concerns the performing right. It is not overly concerned with the interrelationship, if such an interrelationship does exist, between back-end payments and front-end arrangements. To a large extent, any such relationship that might exist is irrelevant to the task of setting a value for the use of the performing right, and certainly not as important as Professor Liebowitz seems to infer. Mechanical rights and composition fees are negotiated without any reference being made to performing rights fees: in this respect, the record of these proceedings casts serious doubts on the Board's statement of 1993 that "there is probably a link between composition fees and performance rights: in the long run, if the latter decline (increase), the former probably increase (decline)."[27] On the contrary, it appears that composition fees are about the same in the United States as they are in Canada.[28]

SOCAN argues that there is a widening gap between performing rights and other creative inputs. The Board finds that the gap SOCAN refers to relates to the use of the copyright, not to the provision of the creative services that are used in the production of a program. The Board does not know whether there is a widening gap between music creative services and other production inputs. Nor does it know how the relationship between performing rights and, say, residuals received by ACTRA members has evolved. The record seems to suggest that music is reasonably

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[23] Testimony of Mr. Ellis, tr. pp. 790 *et seq.*; testimony of Professor Liebowitz, tr. pp. 1504-5.
[24] Canadian royalties account for only 20 per cent of the cost of producing a Canadian program: testimony of Mr. Mustos, tr. p. 3089, and Exhibit CAB-2, Chart 8.
[25] Exhibit SOCAN-6, pp. 4-5
[26] Exhibit SOCAN-6, Additional Financial Information, p. 7
[27] *Public Performance, 1993*, pp. 360-1
[28] CAB Argument, paragraphs 103-106

well compensated in both respects.[29]

It is important to keep in mind that although music may be pervasive within a television program, it is rarely, if ever, more than an input into a complex entertainment product that comprises other inputs whose drawing power is much more significant. It is the final product that generates the revenues in this medium, not its individual components. Music, as one component in a television program, has benefitted well from this revenue and its significance over valued relative to the final product. This can readily be contrasted with the situation of radio, where music can, and often is, the central input that drives audiences to listen.

vi. Conclusion on the Level of Royalties

Overall, the Board has determined that a reduction of the rate in the order of 15 per cent, to 1.8 per cent, is reasonable. As can be seen from Table I, had the Board opted to cap royalties to their 1994 level, this corresponds to the percentage of their revenues broadcasters would have paid in 1996, the last year for which the record contains reliable data. This serves to confirm that the measure of the correction is one which, in the long run, SOCAN is quite capable of absorbing. This is all the more true since, during the relevant period, inflation was very low. The correction, therefore, recognizes the new economic environment while possibly having a positive effect on affected composers and authors.

TABLE I / TABLEAU I
EFFECTIVE RATE ACHIEVED BY CAPPING ROYALTIES TO THEIR 1994 LEVEL[30]
TAUX EFFECTIF ATTEINT EN PLAFONNANT LES REDEVANCES À LEUR NIVEAU DE 1994 [30]

Year Année	[1] SOCAN 1994 Revenues From Tariff 2.A [000$] Revenus de la SOCAN en 1994 provenant du tarif 2.A [000 $]	[2] SOCAN Actual Revenues From Tariff 2.A [000$] Revenus réels de la SOCAN provenant du tarif 2.A [000 $]	[3] Commercial TV Stations Revenues [000$] [2]÷ 0.021 [31] Revenus des stations de télévision commerciales [000 $] [2]÷ 0,021 [31]	[4] Percentage of Commercial TV Stations Revenues Paid to SOCAN if Royalties Capped [1]÷ [3] Pourcentage de leurs revenus que les stations de télévision commerciales auraient versé à la SOCAN si les redevances avaient été plafonnées [1]÷ [3]
1994	23,752	23,752	1,131,047.62	0.0210
1995	23,752	26,332	1,253,904.76	0.02

[29] Exhibit CAB-2, Chart 9A
[30] Source: Exhibit SOCAN-6, Additional Financial Information
[31] The only data available from Statistics Canada and the CRTC for commercial television revenues include the CTV revenues. To back out the CTV revenues, the Board used the license fees actually paid to SOCAN divided by the tariff rate.

1996	23,752	27,721	1,320,047.62	0.02

D. OTHER ADJUSTMENTS TO THE ROYALTY RATE

For the following reasons, the Board declines to make any of the other adjustments which CAB requested to the level of royalties. These requests rest on the assumption that broadcasters should be allowed to continue enjoying the benefits of an abnormal situation. The first asks to perpetuate the effects of a legal ruling which created an economic aberration. The other asks that the Board "defuse" the effects of a decision of the Supreme Court of Canada which declared the existence of rights which composers had all along, but which broadcasters chose to ignore.

i. The CTV "Adjustments"

The tariff shall not be reduced to account for the fact that CTV started paying royalties in September 1993. Until then, certain court decisions[32] allowed CTV and its affiliates to avoid paying royalties on account of CTV's advertising revenues. This, given the structure of the commercial television tariff since 1959, provided CTV and its affiliates with an advantage over their competitors: independent stations, as well as other networks (TVA) which complied with the spirit of the tariff, paid royalties on all advertising revenues generated by their programming. Having CTV pay royalties on account of its own revenues does not create an imbalance; it gets rid of an anomaly, one that the Board is correcting on its first opportunity to do so.

Moreover, CTV affiliates shall continue to pay royalties on the amounts they receive from the network. While there is little evidence on the record on this issue, a decision must nevertheless be reached. The Board rejects CAB's argument that this will result in double-counting. It prefers SOCAN's position in this respect. In all likelihood, when it agreed to a tariff, CTV took into account the long standing practice of requiring its affiliates (as with CBC affiliates) to pay royalties on the amounts they receive from the network. Indeed, one would think that if CTV, by its agreement, intended to lessen the affiliates' liability, it would have sought from SOCAN some sort of written assurances to that effect.

ii. The SODRAC "Adjustment"

The Board also declines to make any adjustment to account for the fact that some Quebec broadcasters now pay royalties to SODRAC for ephemeral copies.

The synchronization right, which includes the right to produce so-called ephemeral copies, is a discrete right and ought not to be confused with the performing right. In these proceedings, the Board's only task is to determine the value of the latter, not of the former. The Board does not regulate the remuneration of the author; yet, factoring the synchronization right into the performing rights tariff in the manner suggested by CAB would amount to precisely that.

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[32] *CAPAC* v. *CTV*, [1968] S.C.R. 676, followed in *CTV Television Network* v. *Canada (Copyright Board)*, [1993] 2 F.C. 115 (C.A.)

Furthermore, the recent adoption, in Bill C-32 (*An Act to amend the Copyright Act*, S.C., 1997, c. 24), of a regime which deals strictly with ephemeral recordings and transfer of format copies lends additional support to the view that the synchronization right has an intrinsic value that is quite distinct from that of other copyrights.[33]

Again, the impact of the exercise of other copyrights, in so far as it entails a cost for the production inputs of a user, can affect the user's ability to pay, and is therefore relevant to the task of setting a tariff for those rights specifically within the Board's jurisdiction. In this case, however, the payments to SODRAC, in and of themselves, do not have an impact on the value of the performing rights licence.[34] The amounts involved remain undetermined, since the record only discloses the price paid for all synchronization rights, and does not segregate the (necessarily lower) amount that might be attributed to "ephemeral copies". In all probability, these amounts are small enough to have no significant impact on a broadcaster's ability to pay.

E. THE DATE FROM WHICH THE RATE REDUCTION SHALL BE EFFECTIVE

For the period from January 1, 1994 to the date of this decision, television stations have been paying according to the terms of the 1993 tariff, pursuant to section 67.3 of the *Act*. These payments were made on an interim basis and the Board has the power to change the rate tariff starting in January 1994. Nevertheless, under the present circumstances, the Board finds several reasons which convince it to apply the reduction only as of January 1, 1997.

First, imposing a reduction as of January 1994 will create serious complications for both broadcasters and composers. Adjustments will be required in respect not only of past payments to SOCAN, but also of past distributions to authors. Any benefits broadcasters may derive from obtaining a refund would be outweighed by the costs of making the required adjustments. Those costs would be money lost to broadcasters as well as authors: in a situation like this one, where no one can be blamed for the delays in reaching a final decision, it would be unfair to let only one of the parties bear the burden of those adjustments.

Second, the 1993 rate had been in place for almost a decade. Under the circumstances, business and accounting practices dictate that decisions be made and reports be filed assuming that the rate would remain constant. There is no need to disrupt past, closed transactions.

Third, the consequences to the broadcasting industry of postponing the rate reduction are relatively minor, while the consequences to SOCAN of reducing the rate all the way back to January 1994 are much more serious. Had the Board decided to grant a reduction earlier than in 1997, it would have opted to introduce it progressively, by capping the royalties at their 1994 level for two years. Such a cap would have generated savings in the order of $2.6 million in 1995

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[33] See sections 30.8 and 30.9 of the *Act*

[34] On this point, CAB is incorrect in relying on the Copyright Appeal Board's decision of 1985. The Board stated that payments for ephemeral copies could have a financial impact on the broadcasting industry and that ability to pay was a relevant factor. It did not state that the value of the performing licence was necessarily less once a price was attached to the synchronization licence: *Final Report of the Copyright Appeal Board to the Minister of Consumer and Corporate Affairs for 1985* (1985), 3 C.P.R. (3d) 20, p. 37 (Cop.Ap.Bd.)

and $4 million in 1996.[35] As important as these amounts may appear, they represent only 0.2 per cent of the industry' revenues in 1995, and 0.3 per cent in 1996. By contrast, $2.6 million represent 5 per cent of SOCAN's total distributions and 10 per cent of the television pool distributions in 1995.[36] Furthermore, as was stated earlier, any savings to the broadcasters would have been reduced to account for at least part of the significant costs that SOCAN would have incurred as a result of the need to implement important corrections in past collections and distributions.

Fourth, the Board is of the view that the reduction of the rate to 1.8 per cent, combined with the other measure outlined in this decision, will provide broadcasters with long-term benefits that will more than compensate for any shortfall resulting from the reduction taking effect only in 1997.

Fifth, in deciding to set the rate at 1.8 per cent, rather than any other level, the Board took into account the fact that the reduction would apply as of 1997, and not as of 1994.

F. THE MODIFIED BLANKET LICENCE (MBL)

i. The Principle

The Board is persuaded that the tariff should expressly enable broadcasters to reduce the amount of royalties they pay to SOCAN when they air programs that do not use music for which they need a SOCAN licence, either because that music is not in SOCAN's repertoire or because the rights have otherwise been cleared. For the following reasons, the Board finds that television broadcasters should have access to a MBL.

First, the Board accepts the evidence of Professors Globerman and Stanbury that the current "all or nothing" institutional arrangements are no longer appropriate to the context in which broadcasters operate. This conclusion is supported by the reasons already set out in section V.C.1. The Board also finds that a licence which enables broadcasters to opt out of the SOCAN licence for certain programs can co-exist with the traditional blanket licence without undermining the blanket protection that the current regime offers.

Second, an important proportion of music used in television programs is composed for that precise purpose: producers already deal with composers for synchronization rights. Since broadcasters are also producers of television shows, this makes it even easier for them to strike deals with composers. All of this leads to a determination in favour of allowing broadcasters to approach composers directly with a view to striking deals in the open market.

Third, the introduction of a MBL will give composers more options for remuneration, including the option of continuing to resort to current institutional arrangements. Continuing the current regime imposes on composers a *one-size-fits-all* approach.

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[35] Table I, *supra*

[36] The distribution figures for 1996 are not part of the record of these proceedings.

