

University of Toronto

From the Selected Works of Ariel Katz

March, 2015

Interveners Factum of Centre for Intellectual Property Policy and Ariel Katz in *CBC v SODRAC* (Supreme Court of Canada)

Ariel Katz, *University of Toronto, Faculty of Law*

David Lametti, *McGill University*

Howard P. Knopf



This work is licensed under a [Creative Commons CC BY International License](https://creativecommons.org/licenses/by/4.0/).



Available at: https://works.bepress.com/ariel_katz/35/

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

**CANADIAN BROADCASTING CORPORATION/
SOCIÉTÉ RADIO-CANADA**

Appellant
(Applicant)

- and -

**SODRAC 2003 INC. and SOCIETY FOR REPRODUCTION RIGHTS OF
AUTHORS, COMPOSERS AND PUBLISHERS IN CANADA (SODRAC) INC.**

Respondents
(Respondents)

- and -

**CENTRE FOR INTELLECTUAL PROPERTY POLICY and ARIEL KATZ
AND OTHERS****

Interveners

FACTUM OF THE INTERVENERS
CENTRE FOR INTELLECTUAL PROPERTY POLICY AND ARIEL KATZ
(“the Interveners”)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Howard P. Knopf
Macera & Jarzyna, LLP
1200 - 427 Laurier Ave. W.,
Ottawa, ON, K1R 7Y2
Phone: 613-238-8173
Fax: 613-235-2508
howard.knopf@macerajarzyna.com
Counsel for the Interveners, the Centre for Intellectual Property Policy and Ariel Katz

TO: THE REGISTRAR

**COPY TO: Counsel for the Appellants,
CANADIAN BROADCASTING
CORPORATION / SOCIÉTÉ
RADIO-CANADA**

**Marek Nitoslawski
Joanie Lapalme**
Fasken Martineau DuMoulin LLP Suite
3700
800 Victoria Square
Montréal, Québec H4Z 1E9

Tel.: 514 397-4335 (me Nitoslawski)
Tel.: 514 397-5294 (Ms. Lapalme) Fax:
514 397-7600
mnitoslawski@fasken.com
jlapalme@fasken.com

**Agent for the Appellants,
CANADIAN BROADCASTING
CORPORATION / SOCIÉTÉ
RADIO-CANADA**

Gerald Kerr-Wilson
Fasken Martineau DuMoulin LLP
Suite 1300
55 Metcalfe Street
Ottawa, Ontario K1P 6L5

Tel.: 613 696-6884
Fax: 613 230-6423
jkerrwilson@fasken.com

**AND TO: Counsel for the Respondents,
SODRAC 2003 INC. and SOCIETY
FOR REPRODUCTION RIGHTS
OF AUTHORS, COMPOSERS AND
PUBLISHERS IN CANADA
(SODRAC) INC.**

Colette Matteau
Matteau Poirier avocats Inc. Suite 210
353 Saint-Nicolas Street Montréal,
Québec H2Y 2P1

Tel.: 514 281-0033
Fax: 514 284-9328
bureau@matteupoirier.com

**Agent for the Respondents,
SODRAC 2003 INC. and SOCIETY
FOR REPRODUCTION RIGHTS
OF AUTHORS, COMPOSERS
AND PUBLISHERS IN CANADA
(SODRAC) INC.**

Frédéric Langlois
Deveau, Bourgeois, Gagné, Hébert &
associés, sncrl
Suite 8
867 Saint-René Blvd. West
Gatineau, Québec J8T 7X6

Tel.: 819 243-2616 ext. 224 Fax: 819
243-2641 flanglois@deveau.qc.ca

****AND COPIES TO OTHER INTERVENERS:**

**COPY TO: Counsel for the Intervener
SAMUELSON-GLUSHKO
CANADIAN INTERNET POLICY
AND PUBLIC INTEREST CLINIC**

**David Fewer
Jeremy De Beer**
University of Ottawa
Faculty of Law
57 Louis Pasteur Street
Ottawa, Ontario K1N 6N5

Tel.: 613 562-5800 Ext. 2558
Fax: 613 562-5417
dfewer@uottawa.ca

**AND TO: Counsel for the Interveners
CANADIAN MUSICAL
REPRODUCTION RIGHTS
AGENCY LTD., CANADIAN
MUSIC PUBLISHERS
ASSOCIATION, AND
INTERNATIONAL
CONFEDERATION OF MUSIC
PUBLISHERS**

**Casey M. Chisick
Peter J. Henein
Eric Mayzel**
Cassels Brock & Blackwell LLP
Scotia Plaza
40 King Street West
Suite 2100
Toronto, Ontario M5H 3C2

Tel.: 416 869-5403
Fax: 416 644-9326
cchisick@casselsbrock.com

**Agent for the Interveners
CANADIAN MUSICAL
REPRODUCTION RIGHTS
AGENCY LTD., CANADIAN
MUSIC PUBLISHERS
ASSOCIATION, AND
INTERNATIONAL
CONFEDERATION OF MUSIC
PUBLISHERS**

Jeffrey W. Beedell
Gowling Lafleur Henderson LLP 160
Elgin Street
Suite 2600, Stn. D
Ottawa, Ontario K1P 1 C3

Tel.: 613 786-0171
Fax: 613 788-3587
jeffbeedell@gowlings.com

**AND TO: Counsel for the Interveners
MUSIC CANADA,
INTERNATIONAL FEDERATION
OF THE PHONOGRAPHIC
INDUSTRY, CANADIAN COUNCIL**

**Agent for the Interveners
MUSIC CANADA,
INTERNATIONAL FEDERATION
OF THE PHONOGRAPHIC
INDUSTRY, CANADIAN**

**OF MUSIC INDUSTRY
ASSOCIATIONS, CANADIAN
INDEPENDENT MUSIC
ASSOCIATION AND
L'ASSOCIATION QUÉBÉCOISE
DE L'INDUSTRIE DU DISQUE, DU
SPECTACLE ET DE LA VIDÉO**

Barry B. Sookman
Daniel G.C. Glover
McCarthy Tétrault LLP
TD Bank Tower
66 Wellington Street West Suite 5300
Toronto, Ontario M5K 1E6

Tel.: 416 601-7949
Fax: 416 868-0673
bsookman@mccarthy.ca

**COUNCIL OF MUSIC INDUSTRY
ASSOCIATIONS, CANADIAN
INDEPENDENT MUSIC
ASSOCIATION AND
L'ASSOCIATION QUÉBÉCOISE
DE L'INDUSTRIE DU DISQUE,
DU SPECTACLE ET DE LA
VIDÉO**

Colin S. Baxter
Conway Baxter Wilson LLP
1111 Prince of Wales Dr. Suite 401
Ottawa, Ontario K2C 3T2

Tel.: 613 780-2012
Fax: 613 688-0271
cbaxter@conway.pro

TABLE OF CONTENTS

PART I: OVERVIEW AND STATEMENT OF FACTS.....	1
PART II: INTERVENERS’ POSITION ON APPELLANT’S QUESTIONS	1
PART III: ARGUMENT.....	1
Standard of Review: Correctness.....	1
The Mandatory Tariff Theory and its Implications	1
The Regulation of CMOs in Canada: History and Rationale	3
The “Mandatory Tariff” Theory Misconstrues the <i>Act</i>	5
The Case Law Does Not Support The “Mandatory Tariff” Theory	7
The Board Lacks the Power to Create New Rights, to Impose Payments, or to Usurp the Jurisdiction of the Superior Courts	8
Mandatory Tariffs Encourage “Double Dipping” and Costly Gratuitous Obligations.....	9
PART IV: SUBMISSION ON COSTS.....	10
PART V: ORDER SOUGHT.....	10
PART VI: TABLE OF AUTHORITIES.....	11
PART VII: STATUTORY PROVISIONS IN ISSUE	14
Competition Act, RSC, 1985, c C-34	15
Copyright Act, RSC, 1985, c C-42	15
Status of the Artist Act, SC 1992, c 33	35

PART I: OVERVIEW AND STATEMENT OF FACTS

1. The Federal Court of Appeal (“FCA”) held that a collective management organization (“CMO”)¹ can ask the Board to approve a licensing scheme and then impose it on users. If correct, such users then have no choice other than to deal with the CMO, and must, as a matter of law, pay the entire specified royalties if they make even a single unauthorized use of a single work from the CMO’s repertoire.² By so ruling, the FCA has upended the legislative scheme.
2. The Interveners submit that this holding (hereinafter referred to as the “mandatory tariff” theory) lacks any basis in law: standard principles of statutory interpretation contradict it; the case law debunks it; and the legislative history discredits it. In addition to absurd results that contradict fundamental tenets of the rule of law, the “mandatory tariff” theory threatens to upset the balance in Canadian copyright law. It would overly compensate owners, contrary to this Court’s holding in *Théberge*,³ and it could gut fair dealing and others users’ rights, contrary to what this Court cautioned against in *CCH*.⁴

PART II: INTERVENERS’ POSITION ON APPELLANT’S QUESTIONS

3. The Interveners agree with CBC that the FCA erred in its interpretation of the reproduction right, and when it held that Board-approved licensing schemes can be imposed on users. They disagree with CBC that the issues may be resolved by imposing a “nominal royalty”.

PART III: ARGUMENT

Standard of Review: Correctness

4. Whether Board-approved licensing schemes can be imposed on users is purely a question of law.⁵ The Board, without analysis, *assumed* they could be.⁶ Relying on *Rogers*,⁷ the FCA did not defer, but, after conducting its own analysis *de novo*, agreed.⁸ Both erred in law. This Court should correct this error.

The Mandatory Tariff Theory and its Implications

5. This appeal stems from proceedings under s 70.2 of the *Copyright Act*, part of the “general

¹ The *Copyright Act*, s 2 uses the term “collective societies”. Interveners’ Factum (hereinafter “IF”) p 15. Other terms found in the literature and case law include “collecting societies” and “copyright collectives”.

² *Canadian Broadcasting Corporation v SODRAC 2003 INC. et al*, 2014 FCA 84 at paras 60-67 [*CBC v SODRAC*], Interveners’ Book of Authorities (hereinafter “IBA”) IBA Tab 7.

³ *Théberge v Galerie d’Art du Petit Champlain inc.* 2002 SCC 34 at para 31 IBA Tab 24.

⁴ *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at para 48 IBA Tab 8.

regime” set forth in ss 70.1-70.6 and concerns a licensing scheme for acts under s 3. Unlike some of the other statutory schemes, the collective administration of s 3 *copyrights*, is and has always been voluntary insofar as: (a) owners *may* administer their rights collectively through CMOs but they are not required to; and (b) users *may* obtain licences from CMOs, but they are not compelled to deal with them.

6. Even though the legislation does not oblige users to deal with CMOs, users might *feel* compelled to do so. In some cases, even though other options exist, users might feel they have no choice because the CMO simply offers the most or only cost-effective method of obtaining a licence. These situations raise fewer policy concerns.⁹ In other cases, users might be compelled to deal with a CMO because, even though competitive licensing alternatives could exist, rightholders have assigned their rights to the CMO, making it the only source for obtaining licences. Obviously, effective and affordable regulatory oversight, ensuring that tariffs are fair, equitable and attractive to users, is all the more important in those cases.

7. In contrast to *de facto* mandatory tariffs, the Interveners focus on the false notion that dealing with CMOs is mandatory *de jure*. This “mandatory tariff” theory holds that approval of a CMO’s licensing scheme results in a legal obligation on users to pay the approved royalties, and that this obligation is enforceable against any user who makes a single unauthorized use of a single work from the CMO’s repertoire. Any such user becomes liable for the entire cost of the tariff, both retroactively and prospectively, for the term thereof, and must comply with the tariff’s related terms and conditions.¹⁰ On this view, the approved tariff becomes, in the Board’s words, a “prospective norm of general application”,¹¹ or in other words - law.

