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Regime Public Performance of Musical Works
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Members Mr. Justice John H. Gomery
Mrs. Sylvie Charron
Mr. Andrew E. Fenus

Proposed Tariffs Considered 2.A, 1998-2004 and Tariff 17, 2001-2004

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

Reasons for decision

Over time, and as required by section 67 of the *Copyright Act* (the "*Act*"), the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed proposed tariffs for the years 1998 to 2004. The Board published these proposals and gave notice to users of their right to object. Two of the tariffs deal with the communication to the public by telecommunication of musical works over the signals of commercial broadcast and non-broadcast (specialty, pay and other) television stations. These reasons deal with these tariffs.

Tariff 2.A concerns commercial broadcast television. The Canadian Association of Broadcasters (CAB) objected to the proposal. Tariff 17 [1] concerns non-broadcast television signals. Those who produce or distribute those signals objected to that proposal. Representing programming undertakings (the non-broadcast services) were Astral Télé Réseaux Inc., Cable News Network, A&E Television Networks, CBC Newsworld/SRC Réseau de l'information, Discovery Communications Inc., Fairchild Television Ltd. (Fairchild), Consortium de Télévision Québec

[1] In these reasons, all references are to Tariff 17. Until now, the relevant tariff was known as Tariff 17.A. Tariff item 17.B was "reserved" for digital pay audio, for which the Board certified a separate tariff item on March 16, 2002. Henceforth, Tariff 17 will only deal with television and the "A" suffix is no longer required.

Canada (TV5), Viacom International Inc. and Le Canal Nouvelles. Bell Globemedia Inc., CTV Television Inc., Pelmorex Communication Inc. and Rogers Media Inc. (collectively, the "CPR") joined their efforts, as did CHUM, Corus Entertainment Inc., Alliance Atlantis, Astral, CanWest Global and others (collectively the "Services"). The Canadian Cable Television Association (CCTA) as well as two Canadian satellite distribution undertakings, Bell ExpressVu and Star Choice Communication Inc., represented the broadcast distribution undertakings (the "BDUs" or transmitters).

On December 13, 2001, at the request of CCTA and after hearing from other participants, the examination process of both tariffs was consolidated. Hearings were held over 14 days between April 22 and May 9, 2003. Arguments were heard on May 29 and 30, 2003.

The Board last certified Tariff 2.A for 1997 and Tariff 17 for 2000. SOCAN's proposed tariffs for 2004 were published on April 19, 2003. At the expiry of the 60-day period allowed by the *Act* to file objections, no one had objected to proposed Tariffs 2.A and 17 other than the participants in these proceedings. On May 30, 2003, with the consent of all participants, the Board ruled that this decision would also deal with the year 2004. Consequently, these reasons deal with Tariff 2.A for the years 1998 to 2004, and with Tariff 17 for the years 2001 to 2004.

The current tariffs [2]

Tariff 2.A has been set at a percentage of a television station's revenues since 1959. The Board's most recent decision in this matter, dated January 30, 1998, reduced the applicable rate from 2.1 to 1.8 per cent and set up a "modified blanket licence" (MBL), allowing stations to "opt out" of the traditional blanket licence for certain programs. On judicial review, the Federal Court of Appeal ruled that the Board could adopt the MBL over the objections of SOCAN.[3]

Tariff 17 goes back to 1990. It applies to signals that are only offered through a transmitter (usually cable or satellite). The key elements of the tariff as it was designed in 1996 were the payment of royalties by the transmitter rather than the services;[4] royalties set at a number of cents per

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[2] For a more detailed historical background, reference should be made to the Board's following decisions:

a. Statement of royalties to be collected for the performance in Canada of dramatico-musical or musical works in 1990, 1991, 1992 and 1993, December 6, 1993, (1990-1994) 345, www.cb-cda.gc.ca/decisions/m06121993-b.pdf, (1993) 52 C.P.R. (3d) 23.
b. Statement of royalties to be collected for the performance or communication by telecommunication in Canada of musical or dramatico-musical works [Tariff 2.A - Commercial television stations in 1994, 1995, 1996 and 1997], January 30, 1998, www.cb-cda.gc.ca/decisions/m30011998-b.pdf, (1998) 83 C.P.R. (3d) 141.
c. Statement of royalties to be collected for the performance or communication by telecommunication in Canada of musical or dramatico-musical works in 1990, 1991, 1992, 1993, 1994 and 1995, April 19, 1996, www.cb-cda.gc.ca/decisions/m19041996-b.pdf (1996) 70 C.P.R. (3d) 501.
d. Statement of royalties to be collected by SOCAN for the public performance or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works in 1996, 1997, 1998, 1999 and 2000, February 16, 2001, www.cb-cda.gc.ca/decisions/m16022001-b.pdf, (2001) 15 C.P.R. (4th) 370.

[3] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Broadcasters*, (1999) 1 C.P.R. (4th) 80 (F.C.A.); F.C. No. 389, leave to appeal to the Supreme Court of Canada denied on April 6, 2000.

[4] As a result of paragraph 2.4(1)(*c*) of the *Act*, the BDU and the service are jointly and severally liable for the single communication that occurs when the BDU transmits a non-broadcast signal to a subscriber. Transmitters and services

subscriber per month for the whole portfolio of Canadian specialty services; tiering of the royalty for systems serving 6,000 subscribers or less (only those with more pay the full amount); and royalties set at a percentage of subscription revenues for non-portfolio services (pay television and American specialty). At the request of all interested parties, this design was maintained in the 1996-2000 tariff. Only the rate for non-portfolio services was the object of a dispute: users asked that the rate be reduced as Tariff 2.A had been. In its decision dated February 16, 2001 on Tariff 17, the Board set the full rate for the year 2000 at 15.5¢ per subscriber, per month for the portfolio services, and reduced the rate for non-portfolio services to 1.8 per cent.

The Main Issues and the Participants' Position

This proceeding involves a number of central issues. Some concern all participants, such as the interrelationship between the tariffs, the level (or levels) of the rates and the fate of the MBL. Others are of concern mostly to non-broadcast services and those who transmit them. These include the revenue base to which the rate should apply, the tiering of the tariff to account for variations in the use of music among services, the relevance of existing discounts to a revenue-based formula, and the extension of the MBL to non-broadcast services.

Participants agree that there should be only one rate in Tariff 2.A and that this should continue to apply to a station's gross income. They also agree that the 2.A and 17 rates should be strongly correlated (though they disagree on how to achieve this). Finally, they agree[5] that Tariff 17 should be a per-service rate set at a percentage of a rate base for all services.

SOCAN asks that the Tariff 2.A rate be increased from 1.8 to 2.1 per cent for the years 1998 to 2003 and to as much as 3.1 per cent in 2004. It also asks that the MBL be abolished or that its financial impact be considerably toned down. It asks that the rate for Tariff 17 be set at 1.78 per cent in 2001, 2.1 per cent in 2002, 2.4 per cent in 2003 and 2.6 per cent in 2004.[6] It wants the rate base to include the revenues of transmitters, not just those of services. It opposes the tiering of Tariff 17 and argues that with the change in tariff formula, existing discounts no longer serve a purpose. Finally, it submits that even if maintained in Tariff 2.A, the MBL should not be extended to Tariff 17.

CAB seeks a reduction of the rate to 1.4 per cent, the maintenance of the MBL and some softening of its conditions.

CCTA and all non-broadcast services ask that the rate in both tariffs be the same and argue in favour of a reduction. They ask that the rate base for Tariff 17 remain the services' revenues and that the MBL be offered to non-broadcast services. They argue that existing discounts remain justified under a percentage based, per-service rate; Fairchild would add a third-language discount.