SOCAN puts forward a number of arguments against the introduction of the MBL. The Board is not persuaded by these arguments, for the following reasons.

a. The MBL is Consistent with Public Policy

Contrary to what SOCAN maintains, the Board has determined that the MBL is consistent not only with public policy in general, but also with the underlying policies of the *Act*. The MBL does not undermine the concept of a blanket licence, since it is itself a blanket licence.[37] Composers are not forced to strike deals directly with broadcasters for their performing rights. They can refuse to deal and they can continue to rely on SOCAN to collect royalties. The MBL does not deprive composers of their right to resort to collective administration of their performing rights; only SOCAN itself, by continuing to insist on exclusive assignments, could limit the composers' access to collective administration.

SOCAN also argues that the MBL could hurt Canadian composers by bringing about a bifurcated system in which music in Canadian programs is cleared at source and only foreign music is administered collectively. The Board finds that this overstates the potential impact of the MBL. The *Act* gives composers the option to administer most of their rights, including performing rights, directly or collectively, without taking any account of how foreign composers have decided to manage the same rights. Therefore, a composer's decision to directly manage his or her performing rights in a given market ought not to depend on how foreign composers go about administering their rights in Canada. Moreover, there is nothing fundamentally wrong with the scenario described by SOCAN, should its members decide to take that approach.

SOCAN's expressed fears about a measure which merely allows agreements to be reached is in conflict with its oft-repeated position with respect to the agreements it reaches with users and groups of users. SOCAN often asks that the Board endorse such agreements. In some cases, SOCAN relies on agreements without having filed a tariff.[38] Sometimes, it goes so far as to abide by the terms of an agreement even if they are in contradiction with a certified tariff.[39] Implementing the MBL merely allows agreements of a different kind to have an impact on the amount of royalties SOCAN is allowed to collect. It is difficult to understand why SOCAN would wish to deny its members the benefit of a transaction mechanism it itself so often uses.

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[37] Broadcasters will continue to have free access to SOCAN's repertoire. The MBL will simply allow them to opt out of the blanket licence for specific programs.

[38] Such an agreement currently exists with the CBC, to which no tariff applies.

[39] An agreement which was never reflected in a tariff governed the relationships between SOCAN's predecessors and members of the Association of Canadian Orchestras for close to a decade starting in 1983, even though the Concert tariff was plainly applicable. The Department of National Defense has been in the past, and may still be, party to a similar agreement, even though some of SOCAN's tariffs would be applicable to its situation. In one set of hearings, SOCAN went so far as to admit that given a tariff which imposed a higher price than the one set out in an agreement, it would apply the agreement, not the tariff. The Board refused to allow SOCAN to practice this sort of price discrimination: see *SOCAN Statement of Royalties 1994-1997* (Re) (1996), 71 C.P.R. (3d) 196, 208c (Cop.Bd.)

b. Broadcasters Will Deal Fairly with Composers

Relying on the testimony of its composer witnesses, SOCAN also expressed some concern about the ability of composers to deal on an equal footing with broadcasters in front-end negotiations. The Board finds these concerns to be unfounded as a matter of economic theory, and inconsistent with the broadcasters' interest in negotiating fairly and establishing long-term relationships. These concerns also ignore the models for collective bargaining developed by others and which are now more broadly available under the *SAA*.

From the record of these proceedings, the Board draws the following conclusions. First, bilateral dealings between broadcasters and composers already take place for the purposes of commissioning music and (at least outside the Province of Quebec) acquiring synchronization rights. Second, the balance of power in the relevant market is fairly even, with buyers having slightly more market power than the sellers. Nothing indicates the existence of undue market power or a market imbalance in these dealings; more specifically, the ability of broadcasters to secure the publishers' share of performing rights is not an indication of market imbalance. Third, broadcasters do perform an important role in promoting programs, with their embedded music, around the world.

The Board takes note of CAB's assurances that its members will deal fairly with composers. While these assurances have no evidentiary weight, there is an expectation by the Board that broadcasters will respect those assurances. The Board will not allow a situation to develop in which composers deal from a position of weakness.

In any event, allowing negotiations to occur in the front end should not leave composers at a disadvantage. Composers already deal in several markets where collective administration is non-existent: the "grand rights" market is an example of this. Composers can form unions. They can use the services of agents or legal representatives. The negotiating power of composers is obviously greatly enhanced if they bargain collectively. In some jurisdictions, status of the artist legislation is in place: this is the case at the federal level and in the Province of Quebec. In others, composers may be able to obtain certification as a labour union.[40] More importantly, the experience with ACTRA clearly shows that collective bargaining can successfully take place even in the absence of any such legislation.[41]

Finally, and most importantly, nothing stops SOCAN from adapting to new market realities. It can adjust its mandate to allow it to do what is necessary to protect and advance its members' interests in areas other than performing rights. This is clearly illustrated by SOCAN's recent entry into the field of reproduction rights with respect to the upcoming home-taping levies.[42]

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[40] Testimony of Mr. Crawley, tr. pp. 510-1

[41] CAB argument, paragraphs 49-51; testimony of Mr. Crawley, tr. pp. 506 *passim*

[42] See "AGM amendment broadens SOCAN's mandate", *Words & Music*, September 1997, p. 4

c. The MBL Will not Give American Composers an Advantage

SOCAN believes that the introduction of the MBL will encourage producers, including broadcasters, to hire American composers who are members of ASCAP, since this society is the only one in the world which secures from its members non-exclusive assignments for the entire world.[43] The record of these proceedings does not support that assertion.

First, Canadian composers represent one "point" toward Canadian content thresholds under CRTC policy and thus there is a significant regulatory incentive to use Canadian composers.[44]

Second, the fact that SOCAN currently secures exclusive assignments is irrelevant, and certainly not determinant. Even if this situation were to continue, broadcasters would be able to obtain Canadian music in several other ways. The most probable scenario would be that some new composers would decline to join SOCAN, and some of its members would decide to leave SOCAN at the end of their membership. They would then join ASCAP, which has no residency requirements.[45] These composers would then enjoy all the benefits of collective administration even though SOCAN continued to insist on obtaining exclusive assignments from its members.[46]

Other possibilities exist. Canadian composers might become employees of organizations which are not themselves members of SOCAN. Broadcasters might also resort to music libraries.[47] This variety of options mitigates any concern, such as the one expressed in an earlier decision of the Board, that the proposed scheme "could conceivably create an advantage for American composers".[48]

The introduction of the MBL might create an advantage to Canadian members of ASCAP. This will arise only if SOCAN continues to forbid its own members from directly licensing their television performing rights.

As Vice-Chairman Hétu points out in his dissenting opinion, there is, at least theoretically, a scenario under which the blanket licence would start unravelling. In order for this to occur, SOCAN would have to continue to insist on exclusive assignments while at the same time, Canadian composers would leave SOCAN without joining ASCAP. This sort of concerted behaviour would be either irrational or in bad faith. More importantly, it requires the conscious, willing participation of both SOCAN and composers.

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[43] BMI secures exclusive assignments of performing rights for everywhere except the United States.
[44] Tr. pp. 483, 3311-3
[45] CAB argument, paragraph 183
[46] ASCAP members, some of whom already are Canadians, can grant licences to users anywhere in the world. Nevertheless, under the reciprocal arrangements that exist between ASCAP and SOCAN, their works are part of SOCAN's repertoire, albeit on a non-exclusive basis: testimony of Mr. Reimer, tr. pp. 1245-50. See also CAB argument, paragraph 183, and testimony of Dr. Stanbury, tr. pp. 2509-10.
[47] Music libraries provide broadcasters with compact discs containing different types or genres of music. Licenses are issued on a non-exclusive basis, at a set price, for a period of one or two years.
[48] *Public Performance, 1993,* p. 365

d. The MBL Will not Be Difficult to Implement

SOCAN is correct in pointing out that the MBL may create certain difficulties in the beginning. However, the evidence filed with respect to the American experience with the PPL seems to indicate that these difficulties should not be major ones. Available technology, combined with usual accounting practices, make it relatively easy, for example, to allocate revenues to specific programs.[49] Most Canadian broadcasters already use electronic traffic systems and programming management systems that can perform the required tasks.[50] Indeed, the fact that SOCAN's distribution system for television is much more sophisticated than ASCAP's means that some of the startup difficulties experienced in the United States will be avoided.[51]

As for the rest, CAB has offered to work through any difficulties that might arise in practice. The Board expects CAB to follow up on this offer. Furthermore, by the time the Board will be asked to certify the tariff for 1998 and beyond, these potential difficulties will have been identified, allowing the Board to address them in its decision. In the unlikely event that the parties are confronted with a difficulty that must be addressed immediately and on which they cannot reach an agreement, they can resort to alternative dispute resolution mechanisms.

ii. The Director

There are references in the dissent to the Director of Investigation and Research. There is no such reference in the majority decision. The Board would note that the Director did not intervene in these proceedings. Whatever the Director may or may not do pursuant to his statutory jurisdiction is conjecture. Such conjecture is not a relevant consideration for the Board and therefore it will not address the issue.

iii. Modalities

Setting up a mechanism such as the MBL is a delicate process. Several objectives must be kept in mind. Broadcasters must derive their legitimate share of the measure's benefit without jeopardizing collective administration. SOCAN must not be burdened with costs that accrue simply because users choose a different way to purchase their performing rights. Users must continue to pay for the SOCAN music they use. Finally, the measure should not undermine the blanket licence.

a. Payment Schedule

Currently, there is a two-month lag in the estimation of fees under Tariff 2.A. Thus, the royalties

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[49] Testimony of Mr. Gertz, tr. pp. 2690-2700

[50] Testimony of Mr. Fillingham, tr. pp. 2882-94

[51] Until the PPL was introduced, ASCAP's sampling of local television programming for the purposes of distribution was very limited (30,000 hours a year, or 450,000 performances): testimony of Mr. Reimer, tr. pp. 1268-70; Exhibit CAB-44, p. 3. By contrast, SOCAN's distribution process already relies on a census of all television programming throughout Canada.

for February of a given year are due on January 31, but their amount is based on the revenues for the previous month of December. That approach raises no difficulties under the current regime, since all revenues are eventually taken into account. Under the MBL, however, difficulties could arise if royalties for the February licence were based on the program schedule for the previous month of December.

It would seem fairer to grant broadcasters a discount in any given month on the basis of the music they cleared in that same month. There are two ways of doing this. Using again the example of a licence for the month of February, one could require the broadcaster to make an interim payment on January 31, based on the data (revenues and cleared programs) for the previous month of December, and then proceed to adjust the final payment on March 31, using the actual data for February. Alternatively, the broadcaster could be asked to pay its February licence on March 31, using the actual data for February to calculate the fee.

The Board selects the second option. The first is unnecessarily burdensome; it requires, in respect of each licence period, two reports, a preliminary payment and an adjustment. The second requires only one report and one payment.

This approach leaves MBL licensees with two extra months in which to pay their royalties when compared to stations who will not opt for the MBL. To compensate for this, an interest factor is added. That factor is set at 1 per cent of the royalties otherwise payable on all programming, which corresponds to an interest rate of approximately 6 per cent per year.

b. Reporting Requirements

The reporting requirements will be those proposed by CAB. SOCAN made no other proposal, and CAB's suggestions appear reasonable.

Consequently, at the time of payment, the station will report and identify the programs benefiting from the MBL, the music contained therein and the revenues attributable thereto.

A clause has been added requiring a station that has elected for the MBL to provide SOCAN with copies of documents on which it relies to state that music in a program has been cleared. This should help ease some of the fears expressed by SOCAN about the difficulties in implementing the licence.

c. Adjustments to the MBL Discount

A number of adjustments were alluded to during the proceedings or in argument. Those that will be made account for the additional operating costs associated with the MBL and for ambient music. Two additional adjustments will be made to account for the extra time MBL licensees will have to pay royalties and for SOCAN's general operating costs.

