Copyright Board
Canada

Commission du droit d'auteur
Canada

Date 2014-08-08

Citation File: Media Monitoring 2011-2016

Regime Collective Administration in Relation of Rights Under Sections 3, 15, 18 and 21 *Copyright Act,* subsection 70.15(1)

Members The Honourable William J. Vancise
Mr. Claude Majeau
Mr. J. Nelson Landry

Statement of Royalties to be collected by CBRA for the fixation and reproduction of works and communication signals, in Canada, by commercial and non-commercial media monitors for the years 2011 to 2016

Reasons for decision

I. INTRODUCTION

[1] On March 30, 2010 and March 28, 2013, pursuant to section 70.13 of the *Copyright Act*[1] (the "*Act*"), the Canadian Broadcasters Rights Agency (CBRA) filed proposed statements of royalties to be collected for the fixation and reproduction of works and communication signals, in Canada, by commercial and non-commercial media monitors for the years 2011 to 2013 and 2014 to 2016, respectively. The proposed statements were published in the *Canada Gazette* on August 7, 2010 and June 6, 2013. Prospective users and their representatives were advised by the Copyright Board of their right to object to the proposals.

[2] In September 2010, J&A Media Services filed an objection to the proposed commercial monitoring tariff for the years 2011 to 2013.

[3] In October 2010, the provinces of Alberta, Ontario and Saskatchewan filed objections to the proposed non-commercial media monitoring tariff for the years 2011 to 2013. Two provinces, Alberta and Ontario, withdrew their objections to the 2011-2013 proposed tariff after entering

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[1] R.S.C. 1985, c. C-42.

into an agreement with CBRA in early 2011. Saskatchewan also withdrew its objection in March 2012 without signing an agreement with CBRA. CBRA also informed the Board that it signed an agreement with the province of British Columbia in January 2011, even though British Columbia did not object to the non-commercial media monitoring tariff.

[4] In November 2010, the Government of Canada sought leave to intervene in the matter of the non-commercial media monitoring tariff for the years 2011 to 2013 with full participation rights. It withdrew its request in April 2012. Five federal departments or agencies signed agreements with CBRA: two agreements were signed with the Privy Council Office (one with its Corporate Services Branch in April 2012 and one with its Communications Branch in May 2012), the other agreements were signed with the Library of Parliament in May 2012, the Department of National Defence in August 2012, Public Safety and Emergency Preparedness in December 2012 and the Royal Canadian Mounted Police in January 2013.

[5] No objectors or intervenors in the non-commercial media monitoring file remained as of April 2012. The non-commercial media monitoring tariff proposal is therefore now uncontested.

[6] There were no objectors to the proposed commercial and non-commercial media monitoring tariffs for the years 2014 to 2016.

[7] In reaching our decision, we examined CBRA's proposals, comments received by objectors, and licence agreements between CBRA and non-commercial media monitors filed with the Board. We also took into consideration responses to our questions posed to the parties.

II. MEDIA MONITORING TARIFFS, 2011-2013

A. PARTIES AND PROPOSED RATES

[8] CBRA collects royalties for programs and program excerpts owned by commercial radio and television stations and networks in Canada. CBRA proposed rates of 14 per cent of the monitor's gross income related to a CBRA program or signal for the commercial media monitoring tariff and of 14 per cent of the monitor's gross monitoring costs related to a CBRA program or signal in the case of the non-commercial media monitoring tariff. The last certified tariff rates were 10 per cent for the two media monitoring tariffs. With the exception of the rates, the proposed tariffs replicate the 2009-2010 certified tariffs.

i. Commercial media monitors

[9] J&A Media Services offers media monitoring services to public and private Canadian companies, governments and associations since 1989. J&A Media Services raised a number of objections regarding the proposed commercial media monitoring tariff rate on the grounds that it is not in the public interest:

- Royalties are not used to encourage news and public affairs programming in Canada;
- The tariff rate is higher than similar music tariffs paid by broadcasters;
- An increased rate will hurt the media monitoring industry, as the increase will be borne by the media monitors alone;
- There is no evidence that freelancers and contributors are fairly compensated by the broadcasters;
- Most small independent media monitors have exited the industry, partly because of financial pressures from the CBRA tariff; and
- Increasing its income at the expense of another industry is a bad practice for private enterprise, employment and competitiveness.

ii. Non-commercial media monitors

[10] According to the province of Alberta, the proposed royalties do not reflect the fair or appropriate value of the copying done by Alberta's employees and do not account for the fact that many copying activities made by its employees are non-infringing, exempted or excluded such as fair dealing for research purposes or insubstantial copying. Alberta claimed that the proposed pixel and frame rate restrictions are unreasonable and too restrictive. It also objected to the proposed reporting, disclosure, interest on late payments and indemnity obligations on the grounds that they are unreasonable and beyond the Board's jurisdiction to impose. Alberta also claimed that it is not bound by the *Act* and that certain demands made in the proposed tariff are *ultra vires* the Copyright Board to impose.

