

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date	2009-09-16
Citation	File: Public Performance of Sound Recordings
Regime	Collective Administration of Performing Rights and of Communication Rights <i>Copyright Act</i> , subsection 68(3)
Members	Mr. Justice William J. Vancise Mrs. Francine Bertrand-Venne Mrs. Jacinthe Th��berge
Proposed Tariffs	7 – Motion Picture Theatres and Drive-Ins (2009-2011) and Tariff No. 9 – Commercial Television (2009-2013)
Considered	[Preliminary Issue]

Statement of Royalties to be collected by NRCC for the performance in public or the communication to the public by telecommunication, in Canada, of published sound recordings embodying musical works and performers' performances of such works

Reasons for decision

I. INTRODUCTION

[1] On March 28, 2008, the Neighbouring Rights Collective of Canada (NRCC) filed, pursuant to subsection 67.1(1) of the *Copyright Act* (the "Act"),¹ two tariff proposals (Tariffs 7 and 9), for the performance in public or the communication to the public by telecommunication, in Canada, of published sound recordings embodying musical works and performers' performances of such works. Tariff 7 claims a royalty for the use of sound recordings embodied in a movie by motion picture theatres and other such establishments. Tariff 9 targets the use of sound recordings in programs broadcast by commercial over-the-air, pay, specialty and other television services. Both tariff proposals were published in the *Canada Gazette* on May 31, 2008. Users and their representatives were advised of their right to object to them.

¹ R.S.C. 1985 c. C-42 as amended.

[2] The Motion Picture Theatre Associations of Canada (MPTAC) objected to Tariff 7. Rogers Communications, Shaw Communications, Bell ExpressVu, Cogeco Cable, Eastlink, Quebecor Media and TELUS (Broadcasting Distribution Undertakings or BDUs) objected to Tariff 9, as did Turner Broadcasting System, the Canadian Broadcasting Corporation, Maple Leaf Sports & Entertainment² and the Canadian Association of Broadcasters (CAB) (collectively the “Objectors”).

[3] NRCC is entitled to collect royalties pursuant to subsection 19(1) of the *Act*, when a published sound recording of a musical work is performed in public or communicated to the public by telecommunication. A sound recording is defined in section 2 of the *Act* as follows:³

“sound recording” means a recording, fixed in any material form, consisting of sounds, whether or not a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work; [our emphasis]

[4] NRCC contends that a proper interpretation of the definition of “sound recording” as found in section 2 of the *Act* does not exclude from the defined term a pre-existing sound recording that is part of a soundtrack of a cinematographic work. It argues that the purpose of the exclusion was to consolidate rights in the visual features of a cinematographic production with the rights in the audio features of a cinematographic production and to protect those rights in a new work defined as a “cinematographic work”.

[5] The Objectors argue that NRCC has no legal right to claim equitable remuneration pursuant to section 19 of the *Act* for the communication to the public by telecommunication of television programs by reason that a plain reading of the definition of a “sound recording” in the *Act* excludes the soundtrack of a cinematographic work when it accompanies the cinematographic work. MPTAC makes substantially the same argument with respect to motion pictures.

[6] The Objectors requested, and the Board subsequently ordered, that the following question be addressed as a preliminary issue:

Is anyone entitled to equitable remuneration pursuant to section 19 of the *Copyright Act* when a published sound recording is part of the soundtrack that accompanies (a) a motion picture that is performed in public (b) a television program that is communicated to the public by telecommunication?

[7] For the reasons that follow, we conclude that the answer to both questions is “no”. When a television program is broadcast or a movie is shown, all sounds embodied in the soundtrack, whether or not they come from a pre-existing sound recording, are communicated or performed.

² Maple Leaf Sports and Entertainment subsequently withdrew from these proceedings.

³ Both section 19 and the definition of “sound recording” were introduced into the *Act* in September of 1997.