As can be seen from Form A, the licence is worded so as to clearly indicate what a station pays on account of each element of the licence. Among other things, this will allow SOCAN, if it so wishes, to allocate certain sums for the purpose for which they were collected, and not to leave them in the television pool.

Additional operating costs associated with the MBL

There shall be an adjustment of 3 per cent of the royalties otherwise payable on all programming to account for the additional operating costs associated with the MBL. Only CAB provided evidence on this issue; it suggested an adjustment of 2 per cent. In the United States, that adjustment is 7 per cent. Two per cent is probably too low, even taking for granted, as argued by CAB, that SOCAN's additional operating costs associated with the MBL will be lower than ASCAP's.

Interest factor

As stated earlier, there shall be an adjustment of 1 per cent of the royalties otherwise payable on all programming to account for the fact that MBL licensees pay their royalties for any given month two months later than other broadcasters.

General operating costs

There shall be an adjustment of 22 per cent of 95 per cent of the amount of royalties otherwise payable on cleared programming, to account for SOCAN's general operating costs. In its proposal, CAB chose to ignore those costs. To do so has the effect of shifting operating costs to other pools. In effect, CAB is asking composers who receive distributions from concerts, for example, to increase their support of SOCAN's general operating costs because the broadcasters are able to bypass SOCAN and clear the performing rights or certain composers decide to receive payments other than through SOCAN. The Board does not intend to have this happen.

A MBL that does not account for all of SOCAN's costs, and not only the additional costs associated with the MBL, threatens collective administration. Therefore, at least at first, the measure must be cost-neutral for SOCAN. The benefit to broadcasters from the MBL should not come at the expense of composers in other pools. As a result, MBL licensees should continue to pay the same share of SOCAN's operating costs, irrespective of how much music they clear.

Furthermore, broadcasters who opt for the MBL will probably continue to rely on the blanket nature of the MBL for most of their programming. They will certainly do so for all ambient and incidental music. The blanket security cannot be provided unless SOCAN continues to operate. MBL licensees must pay their fair share for the costs of this operation.

Given that SOCAN's operating costs are now factored into the MBL, they become relevant to the price of that licence. This has three consequences. First, that percentage could be adjusted if SOCAN's operating cost ratio increases or decreases significantly. Second, SOCAN's efficiency and its distribution rules are now relevant to the determination of at least one aspect of Tariff 2.A.[52] Third, SOCAN should consider seriously keeping data that will allow the Board and

[52] As a result, broadcasters could argue for a lower adjustment on account of general operating costs if they provided cogent evidence of inefficiency in the operation of SOCAN or significant unwarranted cross-subsidization flowing from the television pool to other parts of SOCAN's operations. The evidence provided during these proceedings did not allow the Board to reach such conclusions.

others to better understand the actual costs associated with the operation of the various distribution pools.

The figure of 22 per cent is obtained by dividing SOCAN's operating expenses for 1996 by SOCAN's domestic revenues, increased by the amount that will be generated by Tariff 17 (Transmission of Pay, Specialty and Other Cable Services). No compensation is necessary for the lowering of the rate from 2.1 to 1.8. This adjustment affects only 95 per cent of revenues from cleared programming, since the amounts paid on account of programming that includes SOCAN music and of ambient and incidental music already include a component for general operating expenses.

TABLE II [53] / TABLEAU II [53]
Calculation of the Compensatory Operating Fee
Calcul des droits compensatoires des frais d'exploitation

Actual domestic revenues in 1996 [000$] [54] Revenus domestiques réels en 1996 [000$][54]	75,752
1996 domestic revenues with Tariff 2.A at 1.8% [000$] Revenus domestiques en 1996 si le tarif 2.A avait été de 1,8% [000 $]	71,792
1996 domestic revenues corrected to account for Tariff 17 [55] Revenus domestiques en 1996 ajustés pour tenir compte du tarif 17 [55]	80,792
1996 operating expenses [56] Frais d'exploitation en 1996 [56]	17,553
Ratio of operating expenses to corrected domestic revenues Rapport entre les frais d'exploitation et les revenus domestiques révisés [17,553/ 80,792]	21.73%

Ambient and incidental music including music in commercials

Ambient music is music unavoidably picked up in the background when various events, such as parades or speeches, are filmed or broadcast. Incidental music is that contained in commercials, public service announcements, promotions and stations identifications. Both are either

[53] Sources: Exhibit SOCAN-6 and decision of the Copyright Board dated April 19, 1996 on Tariff 17

[54] Only domestic revenues are used. SOCAN does not charge overhead on revenues from affiliated societies. That practice is followed by many, if not all foreign societies: testimony of Mr. Rock, tr. pp. 1801-4.
This approach actually favours CAB. Canadian composers in the TV pool are subsidized on account of royalties from foreign broadcasts by a ratio of 2.4 to 1: Exhibit SOCAN-6, Additional Information p. 5. This would normally result in an increase in the fee.

[55] The Board estimated Tariff 17 revenues to be about $8.99 millions in 1994: see *SOCAN Statement of Royalties, 1990-1995 (Tariff 17)* (Re) (1996), 70 C.P.R. (3d) 501, 554, Table 12 (Cop.Bd.). That amount has probably not increased significantly since then.

[56] For two reasons, operating expenses net of investment and rental income are used. First, this is the generally accepted practice throughout the world. Second, and most important, since that income is credited directly to overhead, it contributes to reduce equally the overhead for all pools.

impossible or impractical to clear, and a value must therefore be placed on them and paid separately by broadcasters who use the MBL.

Those broadcasters shall pay 5 per cent of royalties otherwise payable on cleared programming to account for ambient and incidental music. That is the amount being paid in the United States for such music. CAB asked that the adjustment be set at 3 per cent. However, it offered no cogent reason for this reduction, and no evidence that Canadian broadcasters use less ambient music that American stations.

The fact that SOCAN does not distribute on ambient music is irrelevant. That music is still owned by SOCAN, and broadcasters still need the licence. CAB did not convince the Board that this type of music is of no value to the broadcasters. Finally, the exemption set out in section 30.7 of the *Act*, as enacted in Bill C-32, does not go as far as CAB seems to maintain.[57]

However, no adjustment is made to account for music in commercials.

Again, the fact that SOCAN does not distribute on account of such music is irrelevant. In any event, SOCAN cannot be allowed to dictate tariff structure through changes in its internal distribution rules. This, however, does not end the matter.

Commercials are either programs in themselves or part of the programs in which they are embedded. In either case, the Board has determined that they do not warrant the payment of royalties by the broadcaster.

If commercials are programs in their own right, then they do not generate any income for the broadcaster. The price paid by an advertiser to air its commercial program is paid for the privilege of having it aired at the same time as the other program, which draws the audience: the local car dealer pays for the right to have its commercial inserted within the 6 p.m. local news, not the other way around. Therefore, even using the approach according to which the value of music is derived from the revenues of the programs in which it is embedded, music in commercials can be ignored.

On the other hand, if commercials become part of the program within which they are embedded, the Board determines that SOCAN's music in such commercials has value for the advertiser, and *de minimis* value for the broadcaster of the program. Interestingly, that is precisely how the market deals with the issue: advertising agencies pay composers (wearing their hats as musicians) residuals for repeat broadcasts of commercials. [58]

Finally, discounting music from commercials in the MBL will allow the Board to identify the

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[57] During his testimony, Mr. Scapillati offered the view that the use of incidental music would no longer be an infringement of copyright, and that a SOCAN licence would no longer be required: tr. p. 2879. That is incorrect, if only because section 30.7 required that the otherwise infringing act be non-deliberate.

[58] Testimony of Mr. Hoffert, tr. p. 323. In a sense, then, it can also be said that sufficient compensation for the subsequent use of the music, through its performance, is already in place and that no additional compensation is necessary.

true character of music use patterns by broadcasters.

This is not the first time the Board views incidental programming as having an insignificant value. In its second Retransmission decision, the Board ascribed no value for the purposes of distribution to interstitial programming because "they are less attractive to distant viewers than the programs they precede, interrupt or follow." [59] That determination is also true of local viewers, at least with respect to music.

As with the 22 per cent adjustment on account of SOCAN's general operating costs, the ambient music fee is calculated using only revenues from cleared programming. Again, the price paid on account of programming that includes SOCAN music already includes a component for ambient music.

The tariff will use the expression "production music" instead of "incidental music", because this is the expression already used in Tariff 1.A (Commercial Radio).

d. Revenue-Based vs Hybrid Formula

CAB proposed that the MBL be only revenue-based. SOCAN, relying on the testimony of Professor Liebowitz, warned that such an approach may lead to cherry-picking. This would occur if broadcasters managed to obtain large discounts by only clearing a minimum amount of music.

A hybrid formula is less susceptible to cherry-picking. However, for three reasons, and for the time being, the Board has selected the revenue-based formula. First, that approach is simpler to administer; a hybrid formula would unduly complicate the administration of the tariff at this stage. SOCAN and the broadcasters should be allowed to see how the formula operates; adjustments could always be made later. Second, the various adjustments to the rate greatly diminish the potential impact of cherry-picking. Indeed, as far as SOCAN is concerned, the 22 per cent adjustment on account of its operating expenses is meant to completely eliminate the effects of such a practice. Third, because of music use patterns in programming, a hybrid formula would not be beneficial to Canadian composers or broadcasters.

e. Opting In and Out of the MBL

CAB has requested that a broadcaster be allowed, as in the United States, to opt in or out of the MBL twice yearly. SOCAN made no comment on the issue. At first glance, CAB's suggestion seems reasonable.

As a result of this provision, broadcasters will be able to opt for the MBL only for periods coming after this decision is issued. This conforms with the position expressed by CAB.[60]

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[59] *Retransmission, 1992*, p. 196
[60] CAB argument, paragraph 206

f. Monthly vs Quarterly Reporting

CAB suggested that reporting under the MBL should be done only quarterly. We find no reason why stations electing for the MBL should not be required to provide SOCAN with complete reports on a monthly basis, as are stations who opt for the standard licence.

g. Ceilings and Floors

During his testimony, Mr. Zwaska indicated that both the ASCAP and BMI agreements provided for a guaranteed minimum amount of royalties (a "floor") while the BMI agreement also provides for a maximum amount of royalties payable (a "ceiling"). During the proceedings, the Board pursued the matter further with some of the witnesses. None of them objected to this approach, and some of them seemed to think it may be a good idea. Neither SOCAN nor CAB addressed this issue in their argument.

The Board determines that neither a ceiling, nor a floor are necessary. The ceiling is not required because the non-refundable adjustments amount to 4 per cent of the royalties otherwise payable on all programming.[61] This is very reasonable compared to the adjustments that are applied in the United States, and which result from the existence of more than one music society. As a result, the risk of excess payment is virtually non-existent.

At first glance, it would appear that a floor would provide several useful features. It may have ensured the progressive introduction of the MBL, thereby allowing the Board to gauge its effects on the relevant market before it was fully implemented. It might also, under certain circumstances, have helped guarantee the continued existence of collective administration and limit the risks of cherry-picking.

A floor would only be useful if the vast majority of programming was of the same origin. Given the abundance of foreign programming on Canadian television and the relative difficulty of clearing rights to those programs, a floor may prevent Canadian broadcasters from clearing music rights for those programs. This would be counterproductive.

The more appropriate way to address the issue, which also eliminates the need for a floor, is to adjust the MBL structure directly. Again, the Board finds that the 22 per cent adjustment on account of SOCAN's operating expenses makes this measure of protection unnecessary.

h. Claiming MBL Benefits when Broadcasters Own the Publisher's Share of All Music in a Program

Broadcasters sometimes acquire the publisher's share of the music which is composed for the express purpose of insertion into their programming. CAB asked that broadcasters be allowed to claim half the benefits of the MBL when they, or someone they control, own the publisher's share in all the music included in a program. The Board denies CAB's request. There are two

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[61] The total of the 3 per cent adjustment for the incremental costs and the 1 per cent interest factor

reasons for this decision.