[11] In addition to the objections made by the province of Alberta, Saskatchewan claimed that the proposed definition of "monitoring note" is unreasonable and too broad. Based on this definition, notes made simultaneously with a broadcast without fixation or reproduction of a work would be considered as being monitoring notes. It also objected to the inclusion of costs related to any research or activity associated with a program or signal in the total media monitoring cost.

[12] The province of Ontario claimed that the proposed 40 per cent rate increase (from 10 per cent to 14 per cent) is unjustified as there is no appreciable expansion of the rights granted by CBRA to media monitors. It objected to the limitation of two CBRA program excerpts of no more than 10 minutes each as being unmanageable. It maintained that limiting the reproduction or fixation of programs to a physical medium is restrictive, cumbersome and inefficient. It also believed that the proposed reporting requirements are onerous and administratively burdensome.

[13] In its request for intervention, the Government of Canada indicated that because of its media monitoring model, it would not be able to manage the restrictions on the use of excerpts and recordings and the proposed reporting requirements. The restrictions are too stringent. The limitation to the fixation of signals to a physical medium precludes the more efficient and cost-effective practice of recording to a hard drive in digital format. Restricting the number and

duration of excerpts limits the utility of the media monitoring function. The Government of Canada claimed that the required costs to meet the proposed requirements would be so high that they would exceed the royalties payable. It also indicated that the increased rate does not take into account the increased monitoring costs such as salary increase, and equipment renewal, among others. The rate increase is disproportionate to inflation without increased value to the works monitored.

B. ANALYSIS

i. Questions asked by the Board

[14] On May 1, 2013, we asked J&A Media Services and signatory parties to agreements with CBRA to answer questions. We did this to gather information on the media monitoring industry, on the increased tariff rates proposed by CBRA and on the increased royalty rates in the agreements. CBRA, J&A Media Services, the province of Alberta and Public Safety and Emergency Preparedness filed comprehensive responses to the questions. The relevant portions of those responses are set out below.

[15] J&A Media Services argued that a rate of 14 per cent would be too high and would hurt the commercial media monitoring industry. This claim was not supported by any evidence or argument. First, CBRA stated that it proposed to increase the commercial media monitoring tariff rate to 14 per cent after being informed that the Canadian Broadcasting Corporation (CBC) was licensing its broadcast material to commercial media monitors for a rate of 14 per cent of their revenues. Thus, certain commercial media monitors agreed to pay CBC 14 per cent of their revenues for rights and benefits seemingly similar to those covered by CBRA's tariff. We were not provided a copy of that agreement.

[16] Second, corporations and governments often contract their media monitoring needs to commercial firms. Most of the time, these contracts define a fixed budget from which the media monitor must deduct royalties. These contracts are awarded by tender. In a competitive environment, all bidders are subject to the same royalty rates and will all adjust their pricing proposals accordingly. Therefore, contrary to J&A Media Services' claim, we conclude that the royalty burden is likely shared with media monitoring clients.

[17] The examination of the responses to our questions led to three findings regarding non-commercial media monitoring. First, in an attempt to maintain parity between the non-commercial rate and the commercial rate, the proposed rate for the non-commercial media monitoring tariff was set by CBRA at 14 per cent. Equating the rates of the two types of monitors creates an insourcing-outsourcing equilibrium. Second, as explained by CBRA, the different rates in the provincial and federal agreements, each negotiated independently, reflect the fact that federal departments negotiated for more rights than the provincial jurisdictions. For example, media monitors in federal departments have reduced record-keeping requirements,

fewer reporting requirements and longer retention periods than provincial media monitors. The higher rates in the agreements with federal departments also allow using higher quality and resolution excerpts of CBRA works. This last explanation provided by CBRA is also consistent with Alberta's response of agreeing to pay a rate of 14.5 per cent exceeding the proposed tariff rate for non-commercial media monitors because of the differences in the quality of the audiovisual reproductions permitted. Third, the gap between the agreed rate in the licence agreements and the proposed tariff rate remained constant, that is, the difference between the agreed rate and the proposed rate for 2011 to 2013 is the same as for 2009 to 2010.

[18] CBRA and J&A Media Services were not aware of similar media monitoring rates outside of Canada.