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came to an agreement on how to share that liability between transmitters and services and among services. That agreement expired at the end of 2000.

[5] Though, as we shall see later, some came to this conclusion later than others.

[6] SOCAN felt it could justify a rate of 2.1 per cent in 2001. However, its proposed tariff of 18.6¢ per subscriber for the portfolio would translate into only 1.78 per cent, which SOCAN accepted as a cap. See Exhibit SOCAN-54; see also transcript at page 3779.

Finally, CPR asks that the tariff be tiered according to four "genres" of services while the Services propose a two-tier tariff similar to what is available to commercial radio.

I. ANALYSIS

A. PRELIMINARY ISSUE: THE RATE STRUCTURE FOR TARIFF 17

Until now, Tariff 17 has set a single rate, expressed as a number of cents per subscriber, per month, for a "portfolio" comprised of all Canadian specialty signals. The rate for Canadian pay and foreign specialty signals is a percentage of their affiliation revenues. At the outset of these proceedings, SOCAN and the Services asked that the portfolio approach be maintained, while all other objectors asked for a rate per signal. The Services eventually joined other objectors.

After having heard SOCAN's evidence in chief, the Board stated that it was strongly inclined to abandon the portfolio approach in favour of a rate per signal. Following this, SOCAN stated that it was willing to accept the change so long as it was revenue neutral. Even though participants have consented to it, the Board feels the need to explain why, in its view, the need for this change is compelling.

The reasons that led the Board to take a portfolio approach in 1996 were set out in its decision.[7] During the period then under review (1990-1995), transmitters offered only two tiers of service: basic and extended basic. All 13 established Canadian specialty signals were included in one or the other. Some 80 to 90 per cent of subscribers received the so-called extended basic service, which made it the *de facto* basic service. Transmitters had just started to offer a third tier, but it was impossible to predict how subscribers would respond to it: in hindsight, the marketing of that tier proved to be a significant, if temporary, failure. The Board did not wish to encourage transmitters to transfer signals from the extended basic to higher, more optional, tiers of service. Then, for the period 1996 to 2000, all participants asked that the portfolio approach be maintained for reasons of administrative convenience.

The situation today is radically different, if only because of the advent of digital tiers and of the considerable increase in the importance of satellite transmitters. Since the tariff's inception, the importance and number of non-broadcast services (and with them the amount of the tariff) have grown by leaps and bounds. The number of Canadian services offered rose from 13 to a hundred or so; another hundred or more licensed services have yet to be launched. Basic service still exists, and some cable transmitters continue to market some services by tiers; however, more and more, subscribers can purchase signals one by one, or in clusters of six or so signals the composition of which can vary from system to system. Finally, the reasons of administrative convenience that led participants to ask that the portfolio approach be maintained from 1996 to 2000 no longer apply: the agreement according to which transmitters and signal providers paid royalties to SOCAN and apportioned the financial liability among themselves expired at the end of 2000.

Participants did not offer any new reasons in favour of maintaining the portfolio approach. The

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[7] *Supra* note 2 c). Part V.A.1, starting at page 14.

Board can think of none.

B. The Correlation between Tariffs 2.A and 17

The Board remains of the view that broadcast and non-broadcast television are part of a single industry and that all players within that industry should pay the same price for their music performing rights, subject to any adjustment justified, for example, by some characteristic in a part of the market or a difference in the use being made of SOCAN's repertoire. Nothing was added in the record of these proceedings to convince the Board that this view, with which all participants appear to agree in any event, ought to be abandoned. The fact that both tariffs will now be expressed as a percentage of a rate base will only help to reinforce that correlation.

C. The Starting Rate

Revenues of non-broadcast services as a group may soon rival in scale those of private conventional broadcasters. Nevertheless, when participants debated the rate, all seemed to use Tariff 2.A as a convenient starting point. So does the Board. That said, given changes in the relative importance of the two sectors of the television industry, it will become increasingly ill-advised to take for granted that one sector should weigh more heavily than the other in tariff decisions.

SOCAN put forward four main sets of arguments in favour of raising the rate.

First, Tariff 2.A was set at between 2.1 per cent and 2.4 per cent for most of its existence. The Board's reasons for lowering the rate to 1.8 per cent in its 1998 decision are no longer tenable, if they ever were. There has been no material change in the amount of music used by private broadcasters in recent years or in the role or importance of music as a creative input in television programming. Consequently, the rate should return to its historical range.

Second, the current rate fails to fully account for the economic value of music performing rights in television programs. Royalty payments for the use of music in television programming have increasingly fallen behind compensation paid for other creative inputs over the course of the last 30 years or so in the case of broadcast television. The same has occurred in non-broadcast television since its inception. According to the economic theory of derived demand, music performance royalties would have been expected, on average, to keep pace with expenditures on all other creative inputs used in the production of television programming had the royalty fees been set in a competitive marketplace.

Third, while competition in the Canadian broadcasting industry has increased, this phenomenon is not new. In any event, policies implemented by the Canadian Radio-television and Telecommunications Commission (CRTC) mitigate the potential negative effects of competition on conventional broadcasters. Broadcasters have been able to generally increase or maintain profitability over the last decade; this suggests that reversing the Board's previous reduction in the rate is justified.

Fourth, there is no valid reason for looking to the United States (US) when setting Canadian rates. In any event, US rates are in fact higher than in Canada when calculated on a proper comparative basis.

CAB's arguments in favour of reducing the rate can be stated as follows.

First, Tariff 2.A rates have generally been declining over the last 25 years. No compelling new evidence has been put forward that would justify reversing this trend. Music use on television has been declining over the longer term, justifying a continued downward trend in the rate. Music use has not increased since the last proceeding, so increasing the rate on this basis is not warranted.

Second, the Board has always ruled that the economic theory of derived demand is irrelevant to setting this tariff. It should continue to do so. According to SOCAN, the theory establishes that existing music royalties are understated; that assertion was and remains unfounded.

Third, a number of environmental factors should be considered in setting the rate. Competitive pressures have continued to increase. Private broadcasters' profits have been relatively flat or declining in recent years, further suggesting that a rate increase is unwarranted.

Fourth, American rates are relevant to setting rates in Canada. Differences in the rate setting regimes are not as significant as suggested by SOCAN. In any event, the existence of differences does not justify ignoring the fact that the effective US rate is less than half of the Canadian rate.

Fifth, the trend in front-end payments to composers also is relevant. According to SOCAN's own witnesses, front-end payments have also been trending downward. Since these rates are determined in an unregulated market, their decline supports reducing the back-end rate as well.

CCTA agrees with CAB in several respects. It rejects the theory of derived demand, adding that a number of errors in the analysis of the specialty services sector undermine any possible conclusions in this respect. It agrees that American rates are both relevant and lower than the rates in Canada, and that increasing competition further supports lowering the rate. CCTA adds two further arguments.

First, since Tariff 17 payments are driven in large part by advertising revenues, SOCAN's royalties are growing at a faster rate than BDU revenues. Given that BDUs eventually shoulder half the burden of the tariff, this places a disproportionate burden on them over the long term.

Second, the royalties paid pursuant to Tariff 17 should bear some relationship to the royalties paid to SOCAN pursuant to the television retransmission tariff, even though there are significant differences between the two tariffs. SOCAN's retransmission royalties currently amount to $1.7 million per year; payments under Tariff 17 are currently in the order of $20 million, and SOCAN is asking that they be increased significantly. Creating any further discrepancy in the royalties collected under the two tariffs is simply not justified.