First, broadcasters do not own the publisher's share of performing rights; SOCAN does. The broadcaster only owns a right to remuneration according to SOCAN's internal distribution rules. In virtually all cases, SOCAN acquires all of the performing rights under the composers' membership agreement. In the exceptional case where a composer might have assigned his or her copyright to a publisher before joining SOCAN, SOCAN acquires that copyright at the time the publisher becomes a member of SOCAN. For a broadcaster to truly own a share of the copyright requires the highly unlikely scenario that (a) the right be acquired from a composer who is not a member of SOCAN, and (b) the broadcaster's publishing arm not be a member of SOCAN.

Second, granting CAB's request would provide broadcasters with an opportunity to cherry-pick in the following way. Each one of them could set up two publishing companies. The first, which would not be a member of SOCAN, would clear programs that generate more than average revenues. The second, which would remain a SOCAN member, would get distributions for the programs that generate lower than average revenues; given SOCAN's distribution rules, they would then be getting more than if they had source-cleared their own rights. The Board will not allow this to happen.

i. Alternative Dispute Resolution

During the proceedings, the Board raised with the parties the issue of alternative dispute resolution mechanisms. Both agreed that these were "a good idea".[62] In main argument, SOCAN did not comment on this issue, while CAB recognized the need for such a measure;[63] in reply, SOCAN did not comment on this part of CAB's argument.

Resort to the courts is expensive, and the Board's own decisions cannot correct past situations. The parties need a mechanism to iron out the difficulties that may arise from the introduction of the MBL. In the circumstances at hand, they should consider arbitration and mediation.

Having said this, the tariff does not contain dispute resolution clauses. It would not have been possible to provide for more than an excessively general provision. Consideration must be given to the details of such a mechanism before one is included in the tariff.

The Board invites the parties to comment on the appropriateness of including a dispute resolution mechanism in the tariff.

G. Conclusion on the Analysis: the Overall Impact of the Lowering of the Rate Combined with the Introduction of the MBL

The measures outlined in this decision provide broadcasters with a number of benefits, while at the same time guaranteeing the continued role of SOCAN in the area of television music performing rights. Thus, the reduction of the rate from 2.1 per cent to 1.8 per cent, while

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[62] Testimony of Mr. Rock, tr. pp. 1964-1965; Exhibit CAB-8 (MBL proposal)
[63] CAB Argument Appendix C, p. 5

reducing broadcasters' payments, will still leave SOCAN with the same amount of Tariff 2.A royalties in 1996 as it received in 1994, a period over which inflation was very low.

As to the MBL, it will also have a number of beneficial effects. The market will be allowed to play a stronger role than is currently possible. Broadcasters and composers will have available new, alternative ways of transacting in performing rights, ways that are designed in such a manner as to ensure that neither collective administration, nor the blanket licence will be put at risk. The manner in which the MBL is designed will afford broadcasters a further benefit, without jeopardizing SOCAN's financial situation. As can be found from Table III, in order to decrease its payments to SOCAN by 25 per cent, a station will have to clear music in programming from which it derives just under 40 per cent of its revenues.

TABLE III / TABLEAU III

REDUCTION FOR A STATION THAT CLEARS 40 PER CENT OF REVENUES
(all figures as a percentage of royalties payable by a non-MBL station)

RÉDUCTION OBTENUE EN AFFRANCHISSANT 40 POUR CENT DES REVENUS
(en pourcentage des redevances payables en vertu de la licence standard)

Payment on account of uncleared program / Redevances pour la programmation non affranchie	60%
Payment for additional operating expenses / Prime pour les dépenses additionnelles	3%
Interest factor / Facteur d'intérêt	1%
Payment for SOCAN's general expenses / Dépenses générales de la SOCAN : 22% × 95% × 40%	8.4%
Ambient music payment / Musique ambiante : 5% × 40%	2%
TOTAL	74.4%
REDUCTION / RÉDUCTION	25.6%

For the reasons given above, the Board is convinced that, in the long run, these measures will benefit Canadian composers, if only because of their increasing reliance on foreign royalties. No one can predict the precise impact that these measures will have on front-end payments to individual composers or on the overall amounts received by all composers. If, as others maintain, there is a relationship between one and the other, then in the long run and overall, the amount being paid at the back-end probably has some impact on the amount being paid in the front-end, and a lowering of the rate combined with the MBL will put more emphasis on negotiated deals in the market. This is a consequence of an evolving marketplace and one which the Board believes it is time to accept.

Claude Majeau

Claude Majeau
Secretary to the Board

DISSENTING OPINION BY VICE-CHAIRMAN HÉTU

VI. INTRODUCTION

As my colleagues, I think that the so-called "CTV" and "SODRAC" adjustments are unwarranted. I also would reject, for the reasons they outline, SODRAC's objection to the production of evidence.

As to the rest, my conclusions are diametrically different. I find that the current tariff structure and rate are not only appropriate, but preferable to the approach put forward by CAB. In my view, both the reduction in the rate and the introduction of the modified blanket licence (MBL) are unwarranted, and will have disruptive and dangerous effects.

A. BACKGROUND

I find it useful to review briefly the history of SOCAN's tariff and to summarize the challenges brought to it by broadcasters over the last decade or so.

The Composers, Authors and Publishers Association of Canada (CAPAC) first proposed tariff aimed at commercial television stations was filed in 1951, and that of BMI Canada[1] in 1954. The certified tariffs for the years 1951 to 1955 state that consideration of the proposed tariffs was "adjourned *sine die*". In 1956 and 1957, a tariff was approved for BMI Canada, while the certified tariffs mention that an agreement was reached as regards CAPAC. In 1958, after hearings, the parties agreed on a formula. For those three years, the royalties were a lump sum to be apportioned amongst all stations.

From 1959 until 1971, the tariff always reflected agreements reached between the television industry and the music societies. In 1959, the parties asked that the tariff be set at 2.1 per cent of a station's revenues. As a result of further agreements, the tariff rose to 2.2 per cent in 1963 and 2.25 per cent in 1969. In 1972, BMI Canada asked for an increase that would have put the combined rate at 2.5 per cent. CAB objected and the *status quo ante* was maintained. A further agreement increased the rate to 2.35 per cent in 1973 and 2.4 per cent in 1974. CAB challenged the rate in 1978, but the Copyright Appeal Board maintained it. Again as a result of agreements, the rate remained at 2.4 per cent from 1979 until 1984.

Since 1985, broadcasters have challenged the television tariff every single year. This resulted in seven different sets of hearings. In 1985, CAB asked for a rate of 1.75 per cent, half way between the rate of 2.4 per cent and the corresponding American rate, then estimated at around 1.09 per cent. The Global Television Network asked for a "limited licence covering only the use of music in non-Canadian programming", to allow clearance at source of music contained in Canadian programming.[2] CJOH Television asked for a blanket licence that would allow for a reduction in payments as a function of the ratio of music cleared at source to the total amount of music used. The Copyright Appeal Board rejected these proposals, left the rate at 2.4 per cent

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[1] Later known as PROCAN.

[2] That request was reiterated each year from 1986 to 1989.

and capped the royalties at their 1984 level. With industry revenues continuing to increase, the share of broadcasters' revenues paid to performing rights societies went down to 2.18 per cent in 1985. For 1986, the Board removed the cap and set the rate at 2.1 per cent. Further requests for reductions were rejected in 1987, 1988 and 1989.

Finally, for the period from 1990 to 1993, CAB asked for the American formula, pure and simple. The tariff would be a fixed sum, set for all the industry, representing the same share of revenues than that paid by American broadcasters to ASCAP and BMI. Thereafter, the amount would be adjusted for inflation. That amount would be allocated among stations, based on the share of royalties they had paid in 1990. A "per program licence"(PPL) would allow a discount for programs containing no SOCAN music, thereby opening the door to direct or source licensing. The new Board stuck to the existing formula and rate.

As can be seen, requests for a licence that accounts for direct or source licensing are nothing new. All have been rejected; every time, the main reasons were the same. First, direct or source licensing was not possible in Canada in light of existing institutional arrangements. Second, and as a result, there was no merit in putting in place a system that could only be used by foreign composers, to the possible detriment of Canadian composers.

It is apparently in response to this basic objection that CAB decided this time to put more emphasis on the benefits to be gained by Canadian composers and broadcasters by changing the current institutional arrangements, and on the ability of the Board to do so. A lot of the evidence retreaded familiar ground; the focus, however, was changed. Overt criticism of SOCAN as a monopoly was subdued, but a mass of evidence and argument criticized the evils of inefficiencies, cross-subsidization and mandated prices. The virtues of free-market negotiations, of providing composers with choices they are not asking for and of collective action (except the SOCAN type) were extolled.

CAB no longer questions the percentage of revenue formula but, bottom line, asks for a rate that would have Canadian broadcasters pay to SOCAN the same share of revenues paid by American broadcasters to ASCAP and BMI. CAB's MBL proposal is also slightly different, and somewhat more sophisticated than its 1993 PPL proposal.

B. ANALYSIS

One of CAB's reasons for asking both a lower rate and a MBL is that this would increase the importance of negotiated bargains in the front-end market. I address this question first. I then deal with CAB's specific proposals.

VII. FAVOURING FRONT-END NEGOTIATIONS

A. INTRODUCTION

CAB wants performing rights to be negotiated in the front-end market wherever possible. In the

case of new programming, that could be done at the same time as the composition contract.[3] CAB argues that such a system would benefit Canadian creators and be more efficient.

This begs the question of whether the Board should adopt tariffs that are intended to favour individuated bargaining of performing rights. This, in turn, requires that I determine who can (or should) decide whether or not a composer's performing rights should be subject to collective administration as well as who can (or should) determine or influence the nature of the deals being struck between composers and music societies.

B. ARE COMPOSERS ENTITLED TO DECIDE TO HAVE THEIR PERFORMING RIGHTS ADMINISTERED COLLECTIVELY, AND ONLY COLLECTIVELY?

CAB states that there are two institutional features to the Canadian regime for the collective administration of music performing rights which prevent direct licensing in Canada. One of them is the fact that SOCAN secures from its members exclusive assignments of their performing rights. The first feature needs to be set in perspective, especially in the context of the rights granted to composers by the Act and of the choices it entitles them to make.The other is the blanket licence.[4]

First, the *Act* expressly grants to each composer the exclusive right to authorize or refuse to authorize any use of his or her works, at whatever conditions he or she sees fit to impose. Composers who would decide to manage their performing rights on their own exert absolute control over them.[5]

Second, the *Act* gives composers the right to decide whether or not to collectively administer their copyrights.[6] Collective administration is subject to various regulatory frameworks; one applies specifically to music performing rights.[7] Composers who opt for collective administration of their performing rights derive certain advantages; they also accept certain constraints. Performing rights societies cannot collect royalties without having a tariff certified by this Board. Moreover, they do not control access to their repertoire: a user only needs to offer to pay the price set in a tariff, and does not require a licence.[8] Conversely, users gain guaranteed access to those societies' repertoire, at a guaranteed, fair and reasonable price.

This is the statutory backdrop against which composers have chosen to grant SOCAN exclusive

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[3] For existing programming, deals could be struck with owners of rights in the programs, when they already own the performing rights. Thus, producers of American programming are, most of the time, first owners of the copyright in commissioned music. This is a result of the American "work-for-hire" doctrine: testimony of Mr. Reimer, tr. p. 1208.

[4] The one-price blanket licence is examined later.

[5] Such is the case for the management of so-called "grand rights".

[6] In a few cases, (retransmission, public performance of performers' performances) collective administration is either compulsory, or constitutes the only way in which certain protected uses can be remunerated.