However, neither the soundtrack nor any of its constituent parts are a “sound recording” when they are communicated or performed with the program or movie.

II. AGREED STATEMENT OF FACTS

[8] The parties filed the following statement of agreed facts for the determination of the preliminary issue:

1. NRCC is a collective society authorized by the Copyright Board under Part VII of the *Copyright Act* to collect equitable remuneration for the performance in public or communication to the public by telecommunication of published sound recordings of musical works.
2. Reproduction of pre-existing published sound recordings of musical works form a part of some of the soundtracks that accompany motion pictures that are performed in public in Canada by motion picture theatres.
3. Reproduction of pre-existing published sound recordings of musical works form a part of some of the soundtracks that accompany television programs that are communicated to the public by telecommunication in Canada by broadcasting undertakings.
4. Some of the sound recordings referred to in paragraphs 2 and 3 are within the repertoire of NRCC for which it has been authorized by performers and makers of sound recordings to collect any equitable remuneration to which such performers and makers of sound recordings may be entitled under section 19(1) of the *Copyright Act*.
5. For greater certainty, none of the above facts shall constitute or be interpreted as an admission by any part: (a) that any of the reproduction referred to in paragraphs 2 and 3 either are or are not “sound recordings” within the meaning of the *Copyright Act*; or (b) that there either is or is not any equitable remuneration right that accrues to performers or sound recording makers as a result of the performances in public or communications to the public by telecommunication described in paragraphs 2 and 3.

[9] In their written representations, the parties also made reference to a number of “facts” or “industry practices”, some of which were not without controversy. They will be referred to as appropriate, insofar as those are already known to the Board and relevant.

III. RELEVANT PROVISIONS OF THE COPYRIGHT ACT

2. In this Act,

“sound recording” means a recording, fixed in any material form, consisting of sounds, whether or not a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work;

[...]

15(1) Subject to subsection (2), a performer has a copyright in the performer’s performance, consisting of the sole right to do the following in relation to the performer’s performance or any substantial part thereof:

(a) if it is not fixed,

(i) to communicate it to the public by telecommunication,

(ii) to perform it in public, where it is communicated to the public by telecommunication otherwise than by communication signal, and

(iii) to fix it in any material form,

(b) if it is fixed,

(i) to reproduce any fixation that was made without the performer's authorization,

(ii) where the performer authorized a fixation, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than that for which the performer's authorization was given, and

(iii) where a fixation was permitted under Part III or VIII, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than one permitted under Part III or VIII, and

(c) to rent out a sound recording of it,

and to authorize any such acts.

[...]

17(1) Where the performer authorizes the embodiment of the performer's performance in a cinematographic work, the performer may no longer exercise, in relation to the performance where embodied in that cinematographic work, the copyright referred to in subsection 15(1).

(2) Where there is an agreement governing the embodiment referred to in subsection (1) and that agreement provides for a right to remuneration for the reproduction, performance in public or communication to the public by telecommunication of the cinematographic work, the performer may enforce that right against

(a) the other party to the agreement or, if that party assigns the agreement, the assignee, and

(b) any other person who

(i) owns the copyright in the cinematographic work governing the reproduction of the cinematographic work, its performance in public or its communication to the public by telecommunication, and

(ii) reproduces the cinematographic work, performs it in public or communicates it to the public by telecommunication,

and persons referred to in paragraphs (a) and

(b) are jointly and severally liable to the performer in respect of the remuneration relating to that copyright.

(3) Subsection (2) applies only if the performer's performance is embodied in a prescribed cinematographic work.

[...]

18(1) Subject to subsection (2), the maker of a sound recording has a copyright in the sound recording, consisting of the sole right to do the following in relation to the sound recording or any substantial part thereof:

(a) to publish it for the first time,

(b) to reproduce it in any material form, and

(c) to rent it out,

and to authorize any such acts.

[...]

19(1) Where a sound recording has been published, the performer and maker are entitled, subject to section 20, to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, except for any retransmission.