8. For many users, the implications of the “mandatory tariff” could be staggering. In the case

⁵ *Copyright Act*, ss 68.2 (IF p 21) & 70.4, (IF p 28). The question is distinct from the question of what constitutes infringement.

⁶ *Society for Reproduction Rights of Authors, Composers and Publishers in Canada v Canadian Broadcasting Corp*, [2012] CarswellNat 4255 at para 63 (Copyright Bd) [SODRAC v CBC], IBA Tab 23.

⁷ *Rogers Communications v SOCAN*, 2012 SCC 35 at para 15, IBA Tab 20.

⁸ *CBC v SODRAC*, *supra* note 2, IBA Tab 7.

⁹ Ariel Katz, “The Potential Demise Of Another Natural Monopoly: Rethinking The Collective Administration Of Performing Rights” (2005) 1:3 J Compet L & Econ 541, at 578-79 [Katz, “The Potential Demise I”], IBA Tab 31.

¹⁰ Ariel Katz, “Spectre: Canadian Copyright and the Mandatory Tariff – Part I”, 27:2 IPJ (forthcoming in 2015), at 3-4, 7-13, IBA Tab 32. An earlier version of this article has been available online since Jan 5, 2015, at <<http://ssrn.com/abstract=2544721>>.

¹¹ *SODRAC v CBC* at para 63, IBA Tab 23. According to the Board, the difference between tariff proceedings and *Copyright Act*, s 70.2 (IF p 27) proceedings is that the former results in a binding norm that can be imposed on a class of users, while the latter can be imposed only on a particular user.

of a university, for example, the “mandatory tariff” theory would entail that, despite all efforts and expenditure to comply with its copyright obligations without dealing with a monopolistic CMO (e.g. by obtaining licences directly from publishers or other market-based intermediaries, relying on “open access” licensing models, and implementing internal fair dealing policies), a single unauthorized reproduction of one work from CMO’s repertoire could nonetheless trigger retroactive and prospective liability of millions dollars.¹² This liability would compound the millions of dollars that the university already pays for acquisitions, subscriptions, and access to licensed digital databases. It might exceed, by orders of magnitude, any monetary award that the university, even if held liable for infringement, could otherwise be reasonably expected to pay. It is noteworthy that in 2012 Parliament decided to cap statutory damages for “non-commercial” infringement at \$5,000 for all previous infringing activity.¹³

The Regulation of CMOs in Canada: History and Rationale

9. In the early 1930s, Parliament deemed it necessary to introduce legislation curbing the powers of CMOs.¹⁴ The key elements of the current scheme were introduced in 1936, based on the recommendations of a Royal Commission appointed to investigate the activities of CMOs.¹⁵ The Commission’s Report summarized the policy challenge that CMOs present as follows:

Most of the present users of music cannot carry on their business and cater to the public without music and it is estimated that between eighty and ninety per cent of [the music a user requires] is under the control of Canadian Performing Right Society, and unless the user obtains a licence to perform the repertoire of Canadian Performing Right Society, he has no other supply available and the public are denied the pleasure of hearing music. Competition no longer exists. A monopoly, or super-monopoly, has arisen. No one quarrels with the author, composer and publisher pooling their rights and placing them in a central bureau for the purpose of collecting a fair fee for the same and of preventing infringement thereof. It is an inevitable monopoly existing for the convenience of the owner and the user; but it should not be exercised arbitrarily and without restraint.¹⁶

10. The Commission aptly used the term “super-monopoly”, because it distinguishes a CMO’s

¹² Bitá Amani, “Access Copyright and the Proposed Model Copyright Licence Agreement: A Shakespearean Tragedy”, (2012) 24:3 IPJ 221, at 226 (estimating that a licence would cost a mid-sized university \$700,000 annually. Access Copyright’s proposed three-year tariff would increase the cost considerably), IBA Tab 33.

¹³ *Copyright Act*, s 38.1(1)(b), IF p 18.

¹⁴ *Vigneux et al v Canadian Performing Right Society Ltd*, (1945) 4 CPR 65 (JCPC), at 68 [*Vigneux JCPC*], IBA Tab 26.

¹⁵ Amendments that were introduced before 1988 are irrelevant to this appeal. The relevance of the amendments that were introduced in 1988 and 1997 are discussed *infra*, para 19.

¹⁶ Hon. James Parker, Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights Society, Limited, and Similar Societies (Ottawa, ON: JO Patenaude, 1935) at 19 [Parker Report], IBA Tab 28.

monopoly from the legally and economically limited monopoly that inheres in the grant of copyright.¹⁷ It indicates that collective administration implicates not only copyright policy, but also competition and other public policies. In *Vigneux*, Duff CJC described the statutory scheme, its history, and the rationale for adopting it, in equally emphatic terms. He emphasized that it was adopted to protect users from the “unrestrained mercies” of CMOs, and that regulation was necessary to ensure that collectively administered copyrights not be made “instruments of oppression and extortion.”¹⁸

11. Parliament decided to realize the potential efficiency of collective administration while preventing its abuse by regulating CMOs as follows: First, the *Act* restricts the freedom of CMOs to choose whom to deal with and under what conditions, and creates a statutory licensing scheme, which allows every user, irrespective of the CMO’s consent, to use works from the CMO’s repertoire without incurring any liability for infringement, provided the user has paid or offered to pay the Board-approved royalties.¹⁹ Second, Parliament empowered the Board to determine not only the amount of royalties, but also their terms and conditions. Presumably, the Board can, and indeed should, exercise its power so as to limit the potential for anti-competitive abuse, including by declining to approve inefficient anti-competitive tariffs when less restrictive alternatives exist.²⁰

12. In sum, the statutory scheme creates a statutory licence for the benefit of users who wish to obtain one. It allows users to obtain a licence (and immunity from liability for infringement)

¹⁷ The legal monopoly granted to an author is limited because copyright applies only to certain specified uses of the work. It is also limited economically, because competition between copyright owners constrains the market power that each of them can exercise (at least to some extent), prevents over-compensation, and works to ensure that the author’s reward is “just”, see *Théberge* at para 31 IBA Tab 24. For example, as successful as JK Rowling and her Harry Potter brand and franchise may be, she does not control all uses of her work (for example, uses that are fair dealing), and still needs to compete with other works, and the reward that her copyright may allow her to obtain will be commensurate with the degree that readers find her work more desirable than others. See Ariel Katz, “Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?” in Marcel Boyer et al, eds, *Competition Policy and Intellectual Property* (Toronto: Irwin Law, 2009) 449, at 460, IBA Tab 29.

¹⁸ *Vigneux v Canadian Performing Right Society*, [1943] SCR 348 at 353–56 [*Vigneux*]. IBA Tab 27. Although Duff CJC dissented in that case, on appeal, the Privy Council adopted his description, *Vigneux JCPC*, at 74, preferred his opinion over that of the majority, and adopted a more far-reaching view in favour of the defendants, at 75-78, IBA 26.

¹⁹ *Vigneux*, at 353, IBA Tab 26; *CAPAC v Sandholm Holdings Ltd*, [1955] Ex CR 244, 24 CPR 58 at para 17 [*Sandholm*], IBA Tab 6.

²⁰ Parliament contemplated additional oversight by the Commissioner of Competition. For example, the Commissioner may ask the Board to examine and modify the voluntary agreements between CMOs and users (*Copyright Act*, ss 70.5-70.6), IF pp 28-30. The Commissioner may also intervene in any proceeding before the Board (*Competition Act*, s 125, IF p 15), and may also exercise its powers under the *Competition Act* with respect to any conduct by a CMO or its members that is not specifically sanctioned under the *Copyright Act*.

when they wish to, but it does not impose on them any new obligations. It has been designed to limit the market power of CMOs, not to enhance it. Canadian courts have reaffirmed these features of the regulatory scheme and the policy objectives behind them.²¹ These principles continued to guide Parliament in 1988 and 1997, when it decided to allow collective administration beyond performing rights, and expand the Board’s jurisdiction accordingly.²²

13. Moreover, the notion of “mandatory tariffs” confuses *collective administration of copyrights* with *collective bargaining* between artists and producers, such as those under the *Federal Status of the Artist Act*.²³ The former protects users by imposing *maximum* terms and other restrictions on monopolistic CMOs and the copyright owners they represent (which typically include the largest multinational media *corporations*). The latter were designed to protect *individual authors* by requiring producers (such as CBC) to comply with *minimum* terms and conditions when they procure the services of such authors.²⁴

The “Mandatory Tariff” Theory Misconstrues the Act

14. In concluding that SODRAC can impose its Board-approved scheme on CBC, the FCA relied on the wrong provision. It cited s 70.2(1), which determines who has standing to initiate such proceedings, but ignored s 70.4, which describes their effect. Section 70.4 confirms the voluntary nature of the scheme: it provides that the user may pay or offer to pay the Board-approved royalties, comply with their related terms and conditions, and thus become statutorily licensed to do what otherwise would require the copyright owner’s consent. If that user—a

²¹ *Infra*, at paras 17-18. *Canadian Assn of Broadcasters v Society of Composers, Authors & Music Publishers of Canada* (1994), 58 CPR (3d) 190 (FCA), IBA Tab 5, where the FCA held that “it is no more the Board’s mandate to protect consumers to the detriment of copyright owners than it is to protect monopolies to the detriment of consumers” and that the Board’s mandate is to “regulate the balance of market power between copyright owners and users”, *ibid* at paras 13-14, is a possible outlier. If the FCA simply meant that CMOs are not merely “evil monopolies” and that the intent of Parliament was to balance the benefits of collective administration while controlling its potential harms, then this holding is consistent with the earlier case law and the legislative history. The FCA’s reliance on the same quote from *Hanfstaengl v Empire Palace* that Duff CJC cited when he described the goals of the scheme in *Vigneux*, IBA Tab 27, supports this interpretation. If, on the other hand, the FCA meant that Parliament sought to allow owners to *increase* their market power, then, with respect, this unsupported holding misconstrues the *Act*.

²² Katz, “Spectre”, at 37-39, IBA Tab 32. In 1997, Parliament also implemented a statutory damages regime. *Copyright Act*, s 38.1(4), IF p 19, applies to certain CMOs administering the public performance right, the s 67 so-called “SOCAN regime” (IF p 19). The language of this provision, which has never been fully tested, is amenable to different interpretations, some would seem to suggest that tariffs of those CMOs are mandatory, while others would be consistent with the opposite view. Even if this provision renders tariffs under the “SOCAN regime” mandatory, it is clearly inapplicable to tariffs under the “general regime”, such as those in the issue at bar.

²³ *Status of the Artist Act*, SC 1992, c 33, ss 31-33, IF pp 35 ff.

²⁴ *Canadian Artists’ Representation v National Gallery of Canada*, 2014 SCC 42 at para 2, IBA Tab 4.

statutory licensee—defaults on her payments, the CMO may sue to recover the unpaid royalties. A user who has not offered to pay the royalties is not a licensee. She does not owe the CMO any royalties and cannot be in “default” of their payment. If Parliament intended to impose such a duty, it would have chosen suitable language.²⁵

15. The FCA also erred by not noticing that the “general regime”, set out in ss 70.1-70.6, applies to any CMO that operates a “licensing scheme” for authorizing “an act mentioned in s 3 ...”.²⁶ Thus, the CMO may, “for the purpose of setting out by *licence* the royalties and terms and conditions relating to classes of uses”,²⁷ file proposed tariffs with the Board, enter into agreements with users, or, in the case of negotiation deadlock, ask the Board to fix the royalties pursuant to s 70.2. Since the general regime concerns *licences* for doing acts under s 3, the nature and scope of those legal concepts determines the nature and scope of a CMO’s licensing scheme, and the effect of its approval by the Board.