[7] No one has challenged that framework or asked that the composers' ability to opt for collective administration be curtailed or otherwise controlled. If anything, Parliament's intention over the last several years has been clearly to allow for more, not less, collective administration.

[8] Subsection 68.2(2) of the *Act*.

assignments of their performing rights. This choice is expressed in the decisions of SOCAN's board of directors as well as through each composer's continued adherence to SOCAN's statutes.

Composers who opt for collective administration of their performing rights readily accept, in the interest of all members, that their ability to strike individual bargains be restricted. Allowing SOCAN to secure exclusive assignments prevents them from forms of cream skimming which would favour star composers but go against the interests of other, usually less experienced ones. Composers who testified, all of whom are part of that elite group that might profit from an end to exclusive assignments, strenuously defended the measure.

Exclusive assignments are the rule everywhere in the world, except in the United States, a few Latin American countries and (to some extent) in the United Kingdom.[9] Both in the United States and in the United Kingdom, restrictions on the exclusive nature of assignments have been the result of antitrust decisions. In the United Kingdom, this was the result of complaints filed by a few superstar composers, not by users.

The exclusive character of assignments is not dictated by the *Act*. Therefore, in so far as this practice may be thought to lessen competition, the Director of Investigation and Research can challenge it. At the time of the merger of the Performing Rights Organization of Canada (PROCAN) and CAPAC, the Director did not give his blessing to the practice as such, but allowed it to stand. I agree with that decision. The reasons why composers feel that this measure is essential to protect their rights is obvious. By joining SOCAN, composers forego any control they may have over the use of their works. The only possible result of one-on-one negotiations for performing rights is a price that is lower than the price set in the SOCAN tariff.[10] The exclusive assignment to SOCAN is the only way composers can avoid dealing with powerful users from a position of weakness.[11] In effect, the end of exclusive assignments would defeat the purpose of collective administration.[12] Composers cannot be asked to pay the price for collective administration without being ensured that they will also enjoy its benefits.

Composers have the right to organize themselves as they have. The choice to manage their performing rights, in some or all markets, on their own or collectively is theirs, and only theirs, to make. Indeed, that choice determines whether the Board has any power at all to set the price for those rights. As long as composers choose SOCAN as their instrument for collecting their performing rights royalties, the Board has to heed that choice and to set fair and reasonable prices and conditions.

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[9] In Europe, composers can assign different parts of their repertoire to different societies. Those assignments are, nevertheless, exclusive. See e.g. Exhibit SOCAN-47 (*Acte d'adhésion aux statuts de la SACEM*), art. 34. According to the testimony of Mr. Tournier, very few authors take advantage of this provision.

[10] Only by foregoing membership in any music society could a Canadian composer be in a position to negotiate a price higher than the SOCAN tariff.

[11] Broadcasters already take full advantage of SOCAN's internal rules by securing for themselves, in most cases, the publisher's share of the royalties.

[12] Significantly, under the *Status of the Artist Act* (*SAA*), the exclusive nature of representation is imposed by statute. In effect, the *SAA* allows to happen in the front end what has been allowed for some time in the back end.

The choice to resort to exclusive assignments is also one that should be made by composers, at least until the Director of Investigation and Research questions that choice. Composers are not asking for a tariff that allows them to strike individual bargains for their performing rights. Under the circumstances, this Board should neither tamper with this feature, nor make determinations whose purpose or effect is to urge copyright owners to abandon it.

This is why I cannot endorse the approach put forward by Professors Globerman and Stanbury. This Board's duty is to set a fair and reasonable price for the use of SOCAN's repertoire, not to take measures, be they a reduction in the rate or giving access to a MBL, aimed at increasing direct negotiations. I remain of that view even if, as some would argue, this could result in a more efficient system.

C. FAVOURING FRONT-END NEGOTIATIONS IS UNWARRANTED AS A MATTER OF POLICY

Given present circumstances, composers have many good reasons to prefer current institutional arrangements over any measure which might favour front-end negotiations. First, existing front-end relationships are already skewed in favour of broadcasters. Second, the change would be expensive. Third, alternatives to collective administration are less attractive. Fourth, there is no reason to believe that the result would be more efficient.

i. The Nature of Current Front-End Relationships

Some business deals do occur in the front end during which the issue of performing rights could, as a matter of practice, be addressed. However, the nature of those dealings and current market conditions are such that composers have reason to fear measures that could increase their relative importance.

First, the testimony of composers during these proceedings vividly highlighted the fact that they, to use a well-worn phrase, are doing more with less. The working conditions of composers who are commissioned to write music for television producers have deteriorated over the last decade or so. Composing fees have been going down, while the composition contract now covers a much wider package of services: in effect, composers now assume the entire music production process. In addition, composers are now required, most of the time, to give up the publisher's share of their right to remuneration to the producer.[13]

Second, in dealings between broadcasters and composers, broadcasters wield considerably more market power. I prefer the analysis of Professor Liebowitz on this point. I find it much more convincing than that of CAB's witnesses. Professor Liebowitz clearly identified the factors to be taken into account in assessing market power, such as "freedom of entry, ability to coordinate behaviour and asymmetry in information and size",[14] all of which clearly favour broadcasters.

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[13] The issue of whether broadcasters' publishing subsidiaries actually do a publisher's job remains very much open: contrast, for example, the testimony of Mr. Morley, tr. p. 81, with that of Ms. Schafran, tr. pp. 3290, 3355-9. Ms. Schafran's testimony was especially telling in outlining the conflict of interest which exists in almost all cases between composers and broadcasters: see, e.g., tr. pp. 3292, 3371-2.

[14] Exhibit SOCAN-48, p. 2

He also offered a thorough analysis of concentration of demand at the local, regional and national levels, concluding that composers "face serious problems of market power",[15] especially in the local and regional markets. That distinction is crucial: in all probability, the first programming for which the MBL will be used is news and information, which is largely produced in the local, "extremely concentrated" market.[16]

Composers who testified on this issue reaffirmed their inability to truly bargain in the front-end market. Significantly, none of CAB's witnesses contradicted these statements. For their part, Professors Globerman and Stanbury admitted that only a few composers could wield market power.[17]

The presence of a regulated back-end payment protects composers from the excessive bargaining power that broadcasters might wield in a one-on-one negotiation. Not surprisingly, SOCAN sees in the measures put forward by CAB, and especially in the MBL, an attempt to circumvent that protection.

I am unmoved by CAB's undertaking, made on behalf of its members, to negotiate in good faith. That undertaking is b inding on no one. This Board can clamour its expectations high and loud, but there are no guarantees that they will be heeded.no guarantees that they will be heeded.

Third, composers are not asking for this to happen. CAB assures us that what it proposes will not jeopardize composers' previous choices and will only serve to address their individual preferences. Yet, to do so requires that this Board ignore the composers' expressed preference not to allow themselves those individual choices. Even star composers, who alone could benefit from a change in the current regime, are asking this Board, as they did in 1986,[18] not to tamper with current institutional arrangements.

ii. A Change Would Be Expensive

It cannot be cheaper to administer a regime which involves multiple payments instead of a single one. My colleagues recognize this from the outset with their 3 per cent administrative premium.

Furthermore, there can be no reduction in SOCAN's overall operating costs as a result of this measure. SOCAN will continue to proceed to its usual census for the purposes of distribution, thereby monitoring uses for which its licence is no longer required. Moreover, SOCAN's services will continue to be required to monitor uses of source-cleared music outside of Canada, if not in the television market, certainly in other markets. Again, my colleagues recognize this through a further 22 per cent adjustment on account of SOCAN's general operating costs.

While it is impossible to predict whether the measure might prove more efficient for individual

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[15] Exhibit SOCAN-48, p. 9
[16] Exhibit SOCAN-48, p. 9
[17] Exhibit CAB-9, p. 28
[18] *Final Report to the Minister of Consumer and Corporate Affairs for 1986* (1986), 11 C.P.R. (3d) 1, p. 11 (Cop.Ap.Bd.)

rights holders, the measure clearly makes SOCAN's administration less efficient, since it does not reduce costs while it reduces revenues.

iii. Alternatives to Collective Administration of Copyright Are Less Attractive

CAB argues that there are at least four courses of action open to composers if they have to bargain in the front-end market. First, they can share information on contracts. Second, they can retain lawyers or agents to negotiate on their behalf. Third, they can collectively bargain minimum terms and conditions with producers, on the ACTRA model. Fourth, they can rely on the *Status of the Artist Act* (*SAA*) in their dealing with federally regulated broadcasters.

CAB fails to explain why composers should wish to resort to those methods in place of a system with which they say they are entirely satisfied, especially given the ground composers have lost to producers over the last several years in their commissioned music contracts. Nevertheless, I wish to outline what are, in my view, the weaknesses of the last two options.[19]

In starting, I note that CAB is arguing that the importance of collective administration can be reduced without risk to the composers for the reason that composers can form unions. Even assuming that those unions could wield all the power that CAB says they could, I must admit that replacing one form of collective bargaining that is both proven and of universal application with another form that is both experimental and narrowly focused strikes me as being rather illogical.

In any event, the two models put forward as alternatives each suffer from limitations that are inherent to their very nature, and which are successfully addressed by collective administration under the *Act*.

Both models have for their main focus the provision of services, not the use of goods. And both suffer a serious disadvantage when it comes to monitoring uses in other markets or outside of Canada.[20] Bargaining agents such as ACTRA or the *Société professionnelle des auteurs et compositeurs du Québec* (SPACQ) do not have the network of contacts or the sort of arrangements that SOCAN enjoys with other music societies around the world. Neither are they equipped to collect for the thousands of small uses which may be made of music originally composed for a popular television show. As a result, SOCAN's services will continue to be required. Such duplication can only result in inefficiency.

Even if "scale agreements" can provide forms of remuneration that are linked to the successful marketing of the program,[21] they cannot deal with copyright if composers have already assigned those rights to another person, including SOCAN. Even for those composers who still control their copyrights, the *SAA* model cannot efficiently ensure the collection of royalties for uses in other markets or outside Canada. Nothing more is required to understand why composers reject

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[19] I take the first two suggestions as having been made more in jest than seriously.

[20] CAB itself pointed to the increased importance of foreign revenues, especially in the television market.

[21] This was clearly recognized in the agreement between SPACQ and SOCAN concerning the former's certification as a bargaining agent: see Exhibit CAB-11, p. 6.

the ACTRA and *SAA* models when it comes to dealing with their copyrights.[22]

Also relevant is the fact that the *SAA* applies only to federally regulated producers. Broadcasters can circumvent the legislation merely by not producing their own programs and ordering them from independent producers. Significantly, this practice is not merely spreading; it is being encouraged by the CRTC.

In any event, the *SAA* model probably requires the creation of a new organization. I somehow doubt that the Canadian Artists and Producers Professional Relations Tribunal would certify as an artists' bargaining agent an organization such as SOCAN, whose membership comprises "producers" within the meaning of the *SAA*.

In the end, it becomes very much an issue of efficiency. I fail to see how a system that requires certification of an association, the signing of a collective agreement and individual negotiations [23] can be more efficient than one which only requires the certification of a tariff, especially since for international uses and uses in other domestic markets, SOCAN's services will still be required.

iv. SOCAN's Inefficiency

Professors Globerman and Stanbury criticized SOCAN for being inefficient and for practising systematic cross-subsidization. Their main arguments in this respect were as follows. First, the services provided by SOCAN could be provided more cheaply. Second, the merger of CAPAC and PROCAN has not generated the expected economies of scale. Third, not all composers need all of SOCAN's services; they should be allowed to buy only some of them. Fourth, since the relative cost of collecting and distributing royalties cannot be the same across the board, this necessarily entails that royalties collected through some tariffs subsidize the operation of other tariffs. This, in their view, interferes with a proper matching of royalties to value. They maintain that composers whose works are undervalued by SOCAN will be better off negotiating directly with producers.