IV. PRINCIPLES OF STATUTORY INTERPRETATION

[10] There is essentially no difference between the parties on the principles of statutory interpretation to be applied in interpreting a statute to define an undefined term such as "soundtrack".

[11] Section 12 of the *Interpretation Act* (Canada) provides that every Act "is deemed remedial" and directs that every Act shall "be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".⁴ The Supreme Court noted in *Rizzo & Rizzo Shoes Ltd.*⁵ that the proper approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".⁶

⁴ *Interpretation Act*, R.S.C. 1985 c. I-21, section 12.

⁵ *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27.

⁶ *Ibid.* at para. 21, quoting Elmer Driedger in *Construction of Statutes* (2d ed. 1983), reproduced in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 1. [Sullivan]

[12] Statutory interpretation however cannot be founded only on the wording of the legislation alone. In interpreting a provision of legislation, a court should strive to ensure that the statute is internally coherent, and should avoid interpretations which create illogical or unnecessary distinctions between groups or individuals. As Professor Sullivan notes in her text:

It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole.⁷

[13] It is also an established principle of interpretation that the legislature does not intend to produce absurd consequences. Professor Côté in his authoritative text *The Interpretation of Legislation in Canada*,⁸ notes that an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, is unreasonable or inequitable or is not compatible with the object of the statute.

[14] Professor Sullivan describes an absurd interpretation in essentially the same terms. She states:

Legislative schemes are supposed to be coherent and to operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme may appropriately labelled absurd.⁹

[...]

A proposed interpretation is likely to be labelled absurd if it would result in persons or things receiving different treatment for inadequate reasons or for no reason at all. This is one of the most frequently recognized forms of absurdity.¹⁰

[15] NRCC points out that the Supreme Court of Canada in interpreting an undefined term in the *Act* in *CCH Canadian Ltd. v. The Law Society of Upper Canada*,¹¹ considered the following factors: the plain meaning of the term, the history and development of copyright law, recent jurisprudence, the purpose of the *Act*, and whether the interpretation adopted was workable and fair.

[16] It is now an accepted principle of statutory interpretation that courts or decision makers may look to the legislative history to assist in the interpretation.¹²

⁷ Sullivan, *supra* note 6 at 223-25.

⁸ Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 1991) at 378-80.

⁹ Sullivan, *supra* note 6 at 313.

¹⁰ Sullivan, *supra* note 6 at 310.

¹¹ [2004] 1 S.C.R. 339 at para. 17.

¹² Sullivan, *supra* note 6 at 577 et seq. and at 593 et seq.

V. ISSUE AND POSITIONS OF THE PARTIES

[17] The issue is, when is a pre-existing sound recording that is subsequently incorporated into a soundtrack no longer a sound recording? A sound recording “excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work”. The meaning of the exclusion must be determined by the construction of the defined term “sound recording” and the undefined term “soundtrack” as it relates to pre-existing sound recordings.

[18] We agree with the CAB that the exclusion can affect pre-existing sound recordings incorporated into a soundtrack in one of only three ways. First, the recording is no longer entitled to any protection as a sound recording. Second, the recording remains a sound recording except when it is part of a soundtrack that accompanies a movie. Third, the recording remains a sound recording even when it is part of a soundtrack that accompanies a movie. NRCC defends the third interpretation; the Objectors argue for the second. No one proposes the first.¹³

[19] NRCC frames the issue as whether the definition of sound recording excludes each sound or group of sounds and each pre-existing sound recording embodied in a soundtrack which accompanies a cinematographic work, or whether it excludes the aggregate of the compiled sounds. NRCC contends that a plain meaning of the word “soundtrack” as used in the *Act* refers to the aggregate of the sounds embodied as a compilation of a soundtrack and as a result the sounds of a pre-existing sound recording which is part of the compilation, cannot be part of or referred to as the soundtrack. That meaning must be determined by reading the statute as a whole.

