Copyright Board Canada

Commission du droit d'auteur Canada

Date	2012-02-17
Citation	File: Public Performance of Musical Works
Regime	Collective Administration of Performing Rights and of Communication Rights *Copyright Act*, section 66.51
Members	Mr. Justice William J. Vancise Mr. Claude Majeau Mrs. Jacinthe Théberge
Proposed Tariff(s) Considered	SOCAN Tariffs 22.4 (2007-2008) and 22.D (2009-2011) - Audiovisual Webcasts; SOCAN Tariffs 22.7 (2007-2008) and 22.G (2009-2011) - Audiovisual User-Generated Content (Application for Interim Tariff)

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

Reasons for decision

I. INTRODUCTION

[1] The Society of Composers, Authors and Music Publishers of Canada (SOCAN) has filed proposed tariffs for the use of its repertoire in audiovisual webcasts and user-generated content transmitted over the Internet. Tariff 22.D[1] targets the use of musical works included in movies and television programs. Tariff 22.G[2] targets the use of musical works in user-generated content.

[2] The Board has consolidated the examination of these proposed tariffs. A hearing is set to begin on June 19, 2012.

[1] Labelled 22.4 for 2007 and 2008.
[2] Labelled 22.7 for 2007 and 2008.

[3] On June 13, 2011, SOCAN applied pursuant to section 66.51 of the *Copyright Act*[3] (the "*Act*"), for an interim tariff for the years 2007 to 2012 in connection with Tariffs 22.D and 22.G.

[4] The interim tariff for audiovisual webcasts would be "payable by a site or service that communicates audiovisual programming similar to that of a broadcaster that is subject to Tariff 2.A (Commercial Television Stations) and Tariff 17 (Transmission of Pay, Specialty and Other Television Services by Distribution Undertakings) for each of the years 2007 to 2011."[4] Generally speaking, the royalty rate would be set at 1.9 per cent of subscription or advertising revenues of the site or service.

[5] The interim tariff for user-generated content would be "payable by a user-generated content site, including but not limited to, YouTube, Facebook, MySpace and Vimeo, for each of the years 2007 to 2012."[5] The royalty rate would be set at 6.8 per cent in the case of music videos and at 1.9 per cent in the case of other audiovisual content. These rates would apply against revenues from advertisements associated with the site's music videos and other audiovisual content.

[6] The facts upon which SOCAN relies can be summarised as follows. Audiovisual webcasting services and user-generated content sites use significant amounts of music, most or all of which is in the repertoire of SOCAN. These services and sites are immensely popular. The amount of content they offer is unprecedented. They generate vast amounts of revenues, some of which are heavily dependent on the use of protected music. No tariff is in place for these uses. SOCAN anticipates that the Board will not likely issue a decision on the matter until the beginning or middle of 2013.

[7] SOCAN argues that in the absence of a tariff, this lengthy delay causes an unfair prejudice to both its members and users. Rights holders are uncertain as to the royalty payments they can reasonably expect to collect; users do not know the extent of the liability for which they should accrue. It would be unfair and prejudicial to SOCAN and its members to allow large and sophisticated entities such as Netflix, Apple and YouTube to continue their significant use of its repertoire without the payment of any compensation whatsoever over such a long period of time.

[8] An interim decision would also fill a legal vacuum, a void SOCAN argues is the result of the Board's decision in *SOCAN 22.B-G*.[6] In that decision, the Board refused to certify a tariff which

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[3] R.S.C. 1985, c. C-42.
[4] *Application by SOCAN for an interim tariff for internet uses of music covered by SOCAN proposed tariffs 22.D and 22.G for the years 2007-2012*, 13 June 2011, at 11. In its application, SOCAN wrote that the interim tariff for audiovisual webcasts was being payable for the years 2007 to 2011. It should rather have been for the years 2007 to 2012.
[5] *Ibid* at 13.
[6] *SOCAN Tariffs 22.B to 22.G, Internet – Other Uses of Music, 1996-2006* (24 October 2008) Copyright Board

would have applied to user-generated content sites. In addition, Tariff 22.D, as certified, targets audiovisual webcasts provided by commercial television broadcasters, pay and specialty television and other television services. It does not apply to services such as Netflix and Sony.

[9] The Services,[7] Apple Inc., Cineplex Entertainment LP and YouTube (collectively "the Objectors") oppose SOCAN's application for an interim tariff.[8] The Objectors generally argue that SOCAN has failed to comply with the test for granting interim relief. The prospective targets of tariffs 22.D and 22.G are for the most part well-known to SOCAN and can be assumed, absent evidence to the contrary, to have the resources to pay the final tariff once set.

[10] Moreover, there exists significant legal uncertainty regarding the Board's authority to certify all or part of the tariff. The Supreme Court of Canada has recently held proceedings to examine the issue of whether a download is a communication to the public by telecommunication. If it is not, then SOCAN's proposed tariffs cannot be applied in the manner proposed in the main application. This militates in favour of denial of the interim tariff.