The Board does not have enough evidence to be able to gauge what the true value of music is in the television industry. The Board would thus not feel comfortable to increase the rate to 2.1 per cent and prefers to limit the increase to 1.9 per cent. The Board would expect that this question be given more attention in future instances than it was in this one. Therefore, the Board maintains the rate for Tariff 2.A at 1.8 per cent up to 2001, and increases it to 1.9 per cent in 2002, 2003 and 2004. The rate for Tariff 17 is set at 1.78 per cent for 2001 and increases to 1.9 per cent for 2002, 2003 and 2004.

There is no need to deal at length with historical trends. Trends can be of help in setting tariffs, however, in this instance, other, more compelling reasons exist for the Board to rule as it does. Not surprisingly, the competing arguments put forward on this issue demonstrate that often, trends, as statistics, can be used to bolster any side of a given argument.

Neither is there any need to deal at length with the relevance of a derived demand analysis in setting these tariffs. The Board remains of the view that without direct empirical evidence relating to the economic valuation of music performing rights as an input in television programming or comparable productions, the theory says nothing about how SOCAN royalties should change over time in relation to overall expenditures on television programming. Moreover, as CCTA pointed out and Professor Stanley J. Liebowitz agreed, no single rate can track a broadcaster's or service's revenues and programming expenses simultaneously. Indeed, both Tariffs 2.A and 17 have been set in relation to revenues, and adjusted from time to time; consequently, they would not be expected to track programming expenditures, nor has it been the intention of the Board or, for that matter SOCAN, that they do so over time.

The Board recognizes that the level of competition within the Canadian industry as a whole has increased in recent years, especially with the launch of many new non-broadcast services. At the same time, however, liberalization of cross-ownership rules along with other regulatory changes have allowed market participants to mitigate the level of competitive risk they face. Thus, it now seems clear that competitive challenges have not prevented the industry from maintaining healthy profits.

This panel considers that American rates cannot be used as the sole basis for setting Canadian rates. That said, the level of American royalty payments could be a constraining factor on Canadian rates. The evidence on the record of this proceeding highlights the difficulties involved in comparing US and Canadian rates, including both front-end and back-end fees. Nevertheless, the Board realizes that the effective percentage rates in the US are lower than those in Canada. Given the considerable overlap in programming content and potential competitive pressures on the Canadian industry created by the close proximity of the US market as well as the possible emergence of a North American market for television rights, the Board considers that this could tend to limit the extent to which the tariffs can be increased, at least for the time being, without acting unfairly towards the television industry.

There remains the two arguments raised by CCTA. The Board does not believe that the burden Tariff 17 imposes on BDUs is growing out of proportion to their revenues. For one thing, any growth in the tariff burden should be compared to the growth in BDU revenues attributable to the services covered by the tariff, not to their overall revenues. Furthermore, if a BDU considers that it should shoulder less than half of the ultimate royalty burden, that can be addressed in negotiations with the services. As for any comparison with the retransmission tariff, it would be too fraught with difficulties to be of any help, precisely because of the differences that exist between non-broadcast and distant broadcast signals and which CCTA itself alluded to.

There remains the matter of timing. Tariff 17 was certified up to the end of 2000 based on the assumption that the Tariff 2.A rate would be 1.8 per cent. To increase Tariff 2.A for the period 1997 to 2000 would create a slight but real competitive imbalance within the industry. Therefore, the rate for Tariff 2.A should remain at 1.8 per cent for that period. In 2001, SOCAN's proposed

tariff effectively caps the Tariff 17 rate at 1.78 per cent. That favours keeping the Tariff 2.A rate at 1.8 per cent for that year. SOCAN will note that these measures are similar in nature and effect to the phasing-in the Board provided for in its 1998 decision on Tariff 2.A.

D. THE RATE BASE

Everyone agrees that a broadcaster's gross revenues should be the rate base for Tariff 2.A. That being said, starting in 2001, at SOCAN's request, the definition of gross revenues in Tariff 2.A is changed to ensure that royalties are paid on account of all revenues generated when a program is broadcast. This is done in part to account for a change in the business structure of the CTV network. It also makes the tariff that applied to that network redundant. Consequently, there is no further need for Tariff 2.E to exist. As a result, amounts paid to a person other than the station broadcasting a program will be included in the station's rate base unless the person who received those amounts pays royalties to SOCAN on those sums. SOCAN, who requested the change, did not ask for it in respect of Tariff 17; consequently, the definition of gross revenues in that tariff will not reflect that change for the time being.

SOCAN does take issue with the Board's past practice with respect to Tariff 17.

SOCAN starts from the proposition that if Tariffs 2.A and 17 do not target consistent rate bases, the rate for one tariff must be adjusted accordingly. On that point, everyone seems to agree.

SOCAN maintains that the current tariffs do neither. Tariff 2.A takes into account all of a conventional broadcaster's revenues. Tariff 17 only targets the service's revenues, be they affiliation payments or advertising revenues.[8] No account is taken of BDU revenues, not even the difference between an affiliation payment and what the BDU charges a subscriber for receiving a service. That, to SOCAN, makes the rate bases inconsistent: as SOCAN views it, the 2.A base is at the "retail" level, while the 17 base is at the "wholesale" level.

To SOCAN, BDUs are not simple signal carriers. The delivery of non-broadcast services is considered a single communication for which the service and the BDU are jointly and severally liable. As a result, it is implicitly to be expected that the revenues of both should be taken into account in calculating royalty payments.

The Board addressed those arguments in 1996. SOCAN has raised no significant additional argument. The Board remains of the view, for the reasons expressed in 1996, that the services' revenues are the appropriate rate base. A few of these reasons bear repeating or being expanded upon. First, including BDU revenues in the rate base would be inconsistent with the method of compensation for other creative inputs used in the production of television programming acquired by non-broadcast services. The fact that as a group, Canadian non-broadcast services spend almost the same percentage of their revenues on programming as do conventional broadcasters provides further justification for the continued use of the existing rate base. Second, BDUs deliver signals: they do not add value to the programming contained in those signals. No account is taken of BDU

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[8] This is done implicitly for portfolio signals and expressly for pay and foreign specialty services.

revenues in Tariff 2.A, even though most viewers no longer receive their local signals off air. Third, like conventional broadcasters, non-broadcast services incur distribution costs which, in their case, involve the delivery of their signals to BDUs.

To argue that the joint and several liability of services and BDUs is an indication that the revenues of both ought to be taken into account does not help. In another context, the Board stated that once legal issues have been addressed, economic considerations become paramount.[9] The Federal Court of Appeal agreed with this statement.[10] As explained in the preceding paragraph, economic considerations strongly support the Board's approach in this matter.

E. Tiering the Tariff

As a group, non-broadcast services tend to use on average the same amount of music as conventional broadcasters. That said, the nature of programming amongst individual services differs significantly, as does their consumption patterns for inputs such as music. For this reason, some objectors argue that Tariff 17 ought to be tiered.

CPR asks that the tariff set four categories or genres of services: general entertainment, music, sports, and news and information. Services assigned to the general entertainment category would pay the same rate as conventional television stations, music services would pay more, sports services would pay less, and news and information services, even less. The proposed ratios among genres reflect differences in the average level of music use among services as shown in a music use study prepared for CPR, the royalty-sharing agreement that applied until the end of 2000 and the rate structure observed in the US for specialty services. The arguments put forward in support of this approach to tiering revolve around the quantity, role and impact of music used by individual services and Member Fenus' support of this approach in his dissent of 1996. The assignment of the various services to a given category relied on intuitive arguments and on a report which sought to provide statistical evidence in support of the proposed categories.

The Services object to tiering by genre, but are willing to accept a tariff that mirrors the commercial radio tariff. All services would pay the same rate as over-the-air stations except for those that use music less than 20 per cent of their broadcast time. These would pay 43.75 per cent of that rate.