16. Section 3 grants the owner of a copyright the “sole right” to do certain acts. The right correlates with every user’s duty to refrain from doing those acts without the owner’s consent. The user’s statutory duty, however, *is not* an obligation to pay, but a duty to refrain from doing certain acts without consent.²⁸ A licence *simpliciter* is “nothing but a permission which would carry with it immunity from proceedings to those who act upon the permission”.²⁹ A licence may be granted unilaterally, or it may be granted as part of a licence agreement, which may include contractual obligations (such as paying royalties) on the licensee. However, a licensor cannot create obligations and impose them unilaterally. Holding otherwise “would give a right not included in the terms of the statute, and ... extend its operation, by construction, beyond its meaning.”³⁰ A licensee can only be compelled to comply with non-statutory obligations if she has assumed them voluntarily. A user whose failure to obtain a licence results in infringement may be liable for infringement and consequential remedies, as the court will determine, but a user cannot

²⁵ See Katz, “Spectre” at 15, 36, IBA Tab 32. The FCA’s error may have also stemmed from using the misnomer “statutory arbitration”. Arbitration proceedings typically bind those who participate in them. The Board (as well as the Appellant, see Appellant’s Factum, para 47) refer to *Copyright Act*, s 70.2 (IF p 27) proceedings as “statutory arbitration”, but this is not the statutory terminology, Katz, “Spectre” at 13.

²⁶ *Copyright Act*, s 70.1 (emphasis added), IF p 22, see also s 2, definition of “collective society”, IF p 15.

²⁷ *Copyright Act*, s 70.12 (emphasis added), IF p 24.

²⁸ Katz, “Spectre”, at 29, IBA Tab 32.

²⁹ *British Actors Film Co Ltd v. Glover*, [1918] 1 KB 299, at 306. See also *Euro-Excellence Inc v Kraft Canada Inc* (2007), 3 SCR 20 at para 27, IBA Tab 3.

³⁰ *Bobbs-Merill v Straus* (1908) 210 U.S. 339, at 350-51, IBA Tab 2.

be a licensee and an infringer at the same time. The FCA overlooked this elementary point.³¹ The *Act* provides that a CMO may recover unpaid royalties from users who are “in default of their payment”,³² but this phrase can only refer to breach of a pre-existing duty to pay. It cannot be construed as imposing such a duty.

The Case Law Does Not Support The “Mandatory Tariff” Theory

17. The FCA’s unheeding endorsement of the “mandatory tariff” theory contradicts established case law, which emphasizes that: (a) an approved tariff constrains the CMO’s power and results in a statutory licence to the benefit of users;³³ (b) a user can obtain a licence by paying or offering to pay the specified royalties;³⁴ (c) the statutory remedy of recovering unpaid royalties is available against licensees, not infringers;³⁵ and (d) a user who declines to take out a licence may be an infringer, but she cannot be an infringer and a licensee at the same time.³⁶

18. In addition, numerous cases before this Court in which CMOs pursued users for copyright infringement in order to persuade users to obtain licences confirm that tariffs cannot be imposed on users who never wished to become licensees.³⁷ Had the easier option of imposing tariffs by suing for the recovery of unpaid tariff royalties been available to those CMOs, they would have pursued it.

³¹ *Composers, Authors and Publishers Association of Canada, Limited v Sandholm Holdings et al*, 24 CPR 58 at para 22 (Ex Ct) [*Sandholm*], IBA Tab 6

³² *Copyright Act*, ss 68.2(1), IF p 21; 70.15, IF p 25; 70.4, IF p 28.

³³ *Vigneux v CPRS*, at 353, IBA Tab 27; *Maple Leaf Broadcasting v. Composers, Authors and Publishers Association of Canada Ltd.*, [1954] SCR 624, at 630 [*Maple Leaf*], IBA Tab 14 (“there might be cases in which such [a broadcaster] would decide against taking a license at the [higher] fee stipulated in the statement filed but would be willing to take a license at the [lower] fee finally certified by the Board.”); *Sandholm* at paras 19, 24, IBA Tab 6; *Performing Rights Organization of Canada Ltd v. Canadian Broadcasting Corporation*, (FCA) 7 CPR (3d) 433, para 13, IBA Tab 17.

³⁴ *Vigneux*, at 353, IBA Tab 27; *Maple Leaf*, at 630, IBA Tab 14; *Sandholm* at paras 23-24, IBA Tab 6; *Performing Rights Organization of Canada v Lion d’Or (1981)*, [1987] 16 FTR 104 at paras 9-10 (FCJ) [*Lion d’Or*], IBA Tab 18.

³⁵ *Maple Leaf*, at 630-31, Tab 14; *Sandholm* at para 24, IBA Tab 6; *Composers, Authors & Publishers Assn of Canada Ltd. v Elmwood Hotel Ltd.*, (1955) 24 CPR 77 (Ex Ct) at 79, IBA Tab 9; *Composers, Authors and Publishers’ Association of Canada Limited v Baton Broadcasting Limited* (1964) 45 CPR 242 at paras 9, 12 (Ex Ct), aff’d *CAPAC v Baton Broadcasting Ltd.* 45 CPR 242 at 248 (SCC), IBA Tab 11; *Lion d’Or* at paras 9-10, IBA Tab 18.

³⁶ *Maple Leaf*, at 630, IBA Tab 14; *Sandholm* at paras 23-24, IBA Tab 6; *Lion d’Or* at para 5, IBA Tab 18. See also Katz, “Spectre”, at 15-26 for fuller discussion of the case law, IBA Tab 32.

³⁷ See Katz, “Spectre” at 17, note 70 (collecting cases), IBA Tab 32. *Composers, Authors and Publishers Association of Canada Limited (CAPAC) v CTV Television Network Limited et al* [1968] SCR 676, IBA Tab 10, provides a particularly vivid illustration of this point, because the Board approved the tariff over CTV’s objections, and CTV refused to take out a licence, *ibid*, at 679. Still, CAPAC’s recourse was suing for infringement, not for recovering the unpaid royalties. CAPAC lost.

19. There is no indication that Parliament intended to depart from these well-established principles in any of the amendments since these cases were decided, much less to turn the goal of the statutory scheme on its head.³⁸ The concepts of “licences” and “licensing schemes” remain the cornerstone of the statutory scheme for the collective administration of copyrights. The weight of the authorities that debunk the “mandatory tariff” theory and the principles those authorities rely on indicate that if Parliament had contemplated radical change in the goals of the scheme and in its *modus operandi*, it would have indicated its intention to do so with “irresistible clearness”.³⁹

The Board Lacks the Power to Create New Rights, to Impose Payments, or to Usurp the Jurisdiction of the Superior Courts

20. Parliament entrusted the Board with “working out of the details of an appropriate royalty tariff”,⁴⁰ but it never delegated to it any legislative power. The “mandatory tariff” theory would entail, however, that copyright owners, who do not have the power to force a licence upon a user, could nonetheless gain such an extraordinary power by filing tariffs with the Board.⁴¹ This would mean that the Board possesses legislative powers, contrary to the holding in the 2012 *CRTC Reference* case, where this Court held that the power to allocate rights between owners and users falls within the exclusive domain of Parliament, and cannot be delegated to a subordinate body.⁴²

21. That holding is also consistent with a broader tenet of the rule of law “that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority”.⁴³ There are clearly no express words empowering the Board to impose payments, and all the powers given to the Board appear capable of a more logical interpretation without imputing any such power.⁴⁴ Even if Parliament could delegate to the Board the power to fill in the details of any mandatory dues, it

³⁸ See Katz, “Spectre”, at 26-27, 37-39, IBA Tab 32.

³⁹ *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, [2003] 2 SCR 157 at para 39, IBA Tab 16.

⁴⁰ *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 at para 49 (SCC), IBA Tab 22.

⁴¹ *Copyright Act*, s 70.1, IF p 22.

⁴² *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 SCR 489 at para 80, IBA Tab 19; *Copyright Act*, s 89, IF p 35.

⁴³ *Ontario English Catholic Teachers’ Assn v Ontario (Attorney General)* (2001), 1 SCR 470 at para 77 [*OECTA*] IBA Tab 15 (citing *Attorney-General v Wilts United Dairies, Ltd.* (1921), 37 LTR 884 (CA) at 885 IBA Tab 1, aff’d (1922), 91 LJKB 897 (HL) [*AG v Wilts*], quoting *Gosling v Veley*, (1850) 12 QB 328 at 407 (per Wilde CJ, dissenting, rev’d *Gosling v Veley*, [1852-53] IV HLC 679 (HL)).

⁴⁴ *AG v Wilts*, at 886, IBA Tab 1.

could not delegate power to impose them *ab initio*. Valid delegation would still require “a detailed statutory framework, setting out the structure of the tax, the tax base, and the principles for its imposition.”⁴⁵ The private copying *levy* scheme, which requires manufacturers and importers of audio recording media to pay a levy to a CMO, offers one clear exception that proves the rule. Paying this levy is unquestionably mandatory, which is why Parliament aptly called it a *levy*.⁴⁶

22. The notion of a mandatory tariff also offends the fundamental principle that no level of government (much less an administrative tribunal) can enact legislation (or, in this case tariffs purporting to have the force of an enactment) that removes part of the core or inherent jurisdiction of the superior courts. Under the mandatory tariff theory, one instance of infringement would make the user liable to pay royalties pursuant to a licensing scheme that she did not seek to become licensed under. If a user has allegedly infringed copyright, she has a right to stand trial before a superior court, and the role of the court cannot be downgraded to merely rubberstamping and enforcing an administratively determined monetary award.⁴⁷

Mandatory Tariffs Encourage “Double Dipping” and Costly Gratuitous Obligations

23. As this Court noted in *ESA*, collective licensing schemes that unbundle the rights necessary for a single economic activity undermine the rationale for allowing collective administration in the first place.⁴⁸ When copyright owners compete with each other, offering users a bundle encompassing all the necessary permissions becomes a competitive advantage, and the market discourages inefficient distinctions and fragmentation of rights.⁴⁹ Yet, as Judge Parker presciently observed in 1935, CMOs and their members have often unbundled rights in order to exact excessive fees, and these types of abuses were among the reasons that led the 1935 Royal

⁴⁵ *OEFTA* at para 75, IBA Tab 15. Compare *Copyright Act*, s 83 IF p 30, where Parliament clearly empowered the Board to fill in the details of a mandatory blank media levy. Whether this delegation is detailed enough to survive constitutional scrutiny would have to wait another day. While this is not the place to discuss whether a mandatory tariff could be constitutional, the rule of law considerations surrounding the imposition of pecuniary obligations are still relevant for the proper construction of the Board’s powers under the Act, and emphasize the implausibility of the “mandatory tariff” theory.

⁴⁶ *Copyright Act*, s 82, IF p 30.

⁴⁷ *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 30, IBA Tab 25.

⁴⁸ *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231 at para 11, IBA Tab 12.

⁴⁹ Ariel Katz, “Copyright Collectives: Good Solution But for Which Problem?” in Harry First et al, eds, *Working Within the Boundaries of Intellectual Property: Innovation Policy For The Knowledge Society* (Oxford: Oxford University Press, 2010) 395, at 402-03 [*Katz, Good Solution*] IBA Tab 30.

