Copyright Board Canada

Commission du droit d'auteur Canada

Date 1994-05-20

Citation FILES: 1989-2, 1990-4, 1991-13, 1992-PM/EM-1 and 1994

Regime Public Performance of Music
Copyright Act, Section 67.2

Members Mr. Justice Donald Medhurst
Michel Hétu, Q.C.
Dr. Judith Alexander
Mr. Michel Latraverse

Proposed Tariffs Considered Preliminary Questions:
17.A.1 (Transmission of Non-Broadcast Services B Television)
17.B (Retransmission of Local Broadcast Television and Radio Signals)

Reasons for decision

At a pre-hearing conference held on February 1, 1994, the Board set a timetable for the consideration of legal and procedural preliminary issues arising from proposed tariffs 2 and 17. These tariffs cover the public performance, or the communication to the public by telecommunication, of musical and dramatico-musical works (the music tariffs). Submissions regarding tariff 17 were filed on February 18, and replies on March 4. This order deals with the issues raised in those documents.

I. TARIFF 17.A.1: TRANSMISSION OF NON-BROADCAST SERVICES (TELEVISION)

A. POSTPONING THE PROCEEDINGS

Some intervenors asked that the examination of tariff 17.A.1 be delayed until the Federal Court of Appeal decides on an application for judicial review filed by the Canadian Association of Broadcasters (CAB). The application pertains to the Board's decision of December 6, 1993 on the music tariff for broadcast television stations. The Board shares the view of SOCAN and the Canadian Cable Television Association (CCTA) that the examination of tariff 17.A.1 should proceed without further delay.

The matter goes back to 1990. The delay in dealing with it arises from parties seeking legal remedies before the Federal Court. CAB's application, and others that might surface later, could

postpone the matter even longer. Further delays are unacceptable.

Some participants stated that the issues raised in CAB's application make it difficult for them to decide which evidence to provide during the hearings into Tariff 17.A.1. The Board disagrees. No one questions that market prices, American rates and music use studies are relevant considerations. The issue before the Federal Court is not whether the Board was entitled to look at such evidence, but whether the Board took sufficient notice of it. Parties are therefore free to produce evidence on these issues, as well as any others they feel should be considered.

Finally, the Board does not consider that it need postpone the proceedings to allow persons who may receive CRTC licenses for new non-broadcast services to participate. People who hope to operate new services could ask now to intervene in the proceedings before the Board. Given the time needed to dispose of tariff 17.A.1, persons who do get a CRTC licence will have ample time to join the proceedings as they unfold.

B. REQUESTS FOR PRELIMINARY RULINGS

Parties also asked that certain issues be dealt with as preliminary matters. These concerned the Board's ability to apportion liability amongst non-broadcast services and retransmitters, and to add payees to a proposed tariff. The Board was also asked to determine whether those powers had changed since the coming into force of Bill C-88,[1] on September 1, 1993.

The Board is unwilling to rule on any of them without the benefit of the record of these proceedings and of further arguments. Among other reasons, it wishes that representatives of non-broadcast services fully participate in these proceedings. From its point of view, their participation will assist in assessing a fair price for that use.

Non-broadcast services have an interest in participating in these proceedings, whether or not they are named in the certified tariff. Their liability may well flow from the very terms of s.3(1.4) of the *Copyright Act* (the "*Act*"). Furthermore, if, as Regional Cablesystems Inc. (Regional) points out, most contribution claims are to be settled on the basis of contracts, non-broadcast services have a definite interest in influencing the outcome of these proceedings. They will also want to ensure that any formula used in the certified tariff does not create unnecessary difficulties in apportioning liability amongst them and the retransmitters.

C. SMALL SYSTEMS

The Board shares the view that small systems should be dealt with at the end of these proceedings. Subject to arguments that may be submitted later, the Board is of the preliminary view that even in the absence of a regulation defining a small system, the Board is required to set a preferential price for them. Therefore, parties will be expected to present evidence and argument on the interpretation of the expression in the absence of such regulation.

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[1] S.C. 1993, ch. 23.

II. TARIFF 17.B: RETRANSMISSION OF LOCAL BROADCAST TELEVISION AND RADIO SIGNALS

CCTA and Regional argued that the matter pertains to the retransmission regime, and not to the music tariffs regime; therefore, it was stated, the proposed tariff 17.B could not be valid under any circumstance. Hence a ruling to that effect should be issued immediately. SOCAN and the CAB argued that such a ruling was premature, in view of CAB's pending application for judicial review. They asked that the consideration of tariff 17.B be postponed until a decision on that application was issued.

Recent amendments have dissipated the uncertainty surrounding the precise nature of the actions of cable operators under the *Act*. Bill C-88 changed the definition of musical work so as to make it impossible to argue that the only manner of communicating a musical work is to hold a sheet of music in front of a camera or to fax it. Now, there can be no doubt that the music we hear on radio or television constitutes a communication of musical works by telecommunication. Bill C-88 also amended s. 3(1.4) of the *Act* ─ the single communication rule ─ in a way that makes it abundantly clear to those who still entertain doubt on the issue, that cable operators do communicate works by telecommunication: no other interpretation is possible given the specific exclusion of retransmitters from the single communication rule.

Furthermore, the legislation implementing the North American Free Trade Agreement,[2] which came into force on January 1, 1994, adds to the *Act* a provision that makes it clear that the person who communicates a work does not perform it.[3]

Others may want to argue whether these amendments were necessary. In the Board's view, they have the merit of safeguarding, as was stated by counsel to Regional, "the integrity of the scheme for copyright liability for retransmission": performing rights should not serve to take away the free use of local signals granted under the retransmission regime.

Whatever the situation may have been before January 1, 1994, retransmitting a musical work constitutes a communication of the work, and only a communication of the work; any decision to the contrary has been superseded. The activities covered by proposed tariff 17.B fall within the retransmission regime, and are not of the kind that can be dealt with in the music tariffs. Since the proposed tariff 17.B relates solely to the period starting January 1, 1994, the unavoidable conclusion is that tariff 17.B as filed cannot be a valid tariff.

Tariff 17.B, therefore, should be struck from the proposed Statement of Royalties as published in the *Canada Gazette*, Part I, dated October 9, 1993.

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[2] S.C. 1993, ch. 44.

[3] See s. 3(4). Subsection (4) is said to be "for the purposes of subsection 3(1);" this does not make it less relevant in the interpretation of the whole *Act*, including the provisions setting out the retransmission regime. Subsection 3(1) contains the essential definition of what is meant by copyright and constitutes, therefore, the linchpin for the whole statute.

III. AGENDA

Parties will soon be contacted to arrange a meeting with Board staff, to determine an agenda for the proceedings. Given the number of participants involved, it would also be useful to consider various means of streamlining the proceedings.

Claude Majeau
Secretary to the Board