SOCAN opposes any tiering. Tiering by genre would result in artificial distinctions and rate allocations. Providing a lower rate to (say) news and information services would create a competitive imbalance with conventional broadcasters that provide similar programming as part of their schedules. Any form of rate tiering should be revenue neutral.

The Board considers that tiering by genre is impractical and could result in inequities between services. First, tiering by genre necessarily relies on past music use patterns. Unless those patterns are very stable, unfairness can result. Tiering by genre made sense in 1996, when the market was controlled and composed of a limited number of players with vastly disparate consumption

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[9] *Supra* note 2 a), page 366.
[10] *Canadian Association of Broadcasters v. SOCAN* (1994) 58 C.P.R. (3[d]) 79, 190 (F.C.A.); (1994) F.C. No. 1540; (1994) 175 N.R. 341.

patterns. This is no longer the case. The market appears to be evolving rapidly, as is the nature of programming and with it, music use patterns by individual services. Second, assigning new services to genres during the life of a tariff requires a mechanism to do so; this adds unnecessary complexity and cost to the administration of the tariff. It also raises the question of whether the Board can retain the ability to do so once the tariff has been certified. Third, the criteria used necessarily involve a measure of subjectivity. Fourth, tiering by genre does not impose any restrictions on the amount of music used by a service. A news and information service could increase significantly its use of music overnight and still pay at the lowest rate.

The fact that the industry-negotiated royalty-sharing agreement provided for three tiers is not sufficient of itself to support a multi-tier rate structure. The agreement was intended to deal with the existing per-subscriber royalty liability allocation and no more; it was to be immediately terminated should the Board change the Tariff 17 rate structure.

On the other hand, introducing a low-music use rate for non-broadcast services modelled on SOCAN Tariff 1.A for commercial radio is highly attractive. A restricted number of services use considerably less music than others on average. The commercial radio model offers a number of advantages. It has withstood the test of time. It imposes most of the administrative burden associated with tiering upon those who benefit from it, little on SOCAN and none on users who pay the full rate. The incentives for those who claim the lower rate to comply with the terms of the tariff are powerful: non-compliance with any of the terms results in instant disqualification. The model reflects not only the actual use of the SOCAN repertoire, but variations in that use over time, all without the need to change the tariff or move a service from one genre to another. Finally, it will probably discourage some broadcasters from using the MBL, since MBL programs will not be counted when deciding whether a station qualifies for the lower rate.[11] Those broadcasters may decide instead to clear music without claiming the MBL, in order to lower their overall use of the SOCAN repertoire.[12]

As much as setting a low-use rate is justified, setting a higher rate for those who use the SOCAN repertoire much more than others is not, at least for the time being. First, as a result of this decision, SOCAN will be significantly better off even if music services pay the same rate as others; in effect, given the shift in tariff formula, SOCAN would be unable to demonstrate any prejudice resulting from the Board's refusal to set a high-use rate. Second, there is insufficient evidence on the record to decide where the cutoff for high-use ought to be set, or what the rate ought to be. Third, monitoring a premium rate raises difficulties of a different order of magnitude than monitoring a low-use rate. It requires putting a significant administrative burden either on the "normal" services, who derive no benefit from the measure,[13] or on the "high-use" services, who actually pay the

[11] This is because a MBL program is in effect "claimed out" of the SOCAN licence. It would make no sense to allow this to happen and to leave the program in the assortment of programs for which low music use may be claimed.

[12] For example, rather than focussing on clearing music in one program, a service that uses music 25 per cent of the time could replace enough SOCAN music in its overall programming by music for which the performing rights have been cleared (and public domain music) to bring itself under the 20 per cent threshold, so long as it does not attempt to claim MBL status for the programs in which that cleared music was used.

[13] This would occur, for example, if the high-end rate were deemed the "normal" rate and "ordinary" users were required to monitor their music use in order not to pay the high-end rate.

price.

The rate for low-music use is not extended to conventional television stations. No one asked that this be done. Furthermore, the record would tend to support the conclusion that no broadcaster currently subject to Tariff 2.A would qualify.

The conditions allowing a service to pay at the lower rate will be the same on the whole as in Tariff 1.A. A service will qualify if it broadcasts works for which it requires a SOCAN licence for less than 20 per cent of its total broadcast time (excluding MBL-cleared programs) and keeps and makes available to SOCAN complete recordings of its last 90 broadcast days. The applicable rate will be 0.8 per cent for the period covered by this tariff. However, the conditions that must be met in order to qualify under this aspect of the tariff make it unlikely for a service to qualify for years before 2004. Consequently, it will most likely have no impact on past transactions.

F. DISCOUNTS

In Tariff 17, the portfolio rate is discounted for mid-size cable systems, in Francophone markets, for transmitters providing no more than three portfolio services and for non-residential premises. These discounts were created in response to the nature of the portfolio rate and its inability to respond to differences in the nature and composition of the portfolio from system to system.[14] With the change to a per-service rate, the continued relevance of these discounts is open to question.[15]

CCTA argues that with the exception of the discount for transmitters carrying three or fewer services, these discounts continue to be relevant under a per-service rate structure.

With respect to non-residential premises and mid-size cable systems, CCTA sees the discounts as relevant as a result of the way in which it expects the services' advertising revenues to be accounted for in a tariff that targets the BDUs. Under this scenario, collection of royalties is complicated due to the fact that the services' advertising revenues are unknown to the BDU. As a result, the new rate structure would still have to effectively function as a fixed per-service, per-subscriber rate for collection purposes, and the formula may not be fully self-adjusting.

As for the Francophone market discount, CCTA argues that it was largely intended to assist French-language services. In its view, the discount was implemented to account for the smaller audiences, limited advertising market, higher relative costs and greater competitive pressures faced by these services and, therefore, should be retained. It was supported in this by TV5, whose counsel described some of the difficulties confronting French language services.

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[14] *Supra* note 2 c). Parts V.B.4, V.B.5 and V.F.

[15] Statement of royalties to be collected by SOCAN for the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works in respect of pay audio services for the years 1997 to 2002, and by NRCC for the communication to the public by telecommunication, in Canada, of published sound recordings embodying musical works and performers' performances of such works in respect of pay audio services for the years 1998 to 2002, March 15, 2002, www.cb-cda.gc.ca/decisions/m15032002-b.pdf, (2002) 19 C.P.R. (4th) 67. Hereafter Pay Audio 2002.

Fairchild operates two national Chinese-language services. It claimed that third-language services face challenges similar to those of Francophone services. Consequently, it argued for a third-language discount.

The possibility of eliminating discounts did not arise until late in the proceeding. CCTA argues that as a matter of procedural fairness, objectors and potential users did not get proper notice that evidence or argument would be required on this issue. Consequently, it suggests that it be left to another day. The Board disagrees. SOCAN could not be expected to address changes to the discounts in its tariff application. The relevance of the discounts is questioned solely as a result of the objectors' request for a change in the tariff formula. These discounts have never applied to non-portfolio services, which have been consistently subject to the tariff formula CCTA now favours in respect of portfolio services: the issue simply had to arise as a result of CCTA's request. All possible categories of users, including those who benefited from the various discounts, were competently represented and had ample opportunity to address this issue.

The central argument in favour of abandoning discounts is that if the market for affiliation rights functions properly, it will take into account those factors (type of premises, market language, size of system) that may have an impact on the price to be paid for the services, thereby reducing the rate base and with it, the amount of royalties. The Board agrees with SOCAN that this makes the tariff essentially self-adjusting. Conversely, if the market does not allow a medium-size BDU to purchase a service at a discount, the Board sees no reason why that same BDU should be allowed to broadcast the music included in that signal for less.