This analysis takes too narrow a view of collective administration. The argument about inefficiency may be valid when looked at from the single perspective of the domestic television market for specific works from specific composers. However, the efficiency sought by each composer is to collect performing rights for all his or her works, from all uses, domestic as well as foreign, all at the lowest possible overall cost. Looked at from this broader perspective, the composer's choice in favour of collective administration certainly seems to be efficiency based.

The same holds true when the issue is examined from the angle of possible cross-subsidization. Looked at narrowly, it may run against a composer's immediate interests. However, because any cross-subsidization is practiced across uses, across works and over time, it may not work overall

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[22] CAB is incorrect in stating that the *SAA* "contemplates setting the terms and conditions for composers *qua* copyright owners": CAB Reply, paragraph 100. Copyright is a good, not a service.

[23] One must remember that the *SAA* only sets minimum terms.

to the detriment of the composer. Composers who may be subsidizing someone else today may well have been on the receiving end yesterday or end up on it tomorrow. Composers in the television market who subsidize someone else may be subsidized in other markets, whether for the same work or for other works.

In any event, inefficiency and cross-subsidization, assuming that they do exist, are of interest, first and foremost, to SOCAN members. It is neither for the Board, nor for CAB to complain about it. If composers are concerned about such issues, their remedies are several. They can change SOCAN's board of directors. They can ask that the Director of Investigation and Research look into the matter. They can set up a new music society.[24] They can even ask this Board to adopt tariffs that allow them to effectively negotiate one-on-one with users.[25] Composers have done none of this.

Inefficiency and cross-subsidization within SOCAN are relevant to CAB only if one or the other results in broadcasters paying a higher price than they would otherwise. This Board has always set tariffs without regard to SOCAN's operating expenses. In the present case, even though SOCAN's operating expenses have, according to CAB, increased over the last five years, the tariff has remained the same.

CAB also questioned whether all composers need all of the services provided by SOCAN. Again, composers have chosen to so spend the revenues they generate. That is none of CAB's, or this Board's, business.

D. CONCLUSION

CAB is asking the Board to allow composers certain "choices", with a view to increasing individuated negotiations. Composers who testified in these proceedings, all of whom are part of that elite group which, assuming that CAB is right, would stand to gain most from CAB's proposals, tell us that they have already made their choice and want to continue the arrangements they currently have with SOCAN. In my view, the reason for this is clear: they do not want broadcasters to be able to use their market power to force their choices on them.

To me, therefore, the issue is not whether the Board should adopt a tariff structure that will favour or increase individuated negotiations in the front end, which I find unwarranted as a matter of policy, but whether CAB's proposals have any merit on their own.

VIII. THE BLANKET LICENCE RATE SHOULD BE MAINTAINED

A. INTRODUCTION

In 1993, the Board stated that "any changes that might have occurred since (the 1986 hearings)

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[24] SOCAN's market is contestable. The only barrier to entry into that market is the requirement that a tariff be certified before collecting royalties.

[25] Past experiences before this Board with SPACQ and others show that members of SOCAN are quite able to express to the Board their dissatisfaction with some of SOCAN's decisions or practices.

are either not relevant to the issue, or not significant enough to justify a reduction in the rate".[26] That statement remains true today. If anything, the record of these proceedings only serves to reinforce my conviction that the rate should remain at the current level.

Thus, I agree with Professor Liebowitz that the current balance between the front-end and back-end markets is working fine and ought not to be disturbed. I also agree that the front-end market can take care of any adjustments in the total compensation composers receive, especially given the market power wielded by broadcasters and producers. My view in this respect is further reinforced by the revelation that broadcasters now generally manage to acquire the publisher's share of the remuneration right for commissioned music in their own productions, thereby actually reducing the price they pay for performing rights. Nothing prevents them, when they purchase programming for their stations, from obtaining the same from Canadian or American producers: Canadian producers generally acquire the publisher's share, while American producers usually are first owners of the copyright.[27]

Furthermore, programming costs have increased as a percentage of revenues, due to increased demand for programming. At the same time, performing rights went down as a share of program expenses.[28] All other things being equal, an increase in demand for programming should bring about an increase in the price of individual programming inputs, including music. I see no reason why composers should not share in the benefits from an increase in demand.

I now turn to the arguments CAB put forward in support of a reduction in the rate. I note in passing that CAB's economic experts did not argue that the current rate is too high, only that the system would work more efficiently if the rate were reduced because it would promote individuated bargaining.

B. A CHANGE IN THE ENVIRONMENT

Clearly, the economic and political environment in which broadcasters operate today is quite different from what it was 15 or 20 years ago. It is also clear that competition has increased at an accelerated rate and will continue to increase in the years to come. CAB believes that this requires a reassessment of the 1993 findings. For the reasons that follow, I disagree.

i. The New Public Policy Directions

Changes in policy have modified the environment within which broadcasters operate. CAB cited two such policies in support of its proposals.[29] Given the task at hand, these policies are neither meaningful nor relevant.

Thus, the "increased reliance on market forces" can hardly be relevant, since the *Act* requires that

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[26] *Public Performance, 1993*, p. 361
[27] See *supra*, n. 3
[28] Exhibit SOCAN-53 (revised chart to SOCAN-4); tr. pp. 1500-5. Music performing royalties represented 5.58 per cent of program expenses in 1972, 4.18 per cent in 1984, 2.96 per cent in 1991 and 3.19 per cent in 1995.
[29] CAB Argument, p. iii and paragraphs 13 to 21.

the Board set the price for performing rights when they are collectively administered. The Board's mandate is to set fair prices for performing rights, not to rely on the market to do so. The Canadian market for music performing rights is regulated once those rights are administered collectively; the Board would abdicate its responsibilities if it relied on private deals to set them.

I also wonder how the "aggressive encouragement of Canadian programming" should result in a lower price for performing rights. The CRTC wants to help create more opportunities for the various players in the television industry and to provide Canadian consumers with more choices. Reducing the rate in SOCAN's tariff has nothing to do with this. It simply takes money from the creators' pockets and puts it in the broadcasters', who may or may not put that money back into Canadian production. The Board does not have the tools to control the manner in which the monies freed up by a rate cut will be spent.

In any event, the sums involved are not important enough in the television production market to make any difference. Thus in 1996, a reduction in the rate from 2.1 per cent to 1.8 per cent would remove $3.96 million from the television pool. This amounts to 13.7 per cent of the funds available for distribution in the pool, but represents less than 0.8 per cent of Canadian programming expenditures by private broadcasters and 0.28 per cent of station revenues.[30] Even if the savings were to be dedicated to Canadian programming, only a small share would find its way back to composers.

ii. Competition and Financial Performance

Competition for audience and advertising market shares is relevant in setting a fair tariff. However, a rate-based formula is responsive to competitive pressures. Moreover, a cut in the rate can hardly be justified when the record shows that the financial performance of conventional broadcasters has actually improved over the last decade, despite increased competition.

Changes in audience share must be used cautiously when assessing what the rate should be. In and of itself, a change in viewing data cannot justify a change in the rate. A rate is used precisely because it automatically adjusts to market conditions. An assumption is made, which is shared by everyone who participated in these proceedings, that changes in viewing result in changes in revenues, which in turn bring about changes in the amount of royalties.[31] I somehow doubt that CAB would agree to an increase in the rate simply because its members' share of viewing was going up.

In any event, total hours of viewing to Canadian conventional broadcasters have remained relatively flat over the period 1986 to 1996.[32] Conventional broadcasters have not lost sales; the market has expanded with the arrival of new services. Over the same period, conventional

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[30] See Exhibits SOCAN-6 and Board-1

[31] That remains true whether audience loss is due to forms of entertainment which generate royalties to SOCAN, such as viewing to specialty channels, to forms that do not, such as viewing to VCR, or to forms that may or may not generate such royalties in the future, such as the Internet.

[32] See Exhibit CAB-3, Appendix A, Table 2, reproduced in part in the table accompanying n. 61, *infra*.

broadcasters were able to sell advertising time at ever-increasing rates.[33] The size of the market is the all important factor here. There may be more guests at the table, but there is also more food for everyone.

The tariffs this Board sets are not meant to fluctuate in accordance with profitability. If that were the case, the commercial television tariff would have increased significantly during the period 1980 to 1984. In any event, while the CRTC might be able to help broadcasters in this respect, this Board is certainly not.

More importantly, the financial picture that emerged from these proceedings is one of an industry that is holding its own quite nicely, not one that is teetering on the edge. Thus, industry revenues have grown at a compound annual rate of 4.8 per cent over the last 10 years, and 2.3 per cent over the last five years. [34] The 10-year figure is higher than the CPI.[35] The fact that conventional services have managed to increase sales in real terms while the supply of airtime was increasing rapidly is indicative of good health. [36]

During the same period, operating margins have gone from a spectacular 24.2 per cent in 1985 to 10.3 per cent in 1990 and to a quite respectable 16.4 per cent in 1995.[37] Since no one expects the industry to recover the profitability levels exhibited in the mid-1980's, that can hardly be an argument in favour of reducing the tariff. CAB's own evidence reflects optimism, not gloom and doom. The broadcasting index has outperformed the TSE 300 since July 1996. A report prepared by TD Securities and filed by CAB notes an increased interest in the sector over recent months.[38] The long term consolidation trend in the industry, as well as private market transactions, also confirm the inherent value in broadcasting assets.

Finally, one should not forget that the television market operates in an environment where competition is controlled. Market entry is regulated with a view to ensuring the viability of existing players. [39] It is not because there is competition within a market, such as television, that it is unregulated.

iii. Increase in Other Sources of Income

My colleagues seem to imply that the emergence of additional sources of income for composers should result in a reduction in the rate. I disagree with that conclusion.

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[33] Exhibit SOCAN-19
[34] Evidence of Mr. Casey, Exhibit SOCAN-3
[35] This can be derived from SOCAN-3.
[36] In itself, the comparison in the growth of air-time sales of specialty services and conventional broadcasters is meaningless. Specialty services sales still represent less than 8 per cent of the total air-time sales in the business. Moreover, the difference in rate of increase is explained in large part by the arrival of new services: over the last five years, the number of specialty services has increased from 13 to 21.
[37] Exhibit SOCAN-3, p. 4
[38] Exhibit CAB-29, p. 5
[39] I cannot recall a conventional television station going bankrupt. The failed first attempt at introducing non-broadcast services resulted in a much more tightly supervised, and successful, second attempt.

An increase in foreign sales of Canadian programs can hardly be a justification for a reduction in the tariff rate. As producers of these programs derive extra revenues from these sales, so should composers.

Neither should the additional revenues from specialty services, under Tariff 17, result in such a reduction. In time, this may bring about, through a reduction in broadcasters' revenues, a decrease in the amount of royalties they pay to SOCAN. That can occur without any change in the rate. Moreover, Tariff 17 takes into account the rate set in Tariff 2.A. A reduction in that rate can only entail a decrease in the importance of that additional source of income. This may also be true of all other tariffs for competing services. In the end, the net result may well be negative, not positive.

iv. The American Price

A review of the manner in which the American price has been arrived at is necessary in order to fully understand the reasons why I find it inappropriate to take it into account in setting the Canadian rate.[40]

In the United States, some aspects of ASCAP's and BMI's operations are subject to consent decrees, issued pursuant to antitrust legislation, dating back as far as 1941. As a result, both ASCAP and BMI are prohibited from securing exclusive assignments of copyright,[41] and broadcasters are entitled to apply for a PPL.[42] ASCAP's consent decree also gives the United States District Court for the Southern District of New York (the Rate Court) the responsibility for determining ASCAP licence fees upon the request of any music user or group of users. [43]

Dealings between local television stations and ASCAP have engendered a flurry of litigation. [44] For our purposes, however, only three sets of proceedings need be referred to.