[19] Both the responses and the agreements filed by CBRA reveal significant differences between the commercial and the non-commercial media monitoring market. Many non-commercial media monitors have signed an agreement with CBRA while this is not a common practice in the commercial media monitoring sector. Most of the non-commercial media monitors that have settled with CBRA first objected to the proposed tariff on the grounds that it did not provide them with the appropriate rights and benefits. By contrast, J&A Media Services' objections do not address the rights included in the proposed tariff.

ii. Comparison of the terms of the agreements with the terms of the non-commercial media monitoring tariff

[20] As previously stated, responses to our questions indicated that monitors within federal departments are willing to pay a higher royalty rate than the proposed tariff rate of 14 per cent for the following additional rights and benefits, that the proposed tariff would not permit:

- Reproduce more than two excerpts of a maximum of 10 minutes each of any CBRA program;
- Make available to government users electronic copies of excerpts via emails or intranet posting in limited electronic format[2] or in audio-only format;
- Display copies of excerpts to internal users;
- Use excerpts with a limited electronic format with a graphic display resolution greater than 320 by 240 pixels and a frame rate greater than 15 frames per second;
- Retain excerpts and CBRA works for a longer period of time than envisioned in the tariff following their broadcast;
- Provide reports on gross monitoring costs not as often as required by the proposed tariff; and,

[2] The term "limited electronic format" refers to the format of an audio-visual reproduction of an excerpt and means that the CBRA signal on which such excerpt is embodied is no greater than an established graphic resolution and in certain cases, with a restriction on the frame rate.

- Not provide reports on media monitoring activities and a list of users.

[21] In our view, these rights are part of what distinguish the proposed tariff rate of 14 per cent from the rates established in the agreements varying from 14 per cent to 17 per cent.

[22] A difficulty in this matter is that although many non-commercial media monitors value additional rights such as those cited above, it appears that their usage of the rights is different. For example, almost all of the non-commercial media monitors have agreed to a different limited electronic format in their agreement with CBRA. Our goal is to certify a tariff that is both fair and relevant. If the tariff rate is too low and does not include the appropriate provisions, users will simply execute side agreements with CBRA and ignore the tariff.

C. Certified Tariffs

i. Non-commercial media monitoring tariff

[23] The evidence on the non-commercial media monitoring tariff filed in this matter is comprised of a set of questions asked by us and responses provided by the parties and agreements between CBRA and non-commercial media monitors. A copy of each agreement between CBRA and the non-commercial monitors was filed with the Board.

[24] Responses to our questions, consistent with our analysis of the filed agreements between CBRA and the non-commercial media monitors, explain the non-commercial media monitors' willingness to pay more than the proposed 14 per cent rate. The agreed rates are consistent with past practices and greater than the proposed tariff rate because of the additional rights included in the agreements such as reduced record-keeping requirements, fewer reporting requirements, longer retention periods and greater resolution and audiovisual format, which are not included in the proposed tariff. It is our understanding that the non-commercial media monitoring tariff is more the default option when no agreement can be reached, rather than the norm. As such, the non-commercial tariff plays a benchmark role rather than being a perfect reflection of the industry practices. It also appears that non-commercial media monitors that have not entered into an agreement with CBRA are paying the rate in the proposed tariff.

[25] In its decision of May 25, 2012 on Re:Sound's Tariff 5, the Board stated that it is recommended to determine if signing parties to the agreements can represent the interests of all prospective users and if comments and arguments made by former parties and non-parties have been addressed.[3] As a prospective norm of general application, a tariff imposes obligations on absent users. As such, it is important to consider the interests of absent users that will be affected

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[3] *Re:Sound Tariff 5.A to G (Use of Recorded Music to Accompany Live Events) 2008-2012* (25 May 2012) Copyright Board Decision at para. 10.

by the certified tariff. According to the record, the majority of non-commercial media monitors have entered into an agreement with CBRA. They should represent the opinions of potential users.[4]

[26] One common ground of objection of former non-commercial media monitors was that the rate increase is unjustified and that the proposed tariff is too restrictive and too limiting. However, it appears from the current practice that agreements can be reached with CBRA with less restrictive terms and a higher royalty rate.

[27] Another ground of objection for some provinces was that they are not bound by the *Act* because of their Crown Immunity. As part of another proceeding, the governments of seven provinces and one territory challenged the legality of the proposed Access Copyright tariffs for the reproduction of works for the years 2005 to 2014 on the basis of Crown Immunity. On January 5, 2012, the Board dismissed the provinces and territories' claim of Crown Immunity by reason that the *Act* binds the Crown by necessary implication.[5] We maintain that position.

[28] The provinces of Alberta and Saskatchewan both objected to the provision for the interest on late payments on the grounds that it was unreasonable and/or beyond the jurisdiction of the Copyright Board. Interest on late payments provisions, essentially identical to the one in the proposed media monitoring tariffs, are common in