[20] NRCC contends that the purpose of the exclusion from the definition of “sound recording” is to consolidate in a single copyright subject matter all the audio and visual elements of a movie and to protect all these elements as a “cinematographic work”. In its submission, this became necessary because copyright protected movies long before talking pictures. As a result, sounds incorporated into movies were protected both as cinematographic works and as contrivances by means of which sounds could be mechanically reproduced. That double protection created problems. The exclusion from the definition ensures “that a soundtrack is treated as part of a cinematographic work and is not separately protected unless the soundtrack does not accompany the cinematographic work”.¹⁴

[21] NRCC argues that what is excluded from the definition of “sound recording” is the soundtrack as a whole, the aggregate of the sounds, not each sound or group of sounds, and not a pre-existing sound recording. The pre-existing sound recording that is subsequently incorporated into a movie soundtrack nevertheless remains a sound recording even when the soundtrack accompanies the movie. In its submission, to find otherwise leads to absurd results. For example, some of the rights

¹³ NRCC resiled from an earlier submission that once the sound recording is used in a soundtrack, it is no longer a “sound recording” as defined in the *Act*.

¹⁴ NRCC Written Representations at para. 41.

in a pre-existing sound recording could be extinguished without the consent of the owner.¹⁵ The definition is intended to ensure that a soundtrack is treated as part of a movie, not to limit or reduce the copyright protection in pre-existing sound recordings.

[22] Finally NRCC contends there is nothing in the legislative history of Bill C-32 in relation to the definition of a sound recording that demonstrates any legislative intent to limit or diminish copyright protection for pre-existing sound recordings by consolidating the rights of copyright in cinematographic works.

[23] The Objectors fundamentally disagree with the position advocated by NRCC. They contend the exclusion serves purposes other than the ones set out by NRCC. In their submission the exclusion is also designed to allow the owner of the copyright in a movie to exploit the work without risking a veto from anyone who contributed to the audio components of the work,¹⁶ as long as the owner has entered into appropriate contractual relationships with these contributors. They point out that NRCC's interpretation would lead to the absurd result that some contributors to the soundtrack would have such a veto.

[24] In their submission, the exclusion set out in the definition of "sound recording" applies to the soundtrack and all of its components, including any incorporated pre-existing sound recording. That recording remains a "sound recording" and the exclusion only applies when the soundtrack accompanies the movie. Copyright in the sound recording is not extinguished. The soundtrack and any pre-existing sound recording embedded in a movie are, and remain, sound recordings when they do not accompany the movie.

[25] Although the *Act* does not define what a soundtrack is, a decision maker can, on a plain reading of the *Act*, determine what it is. A sound recording is "a recording, fixed in any material form, consisting of sounds". A movie is a work whether or not accompanied by a soundtrack. But for the exclusion, a soundtrack would be a sound recording. If it was not, there would be no need for the exclusion. When it is joined with the visual elements of a movie or television program, the soundtrack is part of the movie or program. Otherwise, it is a sound recording.

[26] Finally the Objectors argue that to determine the scope of the exclusion of the soundtrack from the definition of "sound recording" requires looking at all of the sections of the *Act* that grant rights in sound recordings, not just section 19. The words in section 19 must have the same meaning as they do in other sections of the *Act* and must be consistently interpreted throughout the

¹⁵ The exclusion only requires that the soundtrack accompanies the movie, not that it accompanies the movie with the consent of the copyright owner of the soundtrack or of its components.

¹⁶ Section 17 of the *Act* achieves the same result for the visual components of the movie.

Act. The exclusion has an impact not only on the remuneration right, but on all provisions dealing with sound recordings.

VI. ANALYSIS

[27] To decide whether a pre-existing sound recording remains a sound recording even when it is incorporated into a movie soundtrack and the soundtrack accompanies the movie requires that we interpret the defined term “sound recording” and the undefined term “soundtrack” having regard to the principles of statutory interpretation set out above. Generally speaking, we agree with and accept the approach proposed by the Objectors.