In 1954, a first set of proceedings [45] ended in an agreement which set the ASCAP rate for the television blanket licence, comprising a commercial fee and a sustaining fee, at approximately 2.25 per cent.[46]

In 1961, television stations sought a modification of the blanket licence which they eventually

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[40] This outline is based on the testimony of Messrs. Reimer and Zwaska, tr. pp. 1142 *passim*, 2659 *passim*, Exhibit CAB-6 and Exhibit SOCAN-10.

[41] ASCAP's assignments are non-exclusive. BMI's are exclusive except for the United States.

[42] ASCAP's consent decree and related orders also deal with some aspects of sampling and distribution.

[43] In their testimony, Messrs. Reimer and Zwaska alluded to a similar provision now applying to BMI. This is confirmed in *Nimmer on Copyright*, p. 8-271.

[44] The CBS, ABC and NBC networks, as well as the stations they own, are subject to separate licensing regimes with their own history of litigation. Royalties on account of programming on the Fox, Warner Brothers and UPN networks are, again as a result of a court decision, paid by their affiliates.

[45] The so-called *Voice of Alabama* proceedings.

[46] BMI's rates, which were first set in 1959, ranged from 0.81 per cent to 1.09 per cent for stations with over $100,000 in gross revenue.

failed to obtain.[47] Further Rate Court proceedings resulted in a deal being reached in 1969 that applied to the period from 1968 to 1972. A stair-step formula was used: broadcasters paid 2 per cent on revenues for a "base period" and 1 per cent on the rest of revenues.[48] The deal was renewed for the period 1973 to 1977.

In 1978, ASCAP and the broadcasters agreed to extend the terms of those licences on a monthly basis while negotiations took place. In November 1978, the stations filed an antitrust lawsuit. A series of interim licences were issued under the rate fixing mechanism of the consent decree until the antitrust issues were fully resolved in 1985; the stations eventually lost.

Local television stations then asked the Rate Court to set licence fees, including interim fees. [49] As to the interim fees, parties agreed to abandon the *Shenandoah* formula and asked the court to set an industry-wide fee for all stations, that was apportioned on the basis of what stations had been paying for their *Shenandoah* licence, and the court also put into place an interim PPL. The first interim fee decision was issued in 1987.

The Rate Court's final decision was issued in February 1993, covering the period February 1, 1983 to December 31, 1995. In essence, the price was set using the amount of royalties paid by all stations in 1972 [50] and then correcting it to account for the Consumer Price Index as well as for half the percentage increase in the number of stations; the result was then apportioned according to each market's importance and each station's ratings. From February 1993 to October 1995, there was additional litigation and negotiation, including three subsequent Rate Court decisions clarifying certain aspects of the February 1993 decision. This led ultimately to an agreement on licence terms for local television on both blanket and per program licences, which the Rate Court endorsed. That licence applies from October 1, 1995 through to March 31, 1998. [51]

As a result of this, and other proceedings, royalties paid by conventional American broadcasters[52] now represent 0.86 per cent of their advertising revenues. Again this year, CAB wishes to use this figure to challenge the rate paid by Canadian broadcasters. Again this year, for

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[47] *United States v. ASCAP (Application of Shenandoah Valley Broadcasting Inc.)* 1962 Trade Cases ¶ 70,466 (S.D.N.Y.), 1964 Trade Cases ¶ 71,102, cert. denied 377 U.S. 997 (1964)

[48] This is known as the *Shenandoah* formula. As a result, the share of broadcasters' income paid for music performing rights progressively declined to approximately 1.17 per cent by 1985, which is the last year in which the *Shenandoah* formula was applied.

Networks started paying flat fees in 1969. From the time the *Shenandoah* agreement was reached, BMI's licence was set at a percentage of ASCAP's, which increased progressively from 58 per cent in 1969 to 80 per cent in 1995.

[49] This is what is referred to as the *Buffalo Broadcasting* proceedings.

[50] The last year of the first term of the *Shenandoah* agreements.

[51] BMI and broadcasters agreed to put negotiations on hold pending the outcome of the ASCAP Rate Court proceedings. BMI licence agreement covering both blanket and per-program licences now apply for the period from January 1995 to the end of March 1999.

Stations and SESAC reached their first industry-wide agreement in January 1997. The agreement is retroactive to October 1995 and extends to the end of the year 2000. It provides only for blanket licences.

[52] That is royalties paid by television stations for their local programming as well as royalties paid by CBS, ABC and NBC for their network programming and for local programming on the stations they own and operate.

the reasons set out in the Board's 1993 decision, as well as for others on which I will now elaborate, I find that this would be highly inappropriate.

a. Different Comparisons Yield Different Results

In 1995, American broadcasters paid 0.86 per cent of their advertising revenues on account of performing rights, while Canadians paid 2.1 per cent. In that same year, American broadcasters' revenues were approximately 23 times that of Canadian broadcasters, for a population that is only nine times larger.

CAB's way of comparing the price paid by American and Canadian broadcasters for their performing rights is not the only valid one. There are other ways of looking at the situation. Thus, for the same period, American broadcasters paid CAN$286 millions; Canadians paid $23.8 millions, or 8.3 per cent: based on that comparison, American broadcasters pay more than Canadians. On a per capita basis, American broadcasters paid CAN$1.09 and Canadians $0.80. Music fees represented 2.78 per cent of programming costs in the United States, and 3.19 per cent in Canada. Each and every one of these comparisons is at least as valid a basis for argument as CAB's position of choice.[53]

b. The American Price Is Not an Appropriate Proxy

For several reasons, the American price should, on the whole, be given very little weight.

First, the testimony of Mr. Reimer amply demonstrated that the price and tariff structure for American television performing rights have been highly unstable and subject to sudden, important changes. It is generally not a good idea to use such an unstable factor as a proxy.

Second, as was clearly explained in the Board's 1993 decision and repeated in these reasons, the American price is the product of a process which is not relevant to setting the Canadian rate. The record of the current proceedings only serves to reinforce my view in this respect.

Third, the manner in which the American Rate Court arrived at the price for the years 1983 to 1995 leaves considerable doubt as to whether that price is fair and reasonable. I agree with Professor Liebowitz that no economist would ever think that setting a price for 1995 using a 1972 figure and then adjusting it using an inflation index is a reasonable thing to do in a situation like this.[54] No attention is paid to changes in the structure of the relevant market[55] over more than two decades, and fluctuations in programming expenses or advertising revenues are ignored. Composers' revenues, in constant dollars, are frozen at their 1972 level; no account is taken of the fact that, during the same period, advertising revenues were allowed to grow at a rate that

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[53] See Exhibit CAB-3, Appendix A, Table 9 for music licence fees; Exhibit CAB-16 and *supra*, n. 28 for the ratio of licence fees to programming expenses in the United States and in Canada. Population data (262.8 millions for the U.S. and 29.6 millions for Canada) are for 1995 and come from the websites of the U.S. Census Bureau (www.census.gov/stat_abstract) and of Statistics Canada (www.statcan.ca/english/pgdb/people/population).

[54] Tr. p. 1706

[55] Except for partial account being taken of the increase in the number of stations.

vastly outpaced inflation. If anything, this confirms that the American price probably is much too low.

Finally, the American price is not a market price. The price, the structure and the conditions of access to the ASCAP repertoire are the result of litigation going back to the 1940's. Arrangements with BMI were clearly arrived at having in mind the Rate Court's decision dealing with ASCAP. [56] Even the latest agreements are not the product of arms-length negotiations. The parties may have settled their few remaining differences rather than pursue alternative judicial remedies. However, the price they arrived at was calculated using the Rate Court's formula, and the liability of individual stations was determined according to a formula which was also approved by that Court.[57]

Ironically, the best "market proxy" available to this Board is the rate that applied in Canada from 1974 to 1984. The Canadian tariff for the years 1959 to 1971, 1973 to 1977 and 1979 to 1984, including rate increases from 2.1 per cent in 1959 to 2.4 per cent in 1974, always reflected agreements that were reached between the parties. Using that approach, the current rate of 2.1 per cent is lower than the rate which matches most closely the characteristics of a price that was negotiated by the relevant players in the market.

c. The American Rate Was Never the Same as the Canadian Rate

In 1959, the ASCAP rate was 2.25 per cent; the combined rate for ASCAP and BMI was at least 3.34 per cent.[58] In that same year, the Canadian rate was set by agreement at 2.1 per cent.

Furthermore, as was clearly outlined during these proceedings, the rate base never was the same, if only because the amounts that are excluded from it are vastly different.[59]

In any event, the American price and the Canadian rate are set for separate markets, and arrived at through two different systems, according to rules which are significantly different. It can hardly be expected that the results would be the same. At some point in time, the Copyright Appeal Board may or may not have had the ASCAP rate in mind in setting the Canadian rate. That does not make the ASCAP rate into some sort of benchmark. Canadian tariffs are not just a mirror, nor ought to be the mirror, of the prices paid in the United States, or for that matter, anywhere else in the world.

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[56] Testimony of Mr. Zwaska, tr. pp. 2665-6. The repertoire of the third music society, SESAC, is not important enough to have a significant impact on the market.

[57] Exhibit CAB-6, p. 7; see also the testimony of Mr. Reimer, tr. p. 1315.

[58] See *supra*, n. 46 and accompanying text. See also the testimony of Mr. Zwaska during the 1993 hearing, Exhibit SOCAN-10, pp. 1267-8.

[59] See e.g. the testimony of Mr. Reimer, tr. p. 1316.

d. American Broadcasters Are Not Canadian Broadcasters' Chief Competitors for Advertising Revenues

The following table shows that Canadian broadcasters' loss of viewing share over the last decade or so has been to the benefit of pay and specialty services, not American conventional broadcasters. Meanwhile, the consumption of conventional television programming has remained flat. Canadian services overall lost 2.6 per cent of their viewing share while U.S. services lost 9 per cent of their viewing share. The only net gain is to VCR use and other services, which might compete with conventional broadcasters for viewers, but probably does not compete for advertising revenues. [60]

Percentage Share of Weekly Hours of Tuning by All Persons 2+, Canada 1986-1996 [61] **Part d'écoute hebdomadaire, toutes personnes, 2 ans et plus, Canada 1986-1996**[61]			
	1986	**1992**	**1996**
Canadian Private Commercial Broadcasters Télévision conventionnelle privée canadienne	54.4	51.6	48.3
CBC/Radio Canada Owned and Operated CBC/Radio Canada, y compris les stations affiliées	16.4	11.5	12.0
Canadian Pay and Specialty Services Services spécialisés et payants canadiens	1.9	6.3	10.5
Other Canadian Services / Autres services canadiens	1.8	2.1	1.8
Total Canadian Services / Tous les services canadiens	74.5	71.5	72.6
U.S. Conventional Broadcasters / Télévision conventionnelle américaine	22.0	19.3	15.3
U.S. Specialty Services / Services spécialisés américains	0.4	3.0	5.1
Total U.S. Services / Tous les services américains	22.4	22.3	20.4
All Other Services + VCR Use / Magnétoscopes et autres services	3.1	6.2	7.0
Total Hours Tuned (million) / Écoute totale (en millions d'heures)	599.5	619.1	676.5
Total Hours Tuned to Canadian Conventional Broadcasters (million) Écoute totale, télévision conventionnelle canadienne (en millions d'heures)	326.1	319.5	326.7

As can be seen, the only players gaining audience shares are Canadian and American pay and specialty services, all of which share two important characteristics. First, the CRTC regulates their access to the Canadian market. Second, all of them are subject to SOCAN's Tariff 17, which was derived using Tariff 2.A. [62] In other words, those who are taking away audience shares from Canadian broadcasters already pay for their music a price that takes into account what Canadian broadcasters pay for theirs.