[11] Finally, the Objectors argue that the interim tariff proposed by SOCAN is a use-based tariff, whereas the current certified tariffs are structured on a user-based model. It would be inappropriate to impose a use-based tariff now, without a full inquiry into whether such a change is warranted.

II. ANALYSIS

[12] The Board has, over the years, issued a number of interim decisions, reflecting the purpose of interim orders as articulated by the Supreme Court of Canada in *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*.[9] In that decision, Mr. Justice Gonthier speaking for the Court, stated:

> Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.

Decision. [*SOCAN 22.B-G*]

[7] The Services Coalition is comprised of Rogers Communications Inc., Telus Communications Company, Shaw Communications Inc, Quebecor Media inc. and Yahoo! Canada.

[8] The Canadian Broadcasting Corporation filed a reply, advising the Board that it would not be submitting comments in response to SOCAN's request.

[9] *Bell Canada v. Canada (CRTC)*, [1989] 1 S.C.R. 1722 at 1754.

[13] The Board has stated on a number of occasions that the best way to achieve the purposes of an interim decision is to maintain the *status quo* while preventing a legal vacuum.[10]

[14] While maintaining the *status quo* is not the only factor to be taken into account, it does remain an important consideration. One must look at the last tariff certified by the Board in order to determine the nature of the *status quo* in this instance. In this regard, Tariffs 22.D and 22.G do not provide for the payment of royalties for audiovisual webcasts[11] or for user-generated content. As a result, the fundamental issue that must be answered is whether we should grant an interim tariff which applies to audiovisual webcasts and user-generated content where no such tariff presently exists.

[15] Several reasons militate against such a departure. First, SOCAN proposes that its interim tariff target uses, whereas the currently certified tariffs are user-based. In *SOCAN 22.B-G*, the Board held that a user-based structure was more easily adaptable to the constantly evolving Internet environment. In addition, the Board determined that at that time, it was difficult to match the uses that SOCAN described to what actually occurs over the Internet, which favoured a user-based tariff. SOCAN may well lead evidence to convince the Board that the future tariff should be structured in the manner that it proposes. Until then, absent any evidence to the contrary, there is no reason to depart from the existing tariff structure.

[16] Second, the proposed interim tariff specifically targets the sites and services that provide user-generated content. In contrast, the proposed Tariff 22.D seeks to collect royalties *for* communications of musical works originating from such sites and services, without identifying the payers. To adopt in an interim tariff a structure that significantly departs from SOCAN's proposed final tariff makes no sense, particularly in light of the fact that there is an ongoing debate as to who are the proper payers of the tariff. In this respect, some Objectors will no doubt rely on paragraph 2.4(1)(*b*) of the *Act*, to argue that since they only provide the means of telecommunication necessary for another person to communicate, they are not themselves engaged in that communication.

[17] Third, SOCAN has generally suggested interim rates of 1.9 per cent of the revenues of the sites or services. SOCAN arrives at this rate by drawing parallels with other certified tariffs such as Tariffs 22.A, 2.A and 17. Other than these references, SOCAN has provided no economic rationale for the rates that it has proposed. The Board has previously stated that it would tend to

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[10] *SODRAC v. MusiquePlus inc.* (22 November 1999) Copyright Board Decision; *SODRAC v. Les chaînes Télé Astral and Teletoon Inc.* (14 December 2009) Copyright Board Interim Decision; *Access Copyright - Post-Secondary Educational Institutions 2011-2013* (16 March 2011) Copyright Board Decision; *SODRAC v. ARTV* (5 January 2012) Copyright Board Interim Decision.

[11] Unless such a webcast is provided by a broadcaster that is subject to Tariff 2.A (Commercial Television Stations) or 17 (Transmission of Pay, Specialty and Other Television Services by Distribution Undertakings), by the CBC, by the Ontario Educational Communications Authority or by the *Société de télédiffusion du Québec*.

ask for evidence if an interim tariff application seeks to modify the *status quo*. As SOCAN seeks to modify the *status quo*, it would be difficult, if not impossible, to establish a rate, even an interim one, in the absence of any evidence regarding the value of these uses.

[18] Fourth, there are a number of other issues that will undoubtedly arise in the context of the main application that militate against an interim decision. For instance, is SOCAN entitled to a tariff? If so, who should pay it? What is the appropriate rate base? These issues are complex and go to the fundamental structure of any tariff, interim or final. They cannot be addressed without some evidentiary basis. As such, these issues are best addressed in the context of the main application, not in an application for an interim tariff.

[19] Finally, largely for the reasons advanced by the Objectors, we conclude that there are no deleterious effects that cannot be remedied through the issuance of the final tariff. For one thing, the delay at issue runs from 2007 to 2012 and the matter will proceed in a few months. In the event that SOCAN makes its case and that a tariff is certified in accordance with the terms it proposed, SOCAN will receive the quantum of royalties to which its members are entitled on a retroactive basis.

[20] The application for an interim tariff is denied.

Gilles McDougall
Secretary General