[28] NRCC’s attempt to draw a distinction between the soundtrack and its component parts is not convincing. To accept its argument requires adding words to the definition such as “aggregate” or “any part of a” before “soundtrack”. It flows logically from the exclusion that a soundtrack *is* a sound recording, *except* when it accompanies the movie; otherwise, the exception would be redundant. A sound recording consists of sounds. If the soundtrack is not a sound recording when it accompanies the movie, neither are the sounds of which it consists. There is no need to specify that “any part” of the soundtrack is not a sound recording if everything of which it consists is not a sound recording.

[29] The Objectors’ interpretation is the only one that produces consistent and logical results. For example, if the pre-existing sound recording included in a soundtrack is not a sound recording when it accompanies the DVD of the movie, no one controls the rental of the movie because no rental rights exist in either the movie (there is no such right) or in any sound recording (the DVD contains no such recording). By contrast, if NRCC is correct, then each performer, maker and author of each recording incorporated into a soundtrack could effectively veto the renting of the movie through one of the three exclusive rights over the rental of the sound recordings incorporated into the soundtrack.¹⁷ We doubt that Parliament’s intention was to permit these contributors to a movie, but not the copyright owner of the movie, to control the rental of the movie.

[30] The Objectors’ interpretation is consistent with the meaning and intent of subsection 17(1) of the *Act*. The structure of this subsection is similar to the definition of “sound recording”. Performers who authorize the embodiment of “the ... performance” in a movie may no longer exercise their subsection 15(1) rights in relation to the performance “where embodied in that cinematographic work”. The meaning of the provision is clear. The performer has no copyright in the performance when it is part of the movie in which it is embodied; otherwise the performer keeps the copyright in the performance. Furthermore, subsection 17(1) clearly targets not only the performance in its entirety, but also all of its constituent elements: a dancer who participates in a

¹⁷ See paragraphs 3(1)(i), 15(1)(c) and 18(1)(c) of the *Act*.

musical cannot veto the performance of the movie through a copyright she may own in a particular dance number. The expressions “any soundtrack” and “where it accompanies the cinematographic work” as used in the definition of “sound recording” should be interpreted in the same way.

[31] The fact that there is no equivalent to section 17 of the *Act* for sound recordings is easily explained. Section 17 is necessary because, (a) not all performances involve sounds; (b) not all performances involving sounds used in movies are fixed on pre-existing sound recordings; (c) not all fixed performances are fixed with the performer’s permission; and, (d) a performer may have authorized the fixation of the performance but not the incorporation of the fixation into a movie. It is not necessary to account for all these possibilities with respect to sound recordings. The exclusion in the definition is sufficient, because the sound recording is always made with the permission of the person who makes it. The result is the same. The performer and maker, having authorized the inclusion of a performance or sound recording in a movie soundtrack, are precluded from exercising both their respective copyright (including the rental right) and their remuneration right, when the soundtrack accompanies the movie. When the soundtrack does not accompany the movie, all their rights continue to exist.

[32] The BDUs are correct in pointing out that the ability of the performer to receive residuals for the broadcasting of a movie incorporating a performance pursuant to subsection 17(2), however limited,¹⁸ is incompatible with the existence of a remuneration right for that same performance. A double payment would occur only if the performer retained the right to incorporate the performance into a movie through subparagraph 15(1)(b)(ii) of the *Act*. The mere possibility that this might occur demonstrates the lack of logic and consistency in NRCC’s approach.

[33] The copyrights granted in sections 15, 18 and 21 are not symmetrical, but the remuneration right granted in section 19 clearly is.¹⁹ If the maker is entitled to remuneration, so too is the performer with the result that some performers whose performance is incorporated into a movie would receive remuneration twice for the same use.