The Francophone market discount was implemented to account for the lower number and viewing of French-language services in Quebec relative to all other parts of Canada.[16] From now on, royalties automatically adjust to each service's financial circumstances, which are reflective of the nature of each service's market. There is no basis for requiring composers to subsidize services with smaller audiences, especially since these services appear to have achieved on average profitability levels comparable to English language services.

The Board did not hear any evidence that would justify dealing differently with third-language services. Consequently, all existing portfolio-related discounts are abandoned.

As it will become clear later, CCTA's fears that the tariff remain effectively a rate per subscriber which may justify continued discounts are unfounded. There are other means of addressing this issue. The Board intends to make use of those means to alleviate CCTA's worries.

G. PROGRAMMING EXPENSES ADJUSTMENTS

In its initial Tariff 17 decision, the Board adjusted the portfolio rate to account for the fact that non-broadcast services then spent a smaller share of their revenues on programming than conventional broadcasters. This adjustment was eliminated in 2000, when it was found that the ratio was now roughly equivalent for both. The Services now ask that a 14 per cent adjustment be

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[16] *Supra* note 2 c) at pages 24-25.

reintroduced. The Services did not, however, address the issue in their final argument. In any event, the Board would not have granted the request. The Services' calculations appeared to use a different methodology than the one used in 1996. The Board proceeded with its own calculation and found that any difference in this respect seemed minimal.[17] No one challenged the Board's calculations or questioned the underlying methodology. Consequently, the Board concludes that there is no need for an adjustment in this respect.

H. The Modified Blanket Licence

The debate over the MBL occupied a large part of the hearing. The issues raised in this respect can conveniently be divided as follows. Is the MBL legal? Should it be maintained? If so, should it be changed? And should it be extended to non-broadcast services?

i. Is the MBL Legal?

SOCAN's argument can be summarized as follows.

The Board must exercise any discretion granted to it by the *Act* in a manner consistent with the purposes of the *Act* and that reflects the *Canadian Charter of Rights and Freedoms*, (the "*Charter*"), the principles of administrative law, the principles of international law and the fundamental values of the Canadian society.

The right of authors to the protection of their interests in their works has been accorded the status of a human right at the international level.

The purposes of the *Act* include the protection of authors from the unauthorized use of their works and the promotion of collective administration. Collective societies are essential to protecting authors from unauthorized uses and ensuring fair compensation, and thus, in promoting the broader purposes of the legislation. In effect, collective administration now is a fundamental right of authors.

The fundamental values in Canadian society include collective responses to social and economic challenges. The market alone does not provide the solutions to overcome Canada's unique challenges. Individuated bargaining arises from a distinct US cultural and philosophical approach to bargaining, emphasizing individual relations and a distrust of collective solutions.

The growth of collective administration may be seen to parallel the growth and pervasiveness of collective bargaining in employment. Both developed in response to the imbalance of power between the suppliers of the (intellectual or physical) work and its users.

The MBL is contrary to the purposes of the statute. It impinges on the author's freedom of association. To the extent that without the economic security that comes with membership in a collective, the artist may be compromised artistically, the MBL may even affect the right to freedom of expression. When combined with a reduction in the overall tariff, the MBL impinges

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[17] Exhibit Board-1.

upon the integrity of collective societies and undermines the purpose for which they were established by legislation.

There is no need to review the arguments filed by CAB in response to SOCAN. Where relevant, they are reflected in the following analysis.

I. Analysis

Baker v. Canada (Minister of Citizenship and Immigration)[18] stands for the proposition that discretion must be exercised within the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society and the principles of the *Charter*. SOCAN argues that the MBL fails to comply with the purposes of the *Act*, the fundamental values of Canadian society and the principles of the *Charter.*

The issue of whether the MBL is congruent with the underlying purposes of the *Act* was settled in *SOCAN v. CAB*.[19] The Federal Court of Appeal then ruled that the Board has the power to adopt the MBL. The Board cannot have the power to do something that is not congruent with the underlying purposes of the *Act.* Consequently, until told otherwise by the Court, the Board must accept that the MBL accords with those underlying purposes.

That leaves the issues of whether the MBL impinges on the principles of the *Charter* or the fundamental values of Canadian society. SOCAN is correct in stating that these issues remain open as they were not addressed in *SOCAN v. CAB*.[20] These issues can be addressed in tandem, since SOCAN's arguments in this regard tend to overlap. These arguments focus on two propositions.

The first proposition is that collective administration of copyright is of such central importance to the scheme of the *Act* that it has become a fundamental right of authors. SOCAN defends the proposition by overemphasizing the importance of collective administration within the scheme of the *Act.* Once collective administration is put in its true perspective, the exaggeration of the proposition becomes apparent. The Board finds nothing in the *Act* to support the proposition that collective administration of copyright has become a fundamental right of authors.

Thus, SOCAN's statement that the purposes of the *Act* include the promotion of collective administration goes too far. There is little doubt that collective administration has become one of the preferred tools for dealing with copyright issues. Collective administration of copyright is more than ever central to Canada's copyright system. There are powerful encouragements in the *Act* for rights owners to organize. This does not mean, however, that collective administration is the tool of choice in all situations, or even a suitable tool in all instances.

Under some regimes set out in the *Act*, collective administration assumes a pre-eminent role; even then, it is not the only tool available to rights holders. With retransmission, educational rights or ephemeral broadcast copies, the only practical remedy available to a copyright owner is through a

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[18] (1999) 2 S.C.R. 817.
[19] *Supra* note 3.
[20] Indeed, they could not have been, as *SOCAN v. CAB* predates *Baker*.

collective society that benefits from a certified tariff. Even then, however, rights holders who choose not to join a collective can claim their share of royalties. Put another way, even when the *Act* views collective administration as the tool of choice, it still gives individual rights holders the choice not to associate with a collective society.

The role of collective administration is somewhat less pre-eminent in the SOCAN regime. Authors remain free to deal with their music performing rights on their own. Authors who decide to deal with those rights collectively must comply with conditions that they do not face when dealing with their rights on their own. In effect, collective administration is allowed. It is neither encouraged, nor imposed, but merely made available.

SOCAN states that collective administration by its nature removes the freedom to contract individually and relegates the establishment of remuneration to the Board. This is incorrect within the SOCAN regime as well as generally speaking. Music composers are not required by law to join SOCAN or to assign their performing rights exclusively to SOCAN. As for other rights, collective societies in Canada and throughout the world often rely on forms of arrangements other than an exclusive assignment. The Canadian Musical Reproduction Rights Agency uses non-exclusive agency contracts. Access Copyright uses non-exclusive assignments. Two of the American performing rights societies are not allowed to seek exclusive assignments. All European music performing rights collectives are required to some extent to allow some individuated transactions. Finally, within the Canadian general regime, collective administration and individuated bargaining clearly can coexist: even when a tariff is in place, agreements prevail.

As a result, comparisons with collective bargaining in labour relations are awkward, at best. The history of collective administration is not as long, as varied (or as violent) as the history of collective bargaining. Collective societies gained full legitimacy only in 1989, long after the Canadian collective bargaining regimes were well-entrenched. Individuated contracts are mostly anathema to collective bargaining. By contrast, the norm in Canada is that authors always can deal in their rights, even where a collective society exists. Professor Daniel J. Gervais, testifying for SOCAN and relying in that respect on the seminal work of Mihály Ficsor, stated that compulsory collective administration is a tool to be used only where individual management is not possible.

SOCAN's second proposition is that the MBL impinges on the author's rights within the context of the SOCAN regime. This also is incorrect. The MBL does not impinge on the right of association. Authors remain free to join SOCAN.[21] They remain free to refuse to deal their performing rights through channels other than SOCAN. The fact that market pressures may lead them to do otherwise is not relevant. More importantly, the MBL as it is currently practised, comes into play only where the author is asked to compose new works. Collective bargaining is available to those who compose at the request of a user; when they deal with federally regulated industries (as broadcasters are), that right is even guaranteed by legislation.[22] If anything, the absence of a

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[21] Only SOCAN can prevent an author from joining it by making it impossible for a composer interested in signing a MBL contract to become or remain a member.