Commission to recommend regulation by a specialized Board.⁵⁰ They have also resulted in regulatory intervention in the US.⁵¹

24. Accepting the notion of mandatory tariffs would only encourage CMOs to develop such abusive and inefficient schemes, because the Board's approval could shield the owners' practices from full scrutiny under the *Competition Act*, and the apparent authority to impose their schemes could give CMOs the leverage to force users into coercive settlements. The FCA's holding thus entrenches the very mischief that Parliament sought to prevent.

25. For similar reasons, the interveners strongly disagree with CBC's proposal of imposing a "nominal" tariff. Even those few users who can afford advocating for a nominal tariff would still have to comply with onerous auditing, accounting and reporting obligations.⁵²

PART IV: SUBMISSION ON COSTS

26. The Proposed Interveners do not seek any costs and submit that no costs should be awarded against them.

PART V: ORDER SOUGHT

27. The Interveners request permission to make oral submissions of up to 15 minutes in length at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd day of March 2015.

Howard P. Knopf
 Macera & Jarzyna, LLP
 1200 - 427 Laurier Ave. W., Ottawa, ON, K1R 7Y2
 Phone: 613-238-8173 Fax: 613-235-2508
 Counsel for the Proposed Interveners Centre for Intellectual Property Policy and Ariel Katz

⁵⁰ *Parker Report, supra* at 26, see also *ibid* at 30 and 49, IBA Tab 28.

⁵¹ Katz, "Good Solution" at 408-11, IBA Tab 30; Glynn Lunney, "Copyright Collectives and Collecting Societies: The United States Experience", in Daniel Gervais, ed, *Collective Management of Copyright and Related Rights* (Frederick, MD: Kluwer, 2006) 311 at 322-25, IBA Tab 34.

⁵² *SOCAN v Bell et al*, 2010 FCA 139 at para 36, IBA Tab 21.

PART VI: TABLE OF AUTHORITIES

<u>Authority</u>	<u>Page (paragraph number)</u>
<u>Cases</u>	
<i>Attorney-General v Wilts United Dairies, Ltd.</i> (1921), 37 LTR 884 (CA).....	8 (para 21)
<i>Bobbs-Merill v Straus</i> (1908) 210 U.S. 339.....	6 (para 16)
<i>British Actors Film Co Ltd v. Glover</i> , [1918] 1 KB 299.....	6 (para 16)
<i>Canadian Artists' Representation v National Gallery of Canada</i> , 2014 SCC 42.....	5 (para 13)
<i>Canadian Assn of Broadcasters v Society of Composers, Authors & Music Publishers of Canada</i> (1994), 58 CPR (3d) 190 (FCA)	5 (para 12)
<i>Canadian Broadcasting Corporation v SODRAC 2003 INC. et al</i> , 2014 FCA 84.....	1 (para 1)
<i>CAPAC v Sandholm Holdings Ltd</i> , [1955] Ex CR 244, 24 CPR 58	4, 7 (paras 11, 16)
<i>CCH Canadian Ltd v Law Society of Upper Canada</i> [2004] 1 SCR 339	1 (para 2)
<i>Composers, Authors & Publishers Assn. of Canada Ltd. v Elmwood Hotel Ltd.</i> , 1955 (1955) 24 CPR 77 (Exchequer Court)	7 (para 17)
<i>Composers, Authors and Publishers Association of Canada Limited (CAPAC) v. CTV Television Network Limited et al</i> [1968] SCR 676.....	7 (para 18)
<i>Composers, Authors and Publishers' Association of Canada Limited v Baton Broadcasting Limited</i> (1964), 45 CPR 242	7 (para 17)
<i>Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada</i> , 2012 SCC 34, [2012] 2 SCR 231,	9 (para 23)
<i>Euro-Excellence Inc v Kraft Canada Inc</i> (2007), 3 SCR 20.....	6 (para 16)
<i>Maple Leaf Broadcasting v. Composers, Authors and Publishers Association of Canada Ltd.</i> , [1954] SCR 624.....	7 (para 17)
<i>Ontario English Catholic Teachers' Assn v Ontario (Attorney General)</i> (2001), 1 SCR 470	8, 9 (para 21)
<i>Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324</i> , [2003] 2 SCR 157	8 (para 40)
<i>Performing Rights Organization of Canada Ltd v. Canadian Broadcasting Corporation</i> , (FCA) 7 CPR (3d) 433.....	7 (para 17)

<i>Performing Rights Organization of Canada v Lion d'Or (1981)</i> , [1987] 16 FTR 104	7 (para 17)
<i>Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168</i> [2012] 3 SCR 489	8 (para 20)
<i>Rogers Communications v SOCAN</i> , 2012 SCC 35	1 (para 4)
<i>SOCAN v Bell et al</i> , 2010 FCA	10 (para 25)
<i>SOCAN v Canadian Association of Internet Providers</i> , 2004 SCC 45	8 (para 20)
<i>Society for Reproduction Rights of Authors, Composers and Publishers in Canada v Canadian Broadcasting Corp.</i> , [2012] CarswellNat 4255 at para 63 (Copyright Board).....	1, 2 (paras 4, 7)
<i>Théberge v. Galerie d'Art du Petit Champlain inc.</i> 2002 SCC	1 (para 2)
<i>Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)</i> , 2014 SCC	9 (para 22)
<i>Vigneux et al v Canadian Performing Right Society Ltd.</i> (1945) 4 C.P.R. 65 (JCPC) 3, 4 (paras 9, 10)	
<i>Vigneux v Canadian Performing Right Society</i> , [1943] SCR 348 at 353–54 (SCC)...	4, 7 (paras 10, 17)

Other Authorities

Hon. James Parker, <i>Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights Society, Limited, and Similar Societies</i> (Ottawa, ON: JO Patenaude, 1935)	3, 9 (paras 9, 23)
---	--------------------

Articles

Ariel Katz, “Copyright Collectives: Good Solution But for Which Problem?” in Harry First et al, eds, <i>Working Within the Boundaries of Intellectual Property: Innovation Policy For The Knowledge Society</i> (Oxford: Oxford University Press, 2010)	9 (para 23)
Ariel Katz, “The Potential Demise Of Another Natural Monopoly: Rethinking The Collective Administration Of Performing Rights” (2005) 1:3 J Compet L & Econ 541	2 (para 6)
Ariel Katz, “Spectre: Canadian Copyright and the Mandatory Tariff – Part I”, 27:2 IPJ (forthcoming in 2015)	2,5,6,7,8 (paras 7, 12,14,16, 18, 19)
Bitu Amani, “Access Copyright and the Proposed Model Copyright Licence Agreement: A Shakespearean Tragedy”, (2012) 24:3 IPJ 221	3 (para 8)

Statutes

<i>Competition Act</i> , s 125	4, 10 (paras 11, 24)
<i>Copyright Act</i> , s 38.1(4)	5 (para 12)
<i>Copyright Act</i> , s 2.....	1 (para 1)
<i>Copyright Act</i> , s 70.1.....	6 (para 15)
<i>Copyright Act</i> , s 70.12.....	6 (para 15)
<i>Copyright Act</i> , s 70.2.....	2,5,6 (paras 5, 14, 15)
<i>Copyright Act</i> , s 38.1(1)(b)	3 (para 8)
<i>Copyright Act</i> , s 82.....	9 (para 21)
<i>Copyright Act</i> , s 83.....	9 (para 21)
<i>Copyright Act</i> , s 89.....	8 (para 20)
<i>Copyright Act</i> , ss 68.2 and 70.4	1,5,7 (paras 4, 14,16)
<i>Copyright Act</i> , ss 70.5-70.6.....	4 (para 11)

PART VII: STATUTORY PROVISIONS IN ISSUE

THIS PAGE IS BLANK.

SEE NEXT PAGE.

Competition Act, RSC, 1985, c C-34

Representations to Boards, Commissions or Other Tribunals

Marginal note: Representations to federal boards, etc.

125. (1) The Commissioner, at the request of any federal board, commission or other tribunal or on his own initiative, may, and on direction from the Minister shall, make representations to and call evidence before the board, commission or other tribunal in respect of competition, whenever such representations are, or evidence is, relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining the matter.

Definition of “federal board, commission or other tribunal”

(2) For the purposes of this section, “federal board, commission or other tribunal” means any board, commission, tribunal or person that carries on regulatory activities and is expressly charged by or pursuant to an enactment of Parliament with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product. R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Copyright Act, RSC, 1985, c C-42

s. 2

“collective society”

“collective society”

Loi sur la concurrence, LRC (1985), ch C-34

Observations aux offices fédéraux, commissions et autres tribunaux

Note marginale : Observations aux offices fédéraux etc.

125. (1) Le commissaire peut, à la requête de tout office, de toute commission ou de tout autre tribunal fédéral ou de sa propre initiative, et doit, sur l'ordre du ministre, présenter des observations et soumettre des éléments de preuve devant cet office, cette commission ou ce tribunal, en ce qui concerne la concurrence chaque fois que ces observations ou ces éléments de preuve ont trait à une question dont est saisi cet office, cette commission ou cet autre tribunal et aux facteurs que celui-ci ou celle-ci a le droit d'examiner en vue de régler cette question.

Définition de « office, commission ou autre tribunal fédéral »

(2) Pour l'application du présent article, « office, commission ou autre tribunal fédéral » s'entend de tout office, toute commission, tout tribunal ou toute personne qui exerce des activités de réglementation et qui est expressément chargé, par un texte législatif du Parlement ou en application d'un tel texte, de prendre des décisions ou de faire des recommandations afférentes, directement ou indirectement, à la production, la fourniture, l'acquisition ou la distribution d'un produit.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

**Loi sur le droit d'auteur
LRC (1985), ch C-42**

article 2

« société de

« *société de gestion* »

“collective society” means a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 or 81 for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and (a) operates a licensing scheme, applicable in relation to a repertoire of works, performer’s performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or (b) carries on the business of collecting and distributing royalties or levies payable pursuant to this Act;

Copyright in works

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

gestion »
“*collective society*”

« société de gestion » Association, société ou personne morale autorisée — notamment par voie de cession, licence ou mandat — à se livrer à la gestion collective du droit d’auteur ou du droit à rémunération conféré par les articles 19 ou 81 pour l’exercice des activités suivantes::
a) l’administration d’un système d’octroi de licences portant sur un répertoire d’oeuvres, de prestations, d’enregistrements sonores ou de signaux de communication de plusieurs auteurs, artistes-interprètes, producteurs d’enregistrements sonores ou radiodiffuseurs et en vertu duquel elle établit les catégories d’utilisation qu’elle autorise au titre de la présente loi ainsi que les redevances et modalités afférentes;
b) la perception et la répartition des redevances

Droit d’auteur sur l’oeuvre

3. (1) Le droit d’auteur sur l’oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l’oeuvre, sous une forme matérielle quelconque, d’en exécuter ou d’en représenter la totalité ou une partie importante en public et, si l’oeuvre n’est pas publiée, d’en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

a) de produire, reproduire, représenter ou publier une traduction de l’oeuvre;

b) s’il s’agit d’une oeuvre dramatique, de la transformer en un roman ou en une autre

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and

(j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

oeuvre non dramatique;

c) s'il s'agit d'un roman ou d'une autre oeuvre non dramatique, ou d'une oeuvre artistique, de transformer cette oeuvre en une oeuvre dramatique, par voie de représentation publique ou autrement;

d) s'il s'agit d'une oeuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'oeuvre peut être reproduite, représentée ou exécutée mécaniquement;

e) s'il s'agit d'une oeuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'oeuvre en tant qu'oeuvre cinématographique;

f) de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique;

g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une oeuvre artistique — autre qu'une carte géographique ou marine, un plan ou un graphique — créée après le 7 juin 1988;

h) de louer un programme d'ordinateur qui peut être reproduit dans le cadre normal de son utilisation, sauf la reproduction effectuée pendant son exécution avec un ordinateur ou autre machine ou appareil;

i) s'il s'agit d'une oeuvre musicale, d'en louer tout enregistrement sonore;

j) s'il s'agit d'une oeuvre sous forme d'un objet tangible, d'effectuer le transfert de propriété, notamment par vente, de l'objet, dans la mesure où la propriété de celui-ci n'a jamais été transférée au Canada ou à l'étranger avec l'autorisation du titulaire du

and to authorize any such acts.