Canadian broadcasters do lose some advertising revenues to American border broadcasters. However, these losses have no common measure with relative audience shares of Canadian and American broadcasters. It is estimated that competition for advertising from American border

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[60] Testimony of Mr. Ellis, tr. p. 676; Exhibit CAB-3, p. 6

[61] The table is derived from Exhibit CAB-3, Appendix A, Table 2.

[62] In fact, the viewing share to all services that are subject to tariffs set by this Board (total Canadian services + U.S. specialty services) increased from 74.9 per cent to 77.7 per cent over the period.

stations results in a loss of approximately $52.7 millions, [63]or less than 4 per cent of Canadian broadcasters' revenues, while the total audience share of American broadcasters in 1996 was more than 30 per cent of that of private Canadian broadcasters. The explanation for this is simple: most Canadian viewing to American stations is distant.[64]

In any event, the Board's tariffs are ill suited to deal with problems of this sort. Thus, the outright abolition of Tariff 2.A would still not fully compensate Canadian broadcasters' losses due to competition for advertising revenues from American border stations. Obviously, the remedy, if remedy there need be, lies elsewhere.

e. The Fact that Money is Leaving the Country is the Result of Decisions Made by CAB's Own Members

CAB is particularly upset that close to half the amounts distributed from the television pool leave the country. It argues that by reducing the rate, more money would stay in Canada. As the Board noted in 1993,[65] this situation exists because of the programming choices made not by SOCAN, its members or this Board, but by CAB's own members.

f. The Value Broadcasters Derive from SOCAN's Licence Has Not Declined Over Time

As my analysis of the historical evolution of the tariff since 1951 reveals, while the changes in music use patterns to which my colleagues alluded were happening, the rate which Canadian broadcasters paid for performing rights went from 2.1 per cent to 2.4 per cent in the period 1959 to 1974, then stayed flat until 1984, all as a result of negotiated agreements, and then declined to 2.1 per cent as a result of decisions by the Copyright Appeal Board. In my view, any changes occurring in the industry during this whole period were properly taken into account in these agreements and decisions.

What is more telling is that during the last 25 years, the cost of all other programming inputs has increased, not decreased, as a percentage of the broadcasters' revenues. The ratio was 41 per cent in 1972, 50.3 per cent in 1984, hit a high of 60,7 per cent in 1991 and has been in the 55 to 58 per cent range ever since.[66]

Meanwhile, composers saw their composing fees go down, while broadcasters were able to reduce the net cost of their performing rights by acquiring 50% of those rights. [67]

In the circumstances, I cannot agree with my colleagues' conclusion that the value broadcasters derive from SOCAN's licence has declined over time. The measures outlined by them can only serve to further despoil composers of their fair share of television stations' income.

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[63] $23.7 millions of this is attributable to the Bellingham, Washington situation, which Mr. Goldstein characterized as atypical.
[64] This can be determined using *Retransmission, 1990* and *Retransmission, 1992*.
[65] *Public Performance, 1993*, p. 362
[66] This can be derived from tables in Exhibit SOCAN-4.
[67] Testimony of Mr. Morley, tr. pp. 106-8

C. CONCLUSION

In my view, the case has simply not been made to reduce the rate below its current level of 2.1 per cent.

IX. THE MODIFIED BLANKET LICENCE

Broadcasters ask for the ability to get a discount for programs for which they don't require a SOCAN licence. Two of the current regime's institutional features effectively prevent direct negotiations between composers and producers: the exclusive grant of rights and the blanket licence as it is currently structured. Through its proposal, CAB is, it says, asking the Board to take care of that part of the problem which is within its jurisdiction: the licence. It claims that a failure to deal with one aspect of this issue on the basis that the other remains invites permanent paralysis.

I do not disagree in principle with the notion of allowing for a reduction in the royalties paid to SOCAN when users are able to purchase their performing rights from other sources. Given existing circumstances, however, I remain of the view that such a measure is not advisable as a matter of public policy. As I have already stated, I find it unwarranted to adopt a tariff structure that ignores current institutional arrangements and favours individuated negotiations in the front end. I also think that the formula put forward by CAB has its origins in problems that exist across the border and not in Canada, and will undermine the legitimate choices of composers and eventually, the very concept of blanket licence. It will also hurt Canadian composers.

A. THE EXISTENCE OF THE MBL RESTS ON FACTORS THAT EXIST IN THE UNITED STATES AND NOT IN CANADA

The American PPL concept originated in ASCAP's very first consent decree in 1941. It addresses a number of problems that arise in the American context, but have no bearing in the Canadian market.

The first factor is the existence of two major [68] American music societies. The PPL allows a broadcaster to pay royalties to only one of them when a program uses only one repertoire.

Second, the PPL may have helped to bring about in the United States efficiencies that already exist in Canada. Apparently, the PPL has resulted in more accurate reporting of music used in local programs and in an increase in the number of stations surveyed for distribution purposes. Until then, music in local programming was under-represented in surveys; furthermore, a lower value was given to music in local and news programs. These inefficiencies do not exist in Canada. SOCAN takes a full census of music use on television, not a sample. Moreover, SOCAN does not attribute a different value to music according to the type of programming within which music is found.

Third, television stations that use the PPL show programming that is significantly different.

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[68] As to SESAC, see *supra*, n. 56

Virtually all of them are network affiliates in large markets. They rely mostly on network programs, for which music has already been cleared, and on locally-originated (mostly news) programming, the contents over which they can exercise control. Overall, they use relatively little syndicated programming. By contrast, independent stations rely heavily on syndicated programs. [69]

Fourth, in most instances where a television program is produced, the producer is the first copyright owner,[70] even if the composer has provided a music society with an exclusive assignment of copyright. By contrast, subsection 13(3) of the Canadian *Act* is of a much narrower ambit and of little relevance in the creation of music for television.

B. THE MBL NEGATES COMPOSERS' LEGITIMATE CHOICES

Some further comments to the more general ones I have already made in paragraph I.B are appropriate here.

CAB maintains that the MBL can be implemented through various means, thereby reducing the risk that the proposed scheme "could conceivably create an advantage for American composers".[71] It adds that any such advantage will exist only if SOCAN decides to forbid its own members from directly licensing their television performing rights.

I approach the matter differently. As I have stated, I find it legitimate that composers provide SOCAN with exclusive assignments. Once this is accepted, it becomes clear that the effects of the MBL as it is proposed must, perforce, be counterproductive. Even my colleagues conclude that if SOCAN continues to obtain exclusive assignments once the MBL is in place, it will behave either irrationally or in bad faith. Put another way, in order for the measure to work, the only rational choice left to authors is to renounce a legitimate choice they have already made. To set up a system which frustrates composers' choices and then turn around and blame composers for sticking by those choices hardly increases the merits of the measure.

Of course, Canadian composers could choose to leave SOCAN and join ASCAP. This only serves to confirm that the MBL encourages Canadian composers to join ASCAP, something which I find unacceptable.

C. THE MBL IS LIKELY TO UNDERMINE THE BLANKET LICENCE CONCEPT

Until such time as the Director of Investigation and Research puts an end to exclusive assignments, the MBL is only likely to undermine the character, and value, of the blanket licence.

For the MBL to work, it is imperative that the musical works licensed at source or directly continue to form part of SOCAN's repertoire. Even those who opt for the MBL will need to

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[69] There has been little source licensing for syndicated programs: testimony of Mr. Reimer, tr. pp. 1207, 1293.
[70] *Supra* n. 3
[71] *Public Performance, 1993,* p. 365

know that their licence shields them from infringement actions for the use of works which they have not cleared directly themselves. The reason that the American system works is that, as a result of the consent decree, all works directly licensed continue to belong to the societies' repertoires.

If Canadian composers leave SOCAN but do not join ASCAP, the blanket licence concept starts unravelling. The works of composers who leave SOCAN in order to strike individual bargains will cease to form part of SOCAN's repertoire. As a result, SOCAN's repertoire will lose its real value to holders of blanket licences. This should not be permitted to happen.

Moreover, a station having opted for the standard blanket licence would soon find out that it cannot broadcast a particular program because the music does not belong to SOCAN. That station would be forced to pay extra to clear the rights. Under that scenario, opting for the MBL would become the only sensible course to adopt.

In at least two respects, broadcasters derive value from the blanket character of the licence. First, it simplifies considerably the process of purchasing performing rights. Second, it constitutes a virtually bullet-proof insurance policy against infringement proceedings. What CAB is asking will put this value at risk not only with respect to broadcasters who wish to resort to the MBL, but with respect to all broadcasters.

D. THE MBL IS A *QUID* WITHOUT A *QUO*

With the MBL as it is set up by my colleagues, broadcasters get the best of both worlds, at little cost.

Broadcasters will now be able to clear music when it is simple and profitable to do so, while still relying on the blanket licence for music that is difficult to clear, or which would cost more to source-clear. SOCAN has no option in the matter. It cannot refuse to grant the licence.

The revenue-based discount ignores the basic feature (and logic) of the current tariff which is a percentage of revenue for all programming based on overall average use of music irrespective of the amount of music contained in the program. There is no correlation between music use and revenues in individual programs.[72] When each program is viewed independently, the rate is necessarily too high for some and too low for others. Different rates must be assigned to individual programs, or categories of programs.[73] More adequate formulas could be found to ensure that the right amount of revenues is deducted from the standard fee. The approach used by my colleagues can only result in cherry-picking.[74]

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[72] *Public Performance, 1993,* p. 359

[73] This is precisely what Commissioner Fenus did in his dissenting opinion regarding SOCAN's Tariff 17: the Board's decision of April 19, 1996.

[74] Adding to the difficulty is the fact that news programming is especially suited to so-called "library music". This means that a producer/broadcaster is in no way dependent on commissioning composers in order to get the music it needs for the production of a news program. It also means that where commissioned music is replaced by library

The contrast with the American situation is interesting. Currently, some 150 out of 1,020 stations have opted for the PPL; even CAB's witnesses see that number reaching a ceiling at around 250. Clearly, there is a cost associated with the exercise of this option. By contrast, I expect that the vast majority, if not all, Canadian stations will opt for the MBL, because there are little costs, if any, associated with it.

Finally, the manner in which my colleagues deal with commercials leaves me uncomfortable. I have difficulty with the conclusion that music in advertisement has no value. Furthermore, I find dangerous the analogy being drawn with retransmitted short programs on distant signals.

E. THE MBL WILL HURT CANADIAN COMPOSERS

CAB readily admits that "composers for local productions will be most affected, as these programs are relatively unlikely to be exported and thus Canada may be the only source of performing royalties."[75] Most, if not all of these composers probably are Canadians. They also happen to be those who benefit most from SOCAN's current distribution rules. Clearly, CAB is proposing something that will hurt Canadians.

F. CONCLUSION

The very fact that Canadian composers have been allowed to combine as they have makes the MBL either unworkable or undesirable. It presupposes either an end to exclusive assignments or a broadcasters' boycott of SOCAN members. Until either composers or the proper authorities decide that this basic institutional arrangement should not be allowed to continue, it would be most inappropriate for the Board to put in place a system which, to be workable, assumes a different world and frustrates composers' legitimate choices.

In the longer term, and in a world where users themselves look more and more for single-window service, individual bargains can only complicate things. In this respect, the current institutional arrangements appear to me highly preferable to the world sought by CAB.

Rejecting the MBL does not create permanent paralysis. It simply ensures that the system that we have, and which CAB's own witnesses say will continue to be necessary in television and other media,[76] is not compromised by the introduction of an option which is bound to produce undesirable results for all concerned, including the broadcasters themselves.

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music, composers lose not only their performing rights, but all revenues associated with the composition of music.

[75] CAB Argument, paragraph 121

[76] Testimony of Messrs. Zwaska and Gertz, tr. pp. 2814-7.