[34] In our opinion, if the intention of Parliament had been to target television in section 19 of the *Act*, it would not have set up a preferential regime for radio *but not for television*. Subsection 68.1(1) of the *Act* grants preferential treatment only to “wireless transmission systems” which in turn are defined as systems “operated by a terrestrial radio station”,²⁰ thereby targeting only radio.

¹⁸ Pursuant to subsection 17(3) of the *Act*, subsection 17(2) applies only to prescribed cinematographic works as defined in the *Cinematographic Works (Right to Remuneration) Regulations*, S.O.R./1999-194. The definition targets solely Canadian works produced since 1999.

¹⁹ Pointing to the asymmetry of the *copyrights* granted in sections 15, 18 and 21 of the *Act* to performers, makers and broadcasters is of no help in arguing that the *remuneration right* section 19 grants *equally* to performers and makers might also be asymmetrical.

²⁰ *Definition of “Wireless Transmission System” Regulations*, S.O.R./1998-307, section 1.

[35] It is not necessary for us to examine the legislative history of the 1997 amendments given that our interpretation of the *Act* is clearly consistent with the intent of Parliament at the time. It is however, in our opinion, useful to point out certain matters which took place during the Committee proceedings at the time the *Act* was amended and which confirm our opinion.

[36] Four things are clear. First, the definition of “sound recording” was amended at the Committee stage so as to ensure that while a soundtrack would *not* be a sound recording and therefore would *not* attract equitable remuneration when accompanying a movie or television program, the soundtrack *would* be a sound recording and *would* attract equitable remuneration when it was played *separate* from the movie or program. The following comments made at the Standing Committee on Canadian Heritage hearing are instructive:

Mr. Abbott [M.P.]: [...] As [the bill] stands at present, a soundtrack that is now available on a CD would not qualify for rights. Is that right?

Mr. Bouchard [Heritage]: As it is now.

Mr. Abbott: However, the addition of the words “where it accompanies” would then qualify it for neighbouring rights. Is that correct?

Ms. Katz: Yes, that’s correct.

[...]

Mr. Richstone [Justice]:

I’d just like to point out that, as you see in the bill, you have the words “integral part”. That raises a lot of concern on a technical level with a lot of people. What is the integral part? Is that integral part...? Are you going to apply a conceptual test, or are you going to apply a physical test?

Often the soundtrack of a film is not physically an integral part of the film if it’s played at the same time. So the word that is chosen is “accompanies”. You find that word in U.S. legislation and in other Commonwealth legislation.

When the soundtrack accompanies a cinematographic work, it is a part of the cinematographic work. When it doesn’t accompany a cinematographic work – i.e., it is separately marketed, sold, exploited, performed, whatever, as a sound recording – then it’s protected as a sound recording.²¹

²¹ Standing Committee on Canadian Heritage, Transcripts (3 December 1996), MPTAC Written Representations, Tab 3 at 43-44.

[37] Second, when discussing the section 19 remuneration rights of performers and makers, departmental officials never once mentioned television or cinema.²²

[38] Third, the intention was to bring Canadian legislation into line with the *Rome Convention*.²³ As the BDUs pointed out in argument,²⁴ the *Convention* expressly provides that no protection is required in the case of the indirect use of a sound recording such as when it is incorporated into a soundtrack. If Parliament had intended to go beyond *Rome*, it would have made that clear.

[39] Fourth, and most importantly, everyone who spoke on this issue before the Committee clearly understood that there was no intention to include television broadcasts within the scope of section 19.²⁵ Witnesses denounced the fact that audiovisual works had been omitted,²⁶ that musical performers would have no rights “where their songs would be accompanied by a picture”.²⁷ Had these statements been wrong, departmental officials would have corrected them. The consensus in the statements that noted the lack of protection of musicians in audiovisual products, combined with the absence of any rejoinder on the part of departmental officials confirms that our interpretation is consistent with the intention of Parliament at the time.