Royalties

19. (2) For the purpose of providing the remuneration mentioned in this section, a person who performs a published sound recording in public or communicates it to the public by telecommunication is liable to pay royalties

(a) in the case of a sound recording of a musical work, to the collective society authorized under Part VII to collect them; or

(b) in the case of a sound recording of a literary work or dramatic work, to either the maker of the sound recording or the performer.

Statutory damages

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally,

(a) in a sum of not less than \$500 and not more than \$20,000 that the court considers just, with respect to all infringements involved in the proceedings for each work or other subject-matter, if the infringements are for commercial purposes; and

(b) in a sum of not less than \$100 and not more than \$5,000 that the court considers just, with respect to all infringements

droit d'auteur.

Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

Redevances

19. (2) En vue de cette rémunération, quiconque exécute en public ou communique au public par télécommunication l'enregistrement sonore publié doit verser des redevances :

a) dans le cas de l'enregistrement sonore d'une oeuvre musicale, à la société de gestion chargée, en vertu de la partie VII, de les percevoir;

b) dans le cas de l'enregistrement sonore d'une oeuvre littéraire ou d'une oeuvre dramatique, soit au producteur, soit à l'artiste-interprète.

Domages-intérêts préétablis

38.1 (1) Sous réserve des autres dispositions du présent article, le titulaire du droit d'auteur, en sa qualité de demandeur, peut, avant le jugement ou l'ordonnance qui met fin au litige, choisir de recouvrer, au lieu des dommages-intérêts et des profits visés au paragraphe 35(1), les dommages-intérêts préétablis ci-après pour les violations reprochées en l'instance à un même défendeur ou à plusieurs défendeurs solidairement responsables :

a) dans le cas des violations commises à des fins commerciales, pour toutes les violations — relatives à une oeuvre donnée ou à un autre objet donné du droit d'auteur —, des dommages-intérêts dont le montant, d'au moins 500 \$ et d'au plus 20 000 \$, est

involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes.

Collective societies

38.1(4) Where the defendant has not paid applicable royalties, a collective society referred to in section 67 may only make an election under this section to recover, in lieu of any other remedy of a monetary nature provided by this Act, an award of statutory damages in a sum of not less than three and not more than ten times the amount of the applicable royalties, as the court considers just.

Collective Administration of Performing Rights and of Communication Rights

Public access to repertoires

67. Each collective society that carries on

(a) the business of granting licences or collecting royalties for the performance in public of musical works, dramatico-musical works, performer's performances of such works, or sound recordings embodying such works, or

(b) the business of granting licences or collecting royalties for the communication to the public by telecommunication of musical works, dramatico-musical works, performer's performances of such works, or sound recordings embodying such works,

déterminé selon ce que le tribunal estime équitable en l'occurrence;

b) dans le cas des violations commises à des fins non commerciales, pour toutes les violations — relatives à toutes les oeuvres données ou tous les autres objets donnés du droit d'auteur —, des dommages-intérêts, d'au moins 100 \$ et d'au plus 5 000 \$, dont le montant est déterminé selon ce que le tribunal estime équitable en l'occurrence.

Société de gestion

38,1(4) Si le défendeur n'a pas payé les redevances applicables en l'espèce, la société de gestion visée à l'article 67 — au lieu de se prévaloir de tout autre recours en vue d'obtenir un redressement pécuniaire prévu par la présente loi — ne peut, aux termes du présent article, que choisir de recouvrer des dommages-intérêts préétablis dont le montant, de trois à dix fois le montant de ces redevances, est déterminé selon ce que le tribunal estime équitable en l'occurrence.

Gestion collective du droit d'exécution et de communication

Demandes de renseignements

67. Les sociétés de gestion chargées d'octroyer des licences ou de percevoir des redevances pour l'exécution en public ou la communication au public par télécommunication — à l'exclusion de la communication visée au paragraphe 31(2) — d'oeuvres musicales ou dramatico-musicales, de leurs prestations ou d'enregistrements sonores constitués de ces oeuvres ou prestations, selon le cas, sont tenues de répondre aux demandes de renseignements raisonnables du public concernant le répertoire de telles oeuvres ou

other than the communication of musical works or dramatico-musical works in a manner described in subsection 31(2),

must answer within a reasonable time all reasonable requests from the public for information about its repertoire of works, performer's performances or sound recordings, that are in current use.

R.S., 1985, c. C-42, s. 67; R.S., 1985, c. 10 (1st Suppl.), s. 1, c. 10 (4th Suppl.), s. 12; 1993, c. 23, s. 3; 1997, c. 24, s. 45.

Filing of proposed tariffs

67.1 (1) Each collective society referred to in section 67 shall, on or before the March 31 immediately before the date when its last tariff approved pursuant to subsection 68(3) expires, file with the Board a proposed tariff, in both official languages, of all royalties to be collected by the collective society.

Marginal note:Where no previous tariff

(2) A collective society referred to in subsection (1) in respect of which no tariff has been approved pursuant to subsection 68(3) shall file with the Board its proposed tariff, in both official languages, of all royalties to be collected by it, on or before the March 31 immediately before its proposed effective date.

Marginal note:Effective period of tariffs

(3) A proposed tariff must provide that the royalties are to be effective for periods of one or more calendar years.

Marginal note:Prohibition of enforcement

(4) If a proposed tariff is not filed with respect to the work, performer's performance or sound recording in question,

prestations ou de tels enregistrements d'exécution courante dans un délai raisonnable.

L.R. (1985), ch. C-42, art. 67; L.R. (1985), ch. 10 (1er suppl.), art. 1, ch. 10 (4e suppl.), art. 12; 1993, ch. 23, art. 3; 1997, ch. 24, art. 45

Dépôt d'un projet de tarif

67.1 (1) Les sociétés visées à l'article 67 sont tenues de déposer auprès de la Commission, au plus tard le 31 mars précédant la cessation d'effet d'un tarif homologué au titre du paragraphe 68(3), un projet de tarif, dans les deux langues officielles, des redevances à percevoir.

Note marginale :Sociétés non régies par un tarif homologué

(2) Lorsque les sociétés de gestion ne sont pas régies par un tarif homologué au titre du paragraphe 68(3), le dépôt du projet de tarif auprès de la Commission doit s'effectuer au plus tard le 31 mars précédant la date prévue pour sa prise d'effet.

Note marginale :Durée de validité

(3) Le projet de tarif prévoit des périodes d'effet d'une ou de plusieurs années civiles.

Note marginale :Interdiction des recours

(4) Le non-dépôt du projet empêche, sauf autorisation écrite du ministre, l'exercice de quelque recours que ce soit pour violation

no action may be commenced, without the written consent of the Minister, for

(a) the infringement of the rights, referred to in section 3, to perform a work in public or to communicate it to the public by telecommunication;

(b) the infringement of the rights referred to in paragraph 15(1.1)(d) or 18(1.1)(a); or

(c) the recovery of royalties referred to in section 19.

Marginal note:Publication of proposed tariffs

(5) As soon as practicable after the receipt of a proposed tariff filed pursuant to subsection (1), the Board shall publish it in the Canada Gazette and shall give notice that, within sixty days after the publication of the tariff, prospective users or their representatives may file written objections to the tariff with the Board.

R.S., 1985, c. 10 (4th Supp.), s. 12; 1997, c. 24, s. 45; 2001, c. 34, s. 35(E); 2012, c. 20, s. 52.

Effect of fixing royalties

68.2 (1) Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

Marginal note:Proceedings barred if royalties tendered or paid

(2) No proceedings may be brought against a person who has paid or offered to pay the royalties specified in an approved tariff for

du droit d'exécution en public ou de communication au public par télécommunication visé à l'article 3 ou des droits visés aux alinéas 15(1.1)d) ou 18(1.1)a), ou pour recouvrement des redevances visées à l'article 19.

Note marginale :Publication des projets de tarifs

(5) Dès que possible, la Commission publie dans la Gazette du Canada les projets de tarif et donne un avis indiquant que tout utilisateur éventuel intéressé, ou son représentant, peut y faire opposition en déposant auprès d'elle une déclaration en ce sens dans les soixante jours suivant la publication.

L.R. (1985), ch. 10 (4e suppl.), art. 12; 1997, ch. 24, art. 45; 2001, ch. 34, art. 35(A); 2012, ch. 20, art. 52.

Portée de l'homologation

68.2 (1) La société de gestion peut, pour la période mentionnée au tarif homologué, percevoir les redevances qui y figurent et, indépendamment de tout autre recours, le cas échéant, en poursuivre le recouvrement en justice.

Note marginale :Interdiction des recours

(2) Il ne peut être intenté aucun recours pour

(a) the infringement of the right to perform in public or the right to communicate to the public by telecommunication, referred to in section 3;

(b) the infringement of the rights referred to in paragraph 15(1.1)(d) or 18(1.1)(a); or

(c) the recovery of royalties referred to in section 19.

Marginal note:Continuation of rights

(3) Where a collective society files a proposed tariff in accordance with subsection 67.1(1),

(a) any person entitled to perform in public or communicate to the public by telecommunication those works, performer's performances or sound recordings pursuant to the previous tariff may do so, even though the royalties set out therein have ceased to be in effect, and

(b) the collective society may collect the royalties in accordance with the previous tariff,

until the proposed tariff is approved.

1997, c. 24, s. 45; 2012, c. 20, s. 54.

Collective Administration in Relation to Rights under Sections 3, 15, 18 and 21

Collective Societies

Marginal note:Collective societies

70.1 Sections 70.11 to 70.6 apply in respect

violation des droits d'exécution en public ou de communication au public par télécommunication visés à l'article 3 ou des droits visés aux alinéas 15(1.1)d) ou 18(1.1)a), ou pour recouvrement des redevances visées à l'article 19, contre quiconque a payé ou offert de payer les redevances figurant au tarif homologué.

Note marginale :Maintien des droits

(3) Toute personne visée par un tarif concernant les oeuvres, les prestations ou les enregistrements sonores visés à l'article 67 peut, malgré la cessation d'effet du tarif, les exécuter en public ou les communiquer au public par télécommunication dès lors qu'un projet de tarif a été déposé conformément au paragraphe 67.1(1), et ce jusqu'à l'homologation d'un nouveau tarif. Par ailleurs, la société de gestion intéressée peut percevoir les redevances prévues par le tarif antérieur jusqu'à cette homologation.

1997, ch. 24, art. 45; 2012, ch. 20, art. 54.

Version précédente

Gestion collective relative aux droits visés aux articles 3, 15, 18 et 21

Sociétés de gestion

Note marginale :Sociétés de gestion

70.1 Les articles 70.11 à 70.6 s'appliquent

of a collective society that operates

(a) a licensing scheme, applicable in relation to a repertoire of works of more than one author, pursuant to which the society sets out the classes of uses for which and the royalties and terms and conditions on which it agrees to authorize the doing of an act mentioned in section 3 in respect of those works;

(a.1) a licensing scheme, applicable in relation to a repertoire of performer's performances of more than one performer, pursuant to which the society sets out the classes of uses for which and the royalties and terms and conditions on which it agrees to authorize the doing of an act mentioned in section 15 in respect of those performer's performances;

(b) a licensing scheme, applicable in relation to a repertoire of sound recordings of more than one maker, pursuant to which the society sets out the classes of uses for which and the royalties and terms and conditions on which it agrees to authorize the doing of an act mentioned in section 18 in respect of those sound recordings; or

(c) a licensing scheme, applicable in relation to a repertoire of communication signals of more than one broadcaster, pursuant to which the society sets out the classes of uses for which and the royalties and terms and conditions on which it agrees to authorize the doing of an act mentioned in section 21 in respect of those communication signals.

