Copyright Board Canada

Commission du droit d'auteur Canada

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Citation	Files: Public Performance of Musical Works; Public Performance of Sound Recordings; Reproduction of Musical Works; Reproduction of Sound Recordings; Reproduction of Performers' Performances
Regime	Collective Administration of Performing Rights and of Communication Rights Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21 *Copyright Act*, section 66.51
Members	Mr. Justice William J. Vancise Mr. Claude Majeau Mr. J. Nelson Landry
Proposed Tariffs Considered	SOCAN (2008-2010), RE:SOUND (2008-2011), CSI (2008-2012), AVLA/SOPROQ (2008-2011), ARTISTI (2009-2011)

Statement of Royalties to be collected by SOCAN, RE:SOUND, CSI, AVLA/SOPROQ and ARTISTI in respect of commercial radio stations

Reasons for decision

I. INTRODUCTION

[1] On January 22, 2011, the Board certified the *Commercial Radio Tariff (SOCAN: 2008-2010; Re:Sound: 2008-2011; CSI: 2008-2012; AVLA/SOPROQ: 2008-2011; ArtistI: 2009- 2011).* In respect of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and Re:Sound Music Licensing Company (Re:Sound), the tariff targets the communication of musical works, as well as sound recordings of these works and performances incorporated in these recordings. In respect of CMRRA/SODRAC Inc. (CSI), AVLA Audio- Video Licensing Agency (AVLA) and the *Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec* (SOPROQ) (jointly AVLA/SOPROQ), as well as ArtistI, the tariff allows the reproduction of these same works, recordings and performances. Commercial radio stations continue to pay royalties under the tariff. In every respect except one, these are interim royalties, by operation of subsection 68.2(3) and section 70.18 of the *Copyright*

Act[1] (the "*Act*"). The royalties are final with regard to CSI, for which the tariff expires on December 31, 2012.

[2] On November 7, 2012, certain provisions of the *Copyright Modernization Act* [2] came into force. The next day, the Canadian Association of Broadcasters (CAB) requested that the Board:

> issue an interim decision reducing the royalties paid by commercial radio to CSI, AVLA/SOPROQ and ArtistI by 90 per cent, from November 7, 2012 until the Board renders a decision on the merits;
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> declare that, as of that same date, there is no longer a legal basis for a tariff targeting the reproduction of a sound recording, or a performer's performance or work that is embodied in a sound recording, by commercial radio stations; and
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> issue a decision rescinding the CSI tariff as of that same date.

[3] The application is based on recently enacted sections 29.24 and 30.71 of the *Act*, section 30.9 as amended, and *SOCAN v. Bell Canada*.[3] Essentially, CAB submits that their combined effect is such that stations are no longer making reproductions protected by copyright since listening to and creating copies for evaluation purposes is fair dealing for the purpose of research under section 29 of the *Act*; the stations' programming process, from putting together the content to broadcasting, is a single technological process within the meaning of section 30.71 of the *Act*; backup copies are permitted under section 29.24 of the *Act*; and all of the stations are in compliance with section 30.9 of the *Act*. CAB further submits that CSI confirmed each of these arguments in the lobbying it did during the examination of Bill C-11.

[4] CAB proposes that its application be addressed in two steps. The interim decision would be issued quickly, on the basis of evidence and written submissions, as well as findings of fact made by the Board in previous cases. The final decision would require a longer process including hearings; that said, CAB is not proposing to deal with the matter as part of the consideration of all other issues regarding the tariffs for commercial radio.

[5] This decision is rendered solely on the basis of the facts alleged by CAB (unless an allegation is clearly without merit) and of findings of facts made by the Board in previous cases. No one else was asked to provide their arguments for or against the application.

[6] We find that the application on the merits will have to be decided, even though it is, as currently drafted, untenable. We find that it is preferable to consider it at the same time as all

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[1] R.S.C., c. C-42.
[2] S.C. 2012, c. 20. (Previously Bill C-11)
[3] 2012 SCC 36. [*Bell*]

other issues raised by the proposed tariffs for commercial radio. The tariff is made interim from November 7, 2012 in respect of CSI. In all other respects, we deny the application for an interim decision. The rest of these reasons support these conclusions.

II. ANALYSIS

[7] The rather novel way in which this application was brought and the originality of the conclusions sought require that we first comment on the merits in order to better frame our reasons.

[8] First, it is incorrect to claim that because of the rules invoked by CAB, there is no legal basis for any tariff dealing with the reproduction of a sound recording, or a performer's performance or work that is embodied in a sound recording, by commercial radio stations. In this respect, the application is, on its face, untenable. Assuming that every station could currently rely on all of the provisions on which the application is based, it would be impossible for them to prove now that they would comply with them in the future. Even admitting, for the moment, that all of these "users' rights" are to be interpreted broadly, each station must nevertheless show whether it may avail itself of them in respect of each protected use the station makes. Some might not be able to show that they comply with all of the conditions of all the exceptions for all of the reproductions they make. Two examples will suffice to illustrate what we mean.

[9] At first glance, it would appear that a station may not avail itself of sections 29.24 and 30.9 of the *Act* if the source copy is an infringing copy. A record label needs the permission of the copyright owner of a musical work to reproduce the work onto a recording. As a rule, that permission is sought before the recording is made in the case of first recordings. However, in the case of subsequent recordings (or "covers"), a label often does not seek that permission until after having launched the second recording; sometimes, the licence is never issued. Consequently, the copy of the work the label supplies to the radio station is an infringing copy. To what extent would this prevent a station that copies a new recording from availing itself of the exception? On a related note, the Board found that the copy that a digital music distribution service (MDS) delivers is clearly authorized as far as the sound recording is concerned, but is not authorized in respect of the musical work: *Commercial Radio Tariff (SOCAN: 2008-2010; Re:Sound: 2008-2011; CSI: 2008-2012; AVLA/SOPROQ: 2008-2011; ArtistI: 2009-2011).*[4] May a station avail itself of section 30.9 of the *Act* if such is the case?