[22] Ironically, all forms of collective bargaining involving artists, whether they be legislatively sanctioned (in Quebec and at the federal level) or not (in the rest of Canada), imply the conclusion of industry-wide contracts that set minimum working conditions. Needless to say, such contracts allow for the individuated bargaining of better than

MBL could be said to impinge on the right of non members of SOCAN not to associate: when SOCAN gets a share of the revenues generated by a program in which some of the music performing rights are not owned by SOCAN, it makes it difficult for the owner of those rights to negotiate a fee for the communication of that music.

There is no need to spend much time on the argument that the MBL may impinge on freedom of expression. Authors have always had to make financial and artistic compromises in the course of working on a television or film production, as the testimony of the composers' panel clearly showed. More importantly, freedom of expression does not come with the right to be played, nor the right to be paid.

As for the statement that the right of authors to the protection of their interests in their works has been accorded the status of a human right at the international level, it simply does not help the analysis. Assuming, for the sake of argument, that the recognition granted to authors in the *Universal Declaration of Human Rights* is of any legal significance in Canada, the fact remains that the recognition addresses the protection of authors' interests in their works, not the means through which that protection is granted or exercised.

Part of SOCAN's argument relies on the proposition that the purpose of the MBL is to move the setting of royalties out of the collective administration process and turn it back to the individual copyright owner. Again, that is incorrect. The purpose of the MBL as stated in the Board's 1998 decision on Tariff 2.A, is not to impose a particular or specific business model per se, but merely to make available an option to allow individual transactions to occur. Whether the MBL as used in the relevant market has the practical effect of imposing that business model on composers is a matter of fact, which the Board may or may not want to take into account in deciding whether the MBL should continue to exist.

SOCAN's submissions on legal issues are therefore rejected. Consequently, there is no need to address the issue of whether SOCAN was required to comply with section 57 of the *Federal Court Act*.

i. Should the MBL be maintained?

SOCAN wants the MBL to be abolished. Its arguments can be summarized as follows.

First, the MBL is inconsistent with the concept of a blanket licence, which necessarily is set in respect of all music performing rights used in all programming.

Second, broadcasters can "cherry pick" high revenue, low music use programs for the purposes of the MBL. This promotes inefficiency and results in unwarranted reductions in SOCAN's royalty revenues.

Third, the MBL allows broadcasters to use their significant market power unfairly. An analysis of

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minimum conditions.

several measures of market concentration for broadcast and non-broadcast services demonstrates the importance of that power. Composers are at a significant bargaining disadvantage. Several testified that they are strongly opposed to the MBL, that the bargaining power imbalance they face in negotiations with producers is overwhelming and that, as a consequence, composers will be unable to obtain fair treatment under MBL arrangements. They stated that the MBL undermines composers' rights and forces them to look for alternative means, other than SOCAN, to protect their rights. Absent the MBL, the Guild of Canadian Film Composers would not have sought (and obtained) certification under federal status of the artist legislation.

Fourth, music use reports submitted pursuant to the tariff show that broadcasters have repeatedly used music for which they required a SOCAN licence in programs for which they claimed the MBL. These violations of the express terms of the tariff demonstrate that the MBL is plagued with operational problems and will ultimately force SOCAN to incur substantial monitoring and enforcement costs. These costs can be readily avoided by eliminating the MBL.

With a few exceptions, the Board does not share SOCAN's views on these issues.

First, the MBL is not inconsistent with the concept of blanket licence. It is itself a blanket licence, since it guarantees user access to SOCAN's repertoire. In any event, nothing in the *Act* requires that the Board always resort to blanket licences, whatever that term may mean.

Second, "cherry picking" is neither wrong nor inefficient of itself. The record of these proceedings tends to establish that revenues seem to be more important than music use to drive broadcasters to use the MBL. On the one hand, that arrangement allows broadcasters and MBL composers to maximize their revenues. On the other, SOCAN has failed to satisfy the Board that composers, as a group, are significantly worse off. Consequently, there is nothing on the record to demonstrate that the MBL is inefficient either inherently or as it is currently practised.

Third, SOCAN's current market concentration analysis remains flawed, as were earlier attempts of a similar nature. That analysis continues to not properly take into account the relevant market for composers' services. Furthermore, evidence on the effects of the MBL on bargains struck between composers and broadcasters remains anecdotal. None of the composers who have agreed to the most lucrative MBL contracts were called as witnesses by either SOCAN or the CAB. Most importantly, the Board is of the view that the potential for abuse of market power can be addressed through other means, as will be seen later.

However, SOCAN clearly established that MBL claimants used SOCAN music in MBL programs. That said, the tariff already accounts for this possibility: all SOCAN has to do is to ask for what it is clearly entitled to from the delinquent broadcasters. As such, therefore, there is no need for CAB's proposed zero tolerance provision in the tariff, subject to what will be added later on.

CAB advanced other arguments that more or less repeated those put forward in 1998, including the argument that a "one-size-fits-all" pricing arrangement is unnecessary and unfair, that there is a "disconnect" between royalty payments and royalty distributions and that the MBL reduces inefficiencies inherent in SOCAN's internal revenue distribution mechanisms. These arguments were not taken into account in reaching a decision.

In the end, what is truly important on this issue is that there has been relatively little practical experience with the MBL. Agreements were first entered into some two to three years ago. Broadcasters clearly have saved significant amounts. On the other hand, there is no specific evidence either of harm to composers, or that composers, as a group, were necessarily better off under the new arrangement. The few agreements to which the Board had access are not sufficient to form an opinion as to whether composers will be treated fairly in future negotiations. Finally, there is no evidence that SOCAN has been undermined by the MBL. Whether the MBL is viable in the longer term remains an open question. The Board stresses that there has been only limited opportunity for composers and broadcasters to gain experience with it. With this in mind, the Board considers that it would be premature to end the MBL.

ii. Should the MBL be changed?

Should the MBL be retained, SOCAN wishes that it be changed in four ways. First, the benefit obtained through it should be equal to the performance royalties actually paid directly to the composer, not to the revenues associated with cleared programs. Second, the general rate should be increased to compensate SOCAN for the "windfall" savings enjoyed by broadcasters as a result of the MBL. Third, the existing surcharges should remain the same. It is too early to properly assess the costs associated with the implementation and ongoing administration of the MBL. These costs could even increase: monitoring and enforcement would need to be increased given the numerous violations that have occurred to date. Fourth, stations using the MBL should be required to inform SOCAN and the composer of the total advertising revenues generated by the programs subject to the MBL. This would help offset the bargaining disadvantage faced by composers.

For its part, CAB proposes a zero-tolerance regime for users who use SOCAN's repertoire in programs for which they use the MBL. It also proposes reductions to the levels of the existing surcharges; in its view, SOCAN has offered no justification for any of the surcharges.

Two of SOCAN's arguments simply do not withstand analysis. Making the benefits of the MBL equal to the royalties paid to the composer would in effect empty it of all usefulness. Furthermore, not all significant savings constitute a windfall; if the proposition were true, the same could be said of the increased revenues SOCAN will derive as a result of this decision.

The same reasons that favour maintaining the MBL also favour changing it as little as possible. Thus, the Board considers that it would be premature to alter the terms and conditions of the MBL, including the existing surcharges. Stability is required overall if it is to be possible for the Board to develop firm impressions about the MBL, with two exceptions.