R.S., 1985, c. 10 (4th Suppl.), s. 16; 1997, c. 24, s. 46.

Marginal note: Public information

70.11 A collective society referred to in section 70.1 must answer within a reasonable time all reasonable requests from the public for information about its

dans le cas des sociétés de gestion chargées d'octroyer des licences établissant :

a) à l'égard d'un répertoire d'oeuvres de plusieurs auteurs, les catégories d'utilisation à l'égard desquelles l'accomplissement de tout acte mentionné à l'article 3 est autorisé ainsi que les redevances à verser et les modalités à respecter pour obtenir une licence;

a.1) à l'égard d'un répertoire de prestations de plusieurs artistes-interprètes, les catégories d'utilisation à l'égard desquelles l'accomplissement de tout acte mentionné à l'article 15 est autorisé ainsi que les redevances à verser et les modalités à respecter pour obtenir une licence;

b) à l'égard d'un répertoire d'enregistrements sonores de plusieurs producteurs d'enregistrements sonores, les catégories d'utilisation à l'égard desquelles l'accomplissement de tout acte mentionné à l'article 18 est autorisé ainsi que les redevances à verser et les modalités à respecter pour obtenir une licence;

c) à l'égard d'un répertoire de signaux de communication de plusieurs radiodiffuseurs, les catégories d'utilisation à l'égard desquelles l'accomplissement de tout acte mentionné à l'article 21 est autorisé ainsi que les redevances à verser et les modalités à respecter pour obtenir une licence.

L.R. (1985), ch. 10 (4e suppl.), art. 16; 1997, ch. 24, art. 46.

Note marginale : Demandes de renseignements

70.11 Ces sociétés de gestion sont tenues de répondre, dans un délai raisonnable, aux demandes de renseignements raisonnables du public concernant le répertoire de telles oeuvres, de telles prestations, de tels

repertoire of works, performer's performances, sound recordings or communication signals.

1997, c. 24, s. 46.

Tariff or agreement

70.12 A collective society may, for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses,

- (a) file a proposed tariff with the Board; or
- (b) enter into agreements with users.

1997, c. 24, s. 46.

Tariffs

Marginal note:Filing of proposed tariffs

70.13 (1) Each collective society referred to in section 70.1 may, on or before the March 31 immediately before the date when its last tariff approved pursuant to subsection 70.15(1) expires, file with the Board a proposed tariff, in both official languages, of royalties to be collected by the collective society for issuing licences.

Marginal note:Where no previous tariff

(2) A collective society referred to in subsection (1) in respect of which no tariff has been approved pursuant to subsection 70.15(1) shall file with the Board its proposed tariff, in both official languages, of all royalties to be collected by it for issuing licences, on or before the March 31 immediately before its proposed effective date.

1997, c. 24, s. 46.

Marginal note:Application of certain provisions

70.14 Where a proposed tariff is filed under

enregistrements sonores ou de tels signaux de communication, selon le cas.

1997, ch. 24, art. 46.

Projets de tarif ou ententes

70.12 Les sociétés de gestion peuvent, en vue d'établir par licence les redevances à verser et les modalités à respecter relativement aux catégories d'utilisation :

- a) soit déposer auprès de la Commission un projet de tarif;
- b) soit conclure des ententes avec les utilisateurs.

1997, ch. 24, art. 46.

Projets de tarif

Note marginale :Dépôt d'un projet de tarif

70.13 (1) Les sociétés de gestion peuvent déposer auprès de la Commission, au plus tard le 31 mars précédant la cessation d'effet d'un tarif homologué au titre du paragraphe 70.15(1), un projet de tarif, dans les deux langues officielles, des redevances à percevoir pour l'octroi de licences.

Note marginale :Sociétés non régies par un tarif homologué

(2) Lorsque les sociétés de gestion ne sont pas régies par un tarif homologué au titre du paragraphe 70.15(1), le dépôt du projet de tarif auprès de la Commission doit s'effectuer au plus tard le 31 mars précédant la date prévue pour sa prise d'effet.

1997, ch. 24, art. 46.

Note marginale :Application de certaines dispositions

section 70.13, subsections 67.1(3) and (5) and subsection 68(1) apply, with such modifications as the circumstances require.

1997, c. 24, s. 46.

Marginal note: Certification

70.15 (1) The Board shall certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions related thereto as the Board considers necessary, having regard to any objections to the tariffs.

Marginal note: Application of certain provisions

(2) Where a tariff is approved under subsection (1), subsections 68(4) and 68.2(1) apply, with such modifications as the circumstances require.

1997, c. 24, s. 46.

Marginal note: Distribution, publication of notices

70.16 Independently of any other provision of this Act relating to the distribution or publication of information or documents by the Board, the Board shall notify persons affected by a proposed tariff, by

(a) distributing or publishing a notice, or

(b) directing another person or body to distribute or publish a notice,

in such manner and on such terms and conditions as the Board sees fit.

1997, c. 24, s. 46.

Marginal note: Prohibition of enforcement

70.17 Subject to section 70.19, no proceedings may be brought for the infringement of a right referred to in section 3, 15, 18 or 21 against a person who has paid

70.14 Dans le cas du dépôt, conformément à l'article 70.13, d'un projet de tarif, les paragraphes 67.1(3) et (5) et 68(1) s'appliquent avec les adaptations nécessaires.

1997, ch. 24, art. 46.

Note marginale : Homologation

70.15 (1) La Commission homologue les projets de tarifs après avoir apporté aux redevances et aux modalités afférentes les modifications qu'elle estime nécessaires compte tenu, le cas échéant, des oppositions.

Note marginale : Application de certaines dispositions

(2) Dans le cas d'un tarif homologué, les paragraphes 68(4) et 68.2(1) s'appliquent avec les adaptations nécessaires.

1997, ch. 24, art. 46.

Note marginale : Publication d'avis

70.16 La Commission doit ordonner l'envoi ou la publication d'un avis à l'intention des personnes visées par le projet de tarif, indépendamment de toute autre disposition de la présente loi relative à l'envoi ou à la publication de renseignements ou de documents, ou y procéder elle-même, et ce de la manière et aux conditions qu'elle estime indiquées.

1997, ch. 24, art. 46.

Note marginale : Interdiction des recours

70.17 Sous réserve de l'article 70.19, il ne peut être intenté aucun recours pour violation d'un droit prévu aux articles 3, 15, 18 ou 21 contre quiconque a payé ou offert de payer les redevances figurant au tarif

or offered to pay the royalties specified in an approved tariff.

1997, c. 24, s. 46.

Marginal note: Prohibition of enforcement

70.17 Subject to section 70.19, no proceedings may be brought for the infringement of a right referred to in section 3, 15, 18 or 21 against a person who has paid or offered to pay the royalties specified in an approved tariff.

1997, c. 24, s. 46.

Continuation of rights

70.18 Subject to section 70.19, where a collective society files a proposed tariff in accordance with section 70.13,

(a) any person authorized by the collective society to do an act referred to in section 3, 15, 18 or 21, as the case may be, pursuant to the previous tariff may do so, even though the royalties set out therein have ceased to be in effect, and

(b) the collective society may collect the royalties in accordance with the previous tariff,

until the proposed tariff is approved.

1997, c. 24, s. 46.

Marginal note: Where agreement exists

70.19 If there is an agreement mentioned in paragraph 70.12(b), sections 70.17 and 70.18 do not apply in respect of the matters covered by the agreement.

1997, c. 24, s. 46.

Marginal note: Agreement

70.191 An approved tariff does not apply

homologué.

1997, ch. 24, art. 46.

Maintien des droits

70.18 Sous réserve de l'article 70.19 et malgré la cessation d'effet du tarif, toute personne autorisée par la société de gestion à accomplir tel des actes visés aux articles 3, 15, 18 ou 21, selon le cas, a le droit, dès lors qu'un projet de tarif est déposé conformément à l'article 70.13, d'accomplir cet acte et ce jusqu'à l'homologation d'un nouveau tarif. Par ailleurs, la société de gestion intéressée peut percevoir les redevances prévues par le tarif antérieur jusqu'à cette homologation.

1997, ch. 24, art. 46.

Note marginale : Non-application des articles 70.17 et 70.18

70.19 Les articles 70.17 et 70.18 ne s'appliquent pas aux questions réglées par toute entente visée à l'alinéa 70.12b).

1997, ch. 24, art. 46.

Note marginale : Entente

70.191 Le tarif homologué ne s'applique pas en cas de conclusion d'une entente entre une société de gestion et une personne autorisée à accomplir tel des actes visés aux articles 3, 15, 18 ou 21, selon le cas, si cette entente est exécutoire pendant la période d'application du tarif homologué.

1997, ch. 24, art. 46.

where there is an agreement between a collective society and a person authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, if the agreement is in effect during the period covered by the approved tariff.

1997, c. 24, s. 46.

Fixing of Royalties in Individual Cases

Marginal note: Application to fix amount of royalty, etc.

70.2 (1) Where a collective society and any person not otherwise authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, in respect of the works, sound recordings or communication signals included in the collective society's repertoire are unable to agree on the royalties to be paid for the right to do the act or on their related terms and conditions, either of them or a representative of either may, after giving notice to the other, apply to the Board to fix the royalties and their related terms and conditions.

Marginal note: Fixing royalties, etc.

(2) The Board may fix the royalties and their related terms and conditions in respect of a licence during such period of not less than one year as the Board may specify and, as soon as practicable after rendering its decision, the Board shall send a copy thereof, together with the reasons therefor, to the collective society and the person concerned or that person's representative.

R.S., 1985, c. 10 (4th Suppl.), s. 16; 1997, c. 24, s. 46.

Marginal note: Agreement

70.3 (1) The Board shall not proceed with an

Fixation des redevances dans des cas particuliers

Note marginale : Demande de fixation de redevances

70.2 (1) À défaut d'une entente sur les redevances, ou les modalités afférentes, relatives à une licence autorisant l'intéressé à accomplir tel des actes mentionnés aux articles 3, 15, 18 ou 21, selon le cas, la société de gestion ou l'intéressé, ou leurs représentants, peuvent, après en avoir avisé l'autre partie, demander à la Commission de fixer ces redevances ou modalités.

Note marginale : Modalités de la fixation

(2) La Commission peut, selon les modalités, mais pour une période minimale d'un an, qu'elle arrête, fixer les redevances et les modalités afférentes relatives à la licence. Dès que possible après la fixation, elle en communique un double, accompagné des motifs de sa décision, à la société de gestion et à l'intéressé, ou au représentant de celui-ci.

L.R. (1985), ch. 10 (4e suppl.), art. 16; 1997, ch. 24, art. 46.

Note marginale : Entente préjudicielle

70.3 (1) Le dépôt auprès de la Commission d'un avis faisant état d'une entente conclue

application under section 70.2 where a notice is filed with the Board that an agreement touching the matters in issue has been reached.

Marginal note:Idem

(2) An agreement referred to in subsection (1) is effective during the year following the expiration of the previous agreement, if any, or of the last period specified under subsection 70.2(2).

R.S., 1985, c. 10 (4th Supp.), s. 16.