[10] CAB further submits that *Bell* is directly applicable to a station's evaluation and selection copies. There are similarities between listening to a preview before purchasing a work and listening to a complete work to decide whether or not to broadcast it. There are also some

[4] (9 July 2010) Copyright Board Decision at para. 151.

significant differences, to which the Supreme Court itself alluded, for example, full reproduction vs. short excerpts, identical quality vs. low quality, and streaming vs. downloading.[5] A significant amount of additional evidence will no doubt be required, since the question of what is or is not fair is above all a matter of context.

[11] Clearly, the question of the impact of the rules invoked by CAB on the scope (and hence, the value) of the protected reproduction activities in which stations may engage will have to be resolved. This may result in the certification of reduced royalties or of a scaled tariff allowing a station to pay more or less (or nothing) depending on the degree of its compliance with the conditions provided for under these rules. Once the question has been refocused in this way, however, it no longer seems to allow for the categorical answer that CAB is seeking. Simply abolishing the tariffs, were it possible or even desirable, could have damaging consequences for those stations which would be unable to legitimize all the copies they make based on CAB's arguments.

[12] Second, it is preferable to dispose of the application on the merits at the same time as for all of the proposed tariffs for commercial radio, rather than as part of a process dealing solely with CAB's claims. Splitting up the examination of the substantive issues raised in a single matter should be the exception. Singling out for treatment an issue at a preliminary stage is justified, for example, if it can be conveniently isolated, if the evidence required to decide it does not overlap with the rest of the evidence on the merits, and if deciding it first may avoid the need to engage other controversial issues. Such is not the case here. Deciding the application requires substantial evidence that relates to the very core of the debate, namely the scope (and hence, the value) of the protected reproduction activities that stations engage in.

[13] Third, CAB's arguments cannot justify a royalty reduction for an entire industry unless all the stations operate in the same way. Quite apart from what the Board already knows in this respect, the wording of the application confirms that such is not the case. It is stated that evaluation copies are sometimes of lower quality than a CD, sometimes not [para. 27]; that sometimes an MDS file is used for evaluation, sometimes not [para. 28b]; and that programming directors are not always able to perform their evaluation on the basis of an MDS file or a CD [para. 28d]. Given the apparent lack of consistent practices, a sampling or survey will be required to establish the variations. Once again, this is evidence that is usually assessed as part of the examination on the merits.

[14] Fourth, CAB has always insisted that the proceedings in which it participates be split up as little as possible.

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[5] *Bell*, *supra* note 3 at paras. 35, 36, 47, 48.

[15] We now turn to the application to vary the tariff in respect of CSI for the period from November 7 to December 31, 2012. The Board will need to deal with it, since a legislative amendment may justify varying a decision: *Interim Decision (s. 66.52 of the Copyright Act) on the Application to Vary the Television Retransmission Tariff, 1992-1994*.[6] Furthermore, as the questions raised in the application will continue to be an issue after December 31, it is more practical to hear both matters at the same time. This is what the Board did when a broadcast day acquired the status of a compilation: *Retransmission of Distant Radio and Television Signals for the Years 1995, 1996 and 1997 and Variance to the 1994 Tariff*.[7] The best way to deal with the application is to make the tariff certified in January 2011 an interim tariff in respect of CSI, effective November 7, 2012, as the Board did in *Retransmission (Interim) 1994*.[8] There is no need to hear CSI before doing this, as CSI will suffer no prejudice as a result of this decision.

[16] The application for an interim decision is denied in all other respects, for the following reasons.

[17] First, the evidentiary problems and legal issues we alluded to regarding the application on the merits are as much at issue in the application for an interim decision. We do not see how we could deal with the interim application more expeditiously or with less evidence than for the decision on the merits. It is more convenient and fair to leave the parties in their current state and to deal with all of these questions when the application is considered on the merits, so long as this is done without delay.

[18] Second, the point of view that CSI may have expressed before a parliamentary committee is not evidence in this case to substantiate CAB's claims. A person's argument may set out what that person thinks but it does not constitute a basis for statutory interpretation.

[19] Third, the balance of convenience, to the extent that it is relevant in this instance, favours the collective societies. A station is more likely to go out of business than a collective. A station could easily and quickly deduct any overpayment from future royalties. If overpayments are considerable, the Board could easily provide in the tariff that the collectives are to pay them back immediately. The inverse is not necessarily possible.

III. DISPOSITION

[20] The application to vary, as of November 7, 2012, the *Commercial Radio Tariff (SOCAN: 2008-2010; Re:Sound: 2008-2011; CSI: 2008-2012; AVLA/SOPROQ: 2008-2011; ArtistI: 2009-2011)*, to the extent that it concerns CSI, will be dealt with at the same time as the CSI tariff for

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[6] (29 February 1994) Copyright Board Decision. [*Retransmission (Interim) 1994*]
[7] (28 June 1996) Copyright Board Decision.
[8] *Supra* note 6.

2013. Effective November 7, 2012, the Board makes interim the tariff to the extent it concerns CSI. In every other regard, the application for an interim decision filed by CAB on November 8, 2012, is denied.

Gilles McDougall
Secretary General