The Board concludes that the MBL ought to be available only with respect to a broadcaster's in-house productions, for several reasons. This means that the person who makes any incorrect MBL declaration shall alone bear the cost associated with that declaration. This makes it easier to fairly attach further sanctions to incorrect declarations. Also, it would appear that the MBL has effectively been used only for in-house local or network broadcasts. Finally, and most importantly, it allows composers to restore any perceived imbalance through collective bargaining. All broadcasters are subject to federal status of the artist legislation which, arguably, exists to restore the balance of bargaining power between artists (including composers) and producers (including broadcasters). That makes it possible to leave it to the composers' bargaining agent to obtain the

information needed to bargain effectively, and unnecessary to consider the appropriateness of the information exchange mechanism sought by SOCAN. This measure will take effect 60 days after the publication of the tariff, to allow the conclusion of any negotiations concerning music use in programs which currently are eligible to the MBL but would no longer be as a result of this decision.

The Board further concludes that MBL claims over programs for which not all music performing rights have been cleared should be further discouraged. SOCAN is already entitled to the full amount of the tariff with respect to such programs. Still, the risk then incurred by the deficient claimant is only that of having to pay what was owed in any event if caught. The cost of wrongful MBL claims ought to be higher. Consequently, those who make such wrongful claims will have to pay the full tariff for the programming in question and will not be allowed to claim any credit for the surcharges paid on account of the delinquent program. This measure will take effect 30 days after the publication of the tariff but will then apply to past MBL claims. Given the record of these proceedings, broadcasters should have reviewed their past uses of the MBL and corrected any payment deficiencies a long time ago. Still, the Board allows them a further 30 days to do so. After that date, they will incur the additional cost associated with their past delinquencies.

iii. Should the MBL be extended to apply to non-broadcast services?

SOCAN argues that no case has been made to extend the MBL to non-broadcast services, and that such an extension would in any event prove exceedingly complex and costly. CCTA and others suggested that non-broadcast services ought to be treated in the same way as conventional broadcasters.

The Board agrees that non-broadcast services should have access to the MBL under the same terms and conditions as conventional broadcasters. Extending the MBL in this manner is in keeping with the Board's finding that both sectors of the industry should be treated in a consistent manner. SOCAN's arguments in this respect were simply vague and unconvincing.

Giving non-broadcast services access to the MBL raises a few issues of implementation. This is because conventional broadcasters only have advertising revenues and pay their royalties themselves, while services also have affiliation revenues and royalties paid for the communication of the service often, if not always, are paid by the transmitter.

The fact that transmitters pay the royalties most of the time does not of itself raise a problem. Services that resort to the MBL will have a strong incentive to either share with the transmitter the information required to claim the discount or pay their royalties directly to SOCAN. In either scenario, the information required to implement the MBL will flow to those who need it.

Allowing non-broadcast services to use the MBL raises the issue of whether and how to account for affiliation revenues. These revenues are not linked to viewing, advertising revenues or anything else that would make it possible to directly link them to a given program. This leaves three possibilities. The first involves taking no account of affiliation revenues. In the Board's view, this would be unfair: the amount of benefits derived from using the MBL should not depend on the nature of a broadcaster's revenue streams. The second method is to allocate affiliation revenues to programs as a function of a program's advertising revenues. This is not possible for services that

rely only on affiliation revenues. This approach also may create distortions in the case of services that derive only a small portion (say, less than 10 per cent) of their total revenues from advertising. The third solution is to allocate affiliation revenues to programs as a function of air time. This approach is far from perfect; for one thing, it does not account for the relative popularity (and therefore, profitability) of each program. It does have the merit of being simple. This is the approach that will be used in the certified tariff, with the exception of pay-per-view whose revenues, by the very nature of the service, can readily be correlated to individual programs.

J. IMPLEMENTATION ISSUES

A BDU knows how much it pays in affiliation payments to a service; so does the service. By contrast only a service knows the amount of its advertising revenues, at least until the CRTC publishes this data; this occurs usually in February for the last 12 months ending on the previous August 31. This means that the BDU, SOCAN's target of choice for collecting the tariff, does not have all the information it requires to determine how much it owes to SOCAN.

Participants proposed a number of measures to deal with this information gap. SOCAN is prepared to collect royalties based on a service's current affiliation payments and previous year's advertising revenues. Once the CRTC publishes the services' advertising revenues, the information would be used to adjust royalty payments for the preceding month of January and to determine payments for the remaining months of the applicable year. For its part, CCTA proposed a formula involving the conversion of the per service rate into a per subscriber, per month rate.

In the Board's view, the participants' proposed methodologies are both overly complex and unfair. They create a significant lag in royalty payments. In an industry that is evolving as quickly as non-broadcast television, this is not a desirable feature. CCTA's approach in effect brings the tariff back to a portfolio formula. As noted by SOCAN, it does not account for newly launched services. Finally, were a service to close down in the course of a year, the lag created by these approaches could mean that authors would simply lose their fair share of advertising revenues.

In the Board's view, the solution lies in ensuring that information flows efficiently between stakeholders. Each BDU will be allowed one month to inform a service of the number of its subscribers to the service and of the amount it owes the service for carrying its signal. Services will then have one month to supply each BDU with the data required to calculate royalties owing on advertising revenues (as well as any data needed to account for MBL-cleared programs or a low music use claim), unless a service opts to pay royalties directly to SOCAN. Each BDU will in turn have a further month to calculate and pay the amount owed to SOCAN. The tariff ensures that SOCAN receives copy of all relevant information.

Royalties for the use of music in a given month will be based on a service's revenues in that month and payable on the last day of the third month following that month. This has two immediate consequences for SOCAN. First, it will lose some interest income. Second, on the coming into force of the tariff, a two months' gap in royalty payments will result. As to the first point, the Board hopes that what is lost in interest will be compensated in avoiding endless recalculations. Adjustments can be made in the future, as experience is gained with the new tariff. As to the second point, all the Board can say is that this is the unavoidable consequence of the Board's decision to opt for a new tariff formula.

Whether the new tariff works out in practice will depend in large part on the ability of participants to share information in a timely fashion. A small number of late reports could significantly increase the administrative burden. The Board considered measures to ensure that those who provide late or incorrect information bear the burden for doing so. This is probably not possible, since the Board cannot apportion liability among joint and several debtors.[23] Another approach would be to assess a fine payable to the co-debtor of anyone who provides late or incorrect information. This may be possible as part of the terms and conditions of a tariff. Unfortunately, this suggestion was first made in the last round of consultations on the wording of the tariff; not enough information was available to assess its viability. The matter can be addressed in the next round of hearings.

The only matter remaining concerns how to calculate the amount of royalties payable on account of a service's advertising revenues. This is the first time that this tariff formula is used in Tariff 17; consequently, the Board wishes to keep things as simple as possible. Therefore, the figure a service will be required to provide to BDUs shall be the result of dividing the service's advertising revenues in a month by the total number of Canadian subscribers to the service on the first day of that month. It will then be a simple matter for the transmitter to multiply that amount by the number of its clients who subscribe to the service. The matter can be revisited later if, for example, transmitters wish that the formula account for the possibility that not all transmitters pay the same price for a given service.

SOCAN wishes to continue to collect royalties from the transmitters. No one proposed that this be changed. CCTA did suggest that targeting the services would simplify administration of the tariff but acknowledged that changing the target of the tariff was SOCAN's prerogative.