[40] NRCC argues that if our interpretation is correct, the unauthorized copying of a pre-existing musical track off a prerecorded DVD probably does not violate the copyright in the sound recording while copying the same track off a soundtrack released as a CD clearly does. As counsel to MPTAC pointed out,²⁸ this is a logical consequence of the approach used in dealing with movies and is consistent with what happens to all performances pursuant to subsection 17(1) of the *Act* or to the rights of performers who authorize the fixation of a performance pursuant to section 15.

[41] NRCC also argues that if the pre-existing sound recording included in a soundtrack that accompanies the movie is not a sound recording, then the maker cannot sanction the unauthorized inclusion of the sound recording in the first place. We disagree. When deciding whether a sound recording has been reproduced, what matter is the source, not the result or as counsel for the MPTAC put it,²⁹ the thing reproduced, not the reproduction. It is only when the reproduction of the recording has been made and the soundtrack incorporated into the movie that the soundtrack attached to the movie, and nothing else, is not a sound recording within the meaning of the

²² See e.g. the testimony of Ms. Katz, Acting Director General, Cultural Industries, Department of Canadian Heritage, Standing Committee on Canadian Heritage, Transcripts (18 June 1996), MPTAC Written Representations, Tab 2 at 4.

²³ *Ibid.*

²⁴ BDUs’ Written Representations at paras. 67-76.

²⁵ *Ibid.* at paras. 61-64.

²⁶ Testimony of Gisèle Fréchette, *Guilde des musiciens du Québec*, Standing Committee on Canadian Heritage, Transcripts (10 October 1996), BDUs’ Written Representations, Tab 4 at 15.

²⁷ Testimony of Serge Turgeon, *Union des artistes*, Standing Committee on Canadian Heritage, Transcripts (22 October 1996), BDUs’ Written Representations, Tab 5 at 37.

²⁸ Transcripts at 167-70.

²⁹ Transcripts at 167.

definition. To incorporate a pre-existing sound recording into a movie without the maker's consent involves a violation of paragraph 18(1)(b) of the *Act* and triggers all the usual remedies for the copyright owner.

[42] NRCC extensively relied on Australian, American and British authorities, and particularly on the decision of the Australian High Court in *Phonographic Performance Company of Australia Limited v. Federation of Australian Commercial Television Stations*,³⁰ arguing that while the provisions of our *Act* may not be precisely the same as in these other jurisdictions, there nevertheless should be an effort to harmonize our interpretation of copyright protection with other like-minded jurisdictions. The very decision on which NRCC relies to urge this approach clearly states such harmonization should only be done “within the limits permitted by our own legislation”.³¹

[43] NRCC also relied extensively on what it described as standard contract practices in the recording and film industries. We have ignored those arguments for two reasons. First, while we are willing to accept that contractual practices may influence how legislation is drafted, interpreting legislation based on contractual practices probably puts the cart before the horse. Contractual practices are known to change and such changes should not drive the interpretation of pre-existing legislation; second, and most importantly, what NRCC considers to be standard practice may well not be, at least in the province of Québec, as the record from the recent commercial radio proceedings demonstrates.

[44] The answer to the questions set out in paragraph 6 of these reasons is “no”. NRCC's proposed Tariffs 7 and 9 are based on no valid legal foundations and as a result cannot be certified. Consequently, these tariffs are struck from the proposed statement of royalties as published in the *Canada Gazette*, Part I, on May 31, 2008.



Lise St-Cyr
Senior Clerk of the Board

³⁰ [1998] H.C.A. 39.

³¹ *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336 at para. 6. NRCC also relied on *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61 as confirming the approach taken in *Théberge*. There are two difficulties with this submission. First, to do as NRCC suggests would require us to go beyond the plain meaning of the *Act* based on foreign legislation which is different in wording and policy. Second, *Apotex* involves the re-examination of a judicially developed test, not the interpretation of a statute.