Effect of Board decision

70.4 Where any royalties are fixed for a period pursuant to subsection 70.2(2), the person concerned may, during the period, subject to the related terms and conditions fixed by the Board and to the terms and conditions set out in the scheme and on paying or offering to pay the royalties, do the act with respect to which the royalties and their related terms and conditions are fixed and the collective society may, without prejudice to any other remedies available to it, collect the royalties or, in default of their payment, recover them in a court of competent jurisdiction.

R.S., 1985, c. 10 (4th Supp.), s. 16; 1997, c. 24, s. 47.

Examination of Agreements

Definition of “Commissioner”

70.5 (1) For the purposes of this section and section 70.6, “Commissioner” means the Commissioner of Competition appointed under the Competition Act.

Marginal note:Filing agreement with the Board

(2) Where a collective society concludes an

avant la fixation opère dessaisissement.

Note marginale :Durée de l’entente

(2) L’entente visée au paragraphe (1) vaut, sauf stipulation d’une durée plus longue, pour un an à compter de la date d’expiration de l’entente précédente ou de la période visée au paragraphe 70.2(2).

L.R. (1985), ch. 10 (4e suppl.), art. 16.

Portée de la fixation

70.4 L’intéressé peut, pour la période arrêtée par la Commission, accomplir les actes à l’égard desquels des redevances ont été fixées, moyennant paiement ou offre de paiement de ces redevances et conformément aux modalités afférentes fixées par la Commission et à celles établies par la société de gestion au titre de son système d’octroi de licences. La société de gestion peut, pour la même période, percevoir les redevances ainsi fixées et, indépendamment de tout autre recours, en poursuivre le recouvrement en justice.

L.R. (1985), ch. 10 (4e suppl.), art. 16; 1997, ch. 24, art. 47

Examen des ententes

Définition de « commissaire »

70.5 (1) Pour l’application du présent article et de l’article 70.6, « commissaire » s’entend du commissaire de la concurrence nommé au titre de la Loi sur la concurrence.

Note marginale :Dépôt auprès de la Commission

(2) Dans les quinze jours suivant la conclusion d’une entente en vue de l’octroi

agreement to grant a licence authorizing a person to do an act mentioned in section 3, 15, 18 or 21, as the case may be, the collective society or the person may file a copy of the agreement with the Board within fifteen days after it is concluded.

Marginal note:Idem

(3) Section 45 of the Competition Act does not apply in respect of any royalties or related terms and conditions arising under an agreement filed in accordance with subsection (2).

Marginal note: Access by Commissioner

(4) The Commissioner may have access to the copy of an agreement filed in accordance with subsection (2).

Marginal note: Request for examination

(5) Where the Commissioner considers that an agreement filed in accordance with subsection (2) is contrary to the public interest, the Commissioner may, after advising the parties concerned, request the Board to examine the agreement.

R.S., 1985, c. 10 (4th Suppl.), s. 16; 1997, c. 24, s. 48; 1999, c. 2, ss. 45, 46.

Marginal note:Examination and fixing of royalty

70.6 (1) The Board shall, as soon as practicable, consider a request by the Commissioner to examine an agreement and the Board may, after giving the Commissioner and the parties concerned an opportunity to present their arguments, alter the royalties and any related terms and conditions arising under the agreement, in which case section 70.4 applies with such modifications as the circumstances require.

d'une licence autorisant l'utilisateur à accomplir tel des actes mentionnés aux articles 3, 15, 18 ou 21, selon le cas, la société de gestion ou l'utilisateur peuvent en déposer un double auprès de la Commission.

Note marginale :Précision

(3) L'article 45 de la Loi sur la concurrence ne s'applique pas aux redevances et aux modalités afférentes objet de toute entente déposée conformément au paragraphe (2).

Note marginale :Accès

(4) Le commissaire peut avoir accès au double de l'entente.

Note marginale :Demande d'examen

(5) S'il estime qu'une telle entente est contraire à l'intérêt public, le commissaire peut, après avoir avisé les parties, demander à la Commission d'examiner l'entente.

L.R. (1985), ch. 10 (4e suppl.), art. 16; 1997, ch. 24, art. 48; 1999, ch. 2, art. 45 et 46.

Note marginale: Examen et fixation

70.6 (1) Dès que possible, la Commission procède à l'examen de la demande et, après avoir donné au commissaire et aux parties la possibilité de faire valoir leurs arguments, elle peut modifier les redevances et les modalités afférentes objet de l'entente, et en fixer de nouvelles; l'article 70.4 s'applique, compte tenu des adaptations nécessaires, à cette fixation.

Note marginale :Communication

(2) Dès que possible après la fixation, la Commission en communique un double, accompagné des motifs de sa décision, à la

Marginal note: Idem

(2) As soon as practicable after rendering its decision, the Board shall send a copy thereof, together with the reasons therefor, to the parties concerned and to the Commissioner.

R.S., 1985, c. 10 (4th Supp.), s. 16; 1997, c. 24, s. 49(F); 1999, c. 2, s. 46.

Levy on Blank Audio Recording Media

Marginal note: Liability to pay levy

82. (1) Every person who, for the purpose of trade, manufactures a blank audio recording medium in Canada or imports a blank audio recording medium into Canada

(a) is liable, subject to subsection (2) and section 86, to pay a levy to the collecting body on selling or otherwise disposing of those blank audio recording media in Canada; and

(b) shall, in accordance with subsection 83(8), keep statements of account of the activities referred to in paragraph (a), as well as of exports of those blank audio recording media, and shall furnish those statements to the collecting body.

Marginal note: No levy for exports

(2) No levy is payable where it is a term of the sale or other disposition of the blank audio recording medium that the medium is to be exported from Canada, and it is exported from Canada.

1997, c. 24, s. 50.

Filing of proposed tariffs

83. (1) Subject to subsection (14), each

société de gestion, à l'utilisateur et au commissaire.

L.R. (1985), ch. 10 (4e suppl.), art. 16; 1997, ch. 24, art. 49(F); 1999, ch. 2, art. 46.

Redevances

Note marginale : Obligation

82. (1) Quiconque fabrique au Canada ou y importe des supports audio vierges à des fins commerciales est tenu :

a) sous réserve du paragraphe (2) et de l'article 86, de payer à l'organisme de perception une redevance sur la vente ou toute autre forme d'aliénation de ces supports au Canada;

b) d'établir, conformément au paragraphe 83(8), des états de compte relatifs aux activités visées à l'alinéa a) et aux activités d'exportation de ces supports, et de les communiquer à l'organisme de perception.

Note marginale : Exportations

(2) Aucune redevance n'est toutefois payable sur les supports audio vierges lorsque leur exportation est une condition de vente ou autre forme d'aliénation et qu'ils sont effectivement exportés.

1997, ch. 24, art. 50.

Dépôt d'un projet de tarif

83. (1) Sous réserve du paragraphe (14), seules les sociétés de gestion agissant au

collective society may file with the Board a proposed tariff for the benefit of those eligible authors, eligible performers and eligible makers who, by assignment, grant of licence, appointment of the society as their agent or otherwise, authorize it to act on their behalf for that purpose, but no person other than a collective society may file any such tariff.

Marginal note:Collecting body

(2) Without limiting the generality of what may be included in a proposed tariff, the tariff may include a suggestion as to whom the Board should designate under paragraph (8)(d) as the collecting body.

Marginal note:Times for filing

(3) Proposed tariffs must be in both official languages and must be filed on or before the March 31 immediately before the date when the approved tariffs cease to be effective.

Marginal note:Where no previous tariff

(4) A collective society in respect of which no proposed tariff has been certified pursuant to paragraph (8)(c) shall file its proposed tariff on or before the March 31 immediately before its proposed effective date.

Marginal note:Effective period of levies

(5) A proposed tariff must provide that the levies are to be effective for periods of one or more calendar years.

Marginal note:Publication of proposed tariffs

(6) As soon as practicable after the receipt of a proposed tariff filed pursuant to subsection (1), the Board shall publish it in the Canada Gazette and shall give notice that, within

nom des auteurs, artistes-interprètes et producteurs admissibles qui les ont habilités à cette fin par voie de cession, licence, mandat ou autrement peuvent déposer auprès de la Commission un projet de tarif des redevances à percevoir.

Note marginale :Organisme de perception

(2) Le projet de tarif peut notamment proposer un organisme de perception en vue de la désignation prévue à l'alinéa (8)d).

Note marginale :Délai de dépôt

(3) Il est à déposer, dans les deux langues officielles, au plus tard le 31 mars précédant la cessation d'effet du tarif homologué.

Note marginale :Société non régie par un tarif homologué

(4) Lorsqu'elle n'est pas régie par un tarif homologué au titre de l'alinéa (8)c), la société de gestion doit déposer son projet de tarif auprès de la Commission au plus tard le 31 mars précédant la date prévue pour sa prise d'effet.

Note marginale :Durée de validité

(5) Le projet de tarif prévoit des périodes d'effet d'une ou de plusieurs années civiles.

Note marginale :Publication

(6) Dès que possible, la Commission le fait publier dans la Gazette du Canada et donne un avis indiquant que quiconque peut y faire opposition en déposant auprès d'elle une déclaration en ce sens dans les soixante jours suivant la publication.

Note marginale :Examen du projet de tarif

(7) Elle procède dans les meilleurs délais à l'examen du projet de tarif et, le cas échéant,

sixty days after the publication of the tariff, any person may file written objections to the tariff with the Board.

Marginal note: Board to consider proposed tariffs and objections

(7) The Board shall, as soon as practicable, consider a proposed tariff and any objections thereto referred to in subsection (6) or raised by the Board, and

(a) send to the collective society concerned a copy of the objections so as to permit it to reply; and

(b) send to the persons who filed the objections a copy of any reply thereto.

Marginal note: Duties of Board

(8) On the conclusion of its consideration of the proposed tariff, the Board shall

(a) establish, in accordance with subsection (9),

(i) the manner of determining the levies, and

(ii) such terms and conditions related to those levies as the Board considers appropriate, including, without limiting the generality of the foregoing, the form, content and frequency of the statements of account mentioned in subsection 82(1), measures for the protection of confidential information contained in those statements, and the times at which the levies are payable,

(b) vary the tariff accordingly,

(c) certify the tariff as the approved tariff, whereupon that tariff becomes for the purposes of this Part the approved tariff, and

(d) designate as the collecting body the collective society or other society,

des oppositions; elle peut également faire opposition au projet. Elle communique à la société de gestion en cause copie des oppositions et aux opposants les réponses éventuelles de celle-ci.

Note marginale : Mesures à prendre

(8) Au terme de son examen, la Commission :

a) établit conformément au paragraphe (9) :

(i) la formule tarifaire qui permet de déterminer les redevances,

(ii) à son appréciation, les modalités afférentes à celles-ci, notamment en ce qui concerne leurs dates de versement, la forme, la teneur et la fréquence des états de compte visés au paragraphe 82(1) et les mesures de protection des renseignements confidentiels qui y figurent;

b) modifie le projet de tarif en conséquence;

c) le certifie, celui-ci devenant dès lors le tarif homologué pour la société de gestion en cause;

d) désigne, à titre d'organisme de perception, la société de gestion ou autre société, association ou personne morale la mieux en mesure, à son avis, de s'acquitter des responsabilités ou fonctions découlant des articles 82, 84 et 86.

La Commission n'est pas tenue de faire une désignation en vertu de l'alinéa d) si une telle désignation a déjà été faite. Celle-ci demeure en vigueur jusqu'à ce que la Commission procède à une nouvelle désignation, ce qu'elle peut faire sur demande en tout temps.

association or corporation that, in the Board's opinion, will best fulfil the objects of sections 82, 84 and 86,

but the Board is not obligated to exercise its power under paragraph (d) if it has previously done so, and a designation under that paragraph remains in effect until the Board makes another designation, which it may do at any time whatsoever, on application.