To paraphrase an earlier decision of the Board pertaining to pay audio services, SOCAN has the right to seek payment from either the BDU or the service, whether or not the tariff targets one or the other. It is free to seek payment from the distribution undertaking in one instance, and from the service provider in another. Under the circumstances, the only reasonable approach is to say nothing. That said, as was also stated in that decision:

> "This does not mean that the industry is helpless when it comes to deciding who should be the payee of choice. No collective can require that payment be made from anyone before payment is due. That being the case, the debtors would be free to decide who will pay a collective. As long as payment is made on time, then the collective probably has no other choice but to accept it."[24]

In the course of consultations on the wording of the tariff, participants expressed a number of concerns that are the inevitable consequence of the Board's inability to apportion liability. It was suggested for example that the determination of who pays the royalties should not be done month by month. In the Board's view, the tariff cannot impose payment arrangements amongst joint debtors or dictate the duration of those arrangements. These are matters for the stakeholders and

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[23] *Canadian Cable Television Association v. SOCAN et al.*, (1997) 75 C.P.R. (3[d]) 376; (1997) F.C. No. 78; (1997) 208 N.R. 321.
[24] *Supra* note 15.

the ordinary courts, not the Board.

SOCAN also fears that a service may pay only on account of its gross revenues, or to pay only its purported share of the royalties. Private law already deals with partial payments and whether SOCAN is required to accept them. The Board sees no need to interfere with those rules.

SOCAN also suggested that a service should pay royalties on account of all BDUs carrying its signal, or none at all. That suggestion may have practical merit, but does not take proper account of what happens from a legal perspective when a BDU transmits the signal of a service. Each such communication is a separate communication for which different persons are liable. It would not be appropriate that these separate liabilities be bundled as if they constituted a single transaction.

While there may be difficulties involved, CCTA and CPR submitted that a per-service tariff formula could be implemented retrospectively. On the other hand, the Services claimed that this could be very complex and suggested that a per-service rate should only be implemented starting in 2004. The Board agrees with the views of CCTA and CPR on this issue.

Lastly, CCTA proposed that a fixed per-subscriber rate be adopted for community channels and alphanumeric services, since there are no specific revenues that can be readily attributed to these services. These services are of marginal importance for the purposes of the tariff. As suggested by CCTA the rate is set at 0.14¢ per month per subscriber.

K. AMERICAN SPECIALTY SERVICES

Until now, the rate base for royalties paid on account of American specialty services has been these services' affiliation payments only. This is the result of the Board assuming that American services receive no advertising revenues in their Canadian markets. This assumption will need to be reexamined as soon as possible. For one thing, the way in which this tariff accounts for a service's advertising revenues makes it simple to do the same with respect to American services. This, however, will have to wait for another day, as the matter was not canvassed at all by the participants.

L. SMALL CABLE TRANSMISSION SYSTEMS

Small cable transmission systems currently pay a preferential rate of $10 per year. No one suggested any change to this.

Small cable transmission systems are entitled by law to a preferential rate. That said, as the Board pointed out recently, once a tariff is set at a percentage of a rate base, it becomes simpler and fairer to afford the required preference by providing a discount to what would otherwise be payable. Given that the issue was not on the table, it will be left to another time.

Some participants suggested that for the sake of simplicity, small systems should benefit from the preferential treatment afforded to them under the *Act* only if the BDU paid the royalties attributable to the system. Even if this were possible, the Board does not think that the entitlement for preferential treatment should be linked to who pays the royalties. That being said, common sense dictates that royalties on account of a small system ought to be paid by the operator of the small

system. The Board can only hope that the stakeholders will act accordingly.

CCTA asked that the expression "small cable transmission system" be defined in the same manner as in the *Retransmission Tariff 2001-2003* and in the *SOCAN-NRCC Pay Audio Services Tariff, 1997-2002*. In both instances and at the request of all stakeholders, the Board adjusted the wording of the definition as found in the *Definition of "Small Cable Transmission System" Regulations* (SOR/94-755) to take into account the recent *Exemption Order for Small Cable Undertakings* (Appendix I, Public Notice CRTC 2001-121, December 7, 2001). This was a practical response to a practical problem which by its very nature, was to be temporary: everyone expected that the regulations would be amended to account for the exemption order.

The expected amendment has yet to be made. The Board is now concerned with the legality of its past approach. Normally, a subordinate instrument (the tariff) cannot purport to change an instrument of a higher order (the regulations). It may therefore be ill-advised to proceed as the Board did in earlier decisions.

In the past, when users show a very similar profile to other users entitled to a preferential treatment, the Board has treated the former group in the same way as the latter. The reason for doing so was the Board's conviction that anything else would be unfair to the first group. An example of this can be found in the Board's 1996 decision on Tariff 17:

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

The same reasoning is appropriate in the instant case. Consequently, systems which may have lost their status as small cable transmission systems as a result of the CRTC exemption order will pay the same amount of royalties as small cable transmission systems.

M. THE QUANTUM OF ROYALTIES

In 1992, Tariff 2.A generated approximately $23.7 million in royalties. In 2002, that amount was $28 million or so. Put another way, payments grew at the annual rate of 1.7 per cent, while broadcasters' revenues grew at a rate of 2.5 per cent during that same period. The rate of growth would have been higher had the Board not reduced the tariff from 2.1 to 1.8 per cent. Also, the MBL reduced 2002 revenues by approximately $2 million.

Tariff 17 royalties have gone from $6.8 million to at least $22.9 million over the last ten years, or approximately 13 per cent per year; during the same period, the revenues of services grew at a yearly rate of 15.7 per cent. Furthermore, the Board estimates that the royalties for 2002 may be understated by as much as $5 million. The amount reported for that year does not fully reflect the expected revenues for that period. Also, pursuant to subsection 68.2(3) of the *Act*, the certified tariff for 2000 continued to apply on an interim basis after it expired. The portfolio rate remained the same, while the revenues of the portfolio services continued to grow. As a result, the effective portfolio rate fell below the 1.6 per cent level implicitly certified in the Board's decision of February 16, 2001 on Tariff 17.

Using 2002 as the base year, the Board estimates that increasing the Tariff 2.A rate by 0.1 percentage point should increase royalties by roughly $1.6 million.

As for Tariff 17, several factors will have an impact on the total amount of royalties generated. The effective rate for Canadian specialty services increases from 1.6 per cent to 1.9 per cent; this should increase royalties by $4 million or so. The increase of 0.1 per cent in the rate for Canadian pay and foreign specialty services should add a further $0.6 million. The elimination of the existing discounts should account for an additional $2.2 million. Finally, the introduction of a low-music use rate would have reduced the amount of royalties by up to $1.8 million had it been in place in 2002, and had all existing news and information services qualified for the lower rate. Therefore, the Board estimates that the new tariff would have increased Tariff 17 royalties by $5 million had all of the new measures been in place for 2002.

No account is taken of the extension of the MBL to non-broadcast services. The Board expects that it may take some time for services to assess whether or not they may benefit from it and, consequently, that the take-up rate will be relatively slow.

N. REVENUE NEUTRALITY

In at least two respects (the change in tariff formula and tiering), SOCAN insisted that changes in the tariff ought to be revenue neutral. In the Board's view, SOCAN's preoccupation with revenue neutrality is misplaced, if only because the quest for such neutrality supposes that somehow, the one-rate tariff would have generated precisely the right amount of royalties to fairly compensate SOCAN. Such precision is not a characteristic of setting tariffs for the use of musical works.

The adoption of a rate per signal approach results in the removal of all discounts. The scaling in of the tariff for medium size systems is abandoned altogether. The Board anticipates that as a result of this and all other things being equal, SOCAN's revenues will increase, not decrease.

Neither does the Board consider it appropriate to pursue revenue neutrality with respect to tiering. In the Board's view, the new rate structure strikes an appropriate and fair balance of interests. The impact of the measure will not be very significant to SOCAN if, as the Board expects, only a small number of services are able to avail themselves of the low-use rate given their current music consumption pattern.

Claude Majeau
Secretary General