Marginal note: Factors Board to consider

(9) In exercising its power under paragraph (8)(a), the Board shall satisfy itself that the levies are fair and equitable, having regard to any prescribed criteria.

Marginal note: Publication of approved tariffs

(10) The Board shall publish the approved tariffs in the Canada Gazette as soon as practicable and shall send a copy of each approved tariff, together with the reasons for the Board's decision, to the collecting body, to each collective society that filed a proposed tariff, and to any person who filed an objection.

Marginal note: Authors, etc., not represented by collective society

(11) An eligible author, eligible performer or eligible maker who does not authorize a collective society to file a proposed tariff under subsection (1) is entitled, in relation to

(a) a musical work,

(b) a performer's performance of a musical work, or

(c) a sound recording in which a musical work, or a performer's performance of a musical work, is embodied,

Note marginale : Critères particuliers

(9) Pour l'exercice de l'attribution prévue à l'alinéa (8)a), la Commission doit s'assurer que les redevances sont justes et équitables compte tenu, le cas échéant, des critères réglementaires.

Note marginale : Publication

(10) Elle publie dès que possible dans la Gazette du Canada les tarifs homologués; elle en envoie copie, accompagnée des motifs de sa décision, à l'organisme de perception, à chaque société de gestion ayant déposé un projet de tarif et à toutes les personnes ayant déposé une opposition.

Note marginale : Auteurs, artistes-interprètes non représentés

(11) Les auteurs, artistes-interprètes et producteurs admissibles qui ne sont pas représentés par une société de gestion peuvent, aux mêmes conditions que ceux qui le sont, réclamer la rémunération visée à l'article 81 auprès de la société de gestion désignée par la Commission, d'office ou sur demande, si pendant la période où une telle rémunération est payable, un tarif homologué s'applique à leur type d'oeuvre musicale, de prestation d'une oeuvre musicale ou d'enregistrement sonore constitué d'une oeuvre musicale ou d'une prestation d'une oeuvre musicale, selon le cas.

Note marginale : Exclusion d'autres recours

(12) Le recours visé au paragraphe (11) est le seul dont disposent les auteurs, artistes-interprètes et producteurs admissibles en question en ce qui concerne la reproduction d'enregistrements sonores pour usage privé.

Note marginale : Mesures d'application

as the case may be, to be paid by the collective society that is designated by the Board, of the Board's own motion or on application, the remuneration referred to in section 81 if such remuneration is payable during a period when an approved tariff that is applicable to that kind of work, performer's performance or sound recording is effective, subject to the same conditions as those to which a person who has so authorized that collective society is subject.

Marginal note: Exclusion of other remedies

(12) The entitlement referred to in subsection (11) is the only remedy of the eligible author, eligible performer or eligible maker referred to in that subsection in respect of the reproducing of sound recordings for private use.

Marginal note: Powers of Board

(13) The Board may, for the purposes of subsections (11) and (12),

(a) require a collective society to file with the Board information relating to payments of moneys received by the society pursuant to section 84 to the persons who have authorized it to file a tariff under subsection (1); and

(b) by regulation, establish the periods, which shall not be less than twelve months, beginning when the applicable approved tariff ceases to be effective, within which the entitlement referred to in subsection (11) must be exercised.

Marginal note: Single proposed tariff

(14) Where all the collective societies that intend to file a proposed tariff authorize a particular person or body to file a single proposed tariff on their behalf, that person or

(13) Pour l'application des paragraphes (11) et (12), la Commission peut :

a) exiger des sociétés de gestion le dépôt de tout renseignement relatif au versement des redevances qu'elles reçoivent en vertu de l'article 84 aux personnes visées au paragraphe (1);

b) fixer par règlement des périodes d'au moins douze mois, commençant à la date de cessation d'effet du tarif homologué, pendant lesquelles la rémunération visée au paragraphe (11) peut être réclamée.

Note marginale : Représentant

(14) Une personne ou un organisme peut, lorsque toutes les sociétés de gestion voulant déposer un projet de tarif l'y autorisent, déposer le projet pour le compte de celles-ci; les dispositions du présent article s'appliquent alors, avec les adaptations nécessaires, à ce projet de tarif.

1997, ch. 24, art. 50.

body may do so, and in that case this section applies, with such modifications as the circumstances require, in respect of that proposed tariff.

1997, c. 24, s. 50.

No copyright, etc., except by statute

89. No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

1997, c. 24, s. 50.

Status of the Artist Act, SC 1992, c 33

Bargaining and Scale Agreements

Notice to Bargain

Marginal note: Notice to bargain to enter into a scale agreement

31. (1) Where an artists' association is certified in respect of a sector, the association or a producer may issue a notice requiring the other party to begin bargaining for the purpose of entering into a scale agreement.

Marginal note: Notice to bargain to renew or revise a scale agreement or enter into a new scale agreement

Revendication d'un droit d'auteur

89. Nul ne peut revendiquer un droit d'auteur autrement qu'en application de la présente loi ou de toute autre loi fédérale; le présent article n'a toutefois pas pour effet d'empêcher, en cas d'abus de confiance, un individu de faire valoir son droit ou un tribunal de réprimer l'abus.

1997, ch. 24, art. 50.

Loi sur le statut de l'artiste, LC 1992, ch 33

Négociations et accords-cadres

Avis de négociation

Note marginale : Avis de négociation d'un accord-cadre

31. (1) L'association d'artistes, une fois accréditée pour un secteur, ou le producteur en cause peut transmettre à l'autre partie un avis de négociation en vue de la conclusion d'un accord-cadre.

Note marginale : Avis de négociation d'un nouvel accord-cadre

(2) Lorsqu'il y a un accord-cadre, toute partie peut, dans les trois mois précédant la date de son expiration, ou au cours de la

(2) Where a scale agreement is in force, either party may, in the three months immediately preceding the date that the agreement expires or within any longer period stipulated in the agreement, issue a notice to the other party to begin bargaining in order to renew or revise it or to enter into a new scale agreement.

Marginal note: Notice to bargain

(3) An association substituted as a party to a scale agreement pursuant to paragraph 28(5)(c) may, within six months after the date of its certification, issue a notice requiring the producer that is a party to the agreement to begin bargaining for the purpose of renewing or revising it or entering into a new scale agreement.

Marginal note: Revision during term

(4) Where a scale agreement provides for revision during its term, a party entitled to do so by the agreement may give notice to the other party to begin bargaining in order to revise any provision of the agreement.

Marginal note: Notice to Minister

(5) Any party that issues a notice to the other party to begin bargaining shall send a copy of the notice to the Minister without delay.

Duty to bargain and not to change terms and conditions

32. Where a notice to begin bargaining has been issued under section 31,

(a) the artists' association and the producer shall without delay, but in any case within twenty days after the notice was issued, unless they otherwise agree,

(i) meet, or send authorized representatives to meet, and begin to bargain in good faith,

période plus longue qu'il prévoit, transmettre à l'autre partie un avis de négociation en vue du renouvellement ou de la révision de celui-ci ou de la conclusion d'un nouvel accord-cadre.

Note marginale : Nouvelles négociations

(3) En cas de substitution d'associations, l'association substituée peut, dans les six mois suivant la date de l'accréditation, exiger que le producteur lié par l'accord-cadre entame des négociations en vue du renouvellement ou de la révision de celui-ci ou de la conclusion d'un nouvel accord-cadre.

Note marginale : Révision avant échéance

(4) Si l'accord-cadre permet la révision d'une de ses dispositions avant l'échéance, toute partie habilitée à y procéder peut transmettre à l'autre partie un avis de négociation à cet effet.

Note marginale : Copie à expédier au ministre

(5) Une copie de l'avis de négociation est à expédier sans délai au ministre par la partie qui l'a donné.

Obligation de négocier et de ne pas modifier les modalités

32. Une fois l'avis de négociation donné, les règles suivantes s'appliquent :

a) sans retard et, en tout état de cause, dans les vingt jours qui suivent ou dans le délai dont ils sont convenus, l'association d'artistes et le producteur doivent se rencontrer et entamer des négociations de bonne foi, ou charger leurs représentants autorisés de le faire en leur nom, et faire tout

and

(ii) make every reasonable effort to enter into a scale agreement; and

(b) the producer shall not alter, without the consent of the artists' association, any term or condition of engagement, including the rates of remuneration, or any right or privilege of an artist or the association, that is contained in the scale agreement, until such time as pressure tactics are permitted under section 46.

Duration and Effect of Scale Agreements

Marginal note:Effect of scale agreements

33. (1) For the term set out in it, a scale agreement binds the parties to it and every artist in the sector engaged by the producer, and neither party may terminate the agreement without the Board's approval, except when a notice to bargain is issued under subsection 31(3).

Marginal note:Scale agreement to be filed

(2) The parties to a scale agreement shall file a copy of the agreement with the Minister without delay.

Marginal note:Association of producers

(3) A scale agreement entered into by an association of producers binds, even in the event that the association is dissolved, each producer that

(a) is a member of the association at the time the agreement is signed and did not give the parties notice of withdrawal before the agreement was signed;

(b) not being a party to any other scale agreement in respect of the same sector, subsequently becomes a member of that

effort raisonnable pour conclure un accord-cadre;

b) le producteur ne peut modifier, sans le consentement de l'association d'artistes, ni la rémunération ou les conditions de travail prévues à un accord-cadre, ni les droits ou avantages conférés aux artistes ou à l'association par celui-ci, tant que les conditions fixées à l'article 46 pour l'exercice de moyens de pression ne sont pas réalisées.

Durée et effet des accords-cadres

Note marginale :Effet

33. (1) L'accord-cadre lie les parties pour la durée dont elles conviennent, ainsi que tous les artistes de ce secteur engagés par le producteur; elles ne peuvent y mettre fin qu'avec l'aval du Conseil ou que dans le cas prévu au paragraphe 31(3).

Note marginale :Copie au ministre

(2) Les parties font parvenir, sans délai, une copie de l'accord-cadre au ministre.

Note marginale :Associations de producteurs

(3) L'accord-cadre conclu avec une association de producteurs lie chaque producteur qui en est alors membre et qui n'a pas signifié aux parties son retrait ou qui, n'étant pas lié par un autre accord-cadre dans le même secteur, devient membre de l'association, ainsi que celui qui cesse, après sa conclusion, d'en faire partie. Il lie les producteurs même si l'association est dissoute.

Note marginale :Sauvegarde des dispositions plus favorables

(4) L'accord-cadre l'emporte sur les stipulations incompatibles de tout contrat

association; or

(c) withdraws from membership in the association.

Marginal note: Saving more favourable benefits

(4) A scale agreement applies notwithstanding any inconsistency with a contract between an artist and a producer, but it shall not be applied so as to deprive an artist of a right or benefit under the contract that is more favourable to the artist than is provided for under the agreement.

Marginal note: Application

(5) The Board shall assess what is more favourable to the artist under subsection (4) in relation to each right or benefit and shall compare the elements of each right or benefit under the scale agreement with the elements of each under the contract.

1992, c. 33, s. 33; 2012, c. 19, s. 545.

individuel entre un artiste et un producteur, mais n'a pas pour effet de porter atteinte aux droits ou avantages plus favorables acquis par un artiste sous leur régime.

Note marginale : Interprétation

(5) Chaque droit ou avantage devant être considéré séparément, l'appréciation par le Conseil de la nature plus favorable de celui-ci se fait disposition par disposition et au cas par cas.

1992, ch. 33, art. 33; 2012, ch. 19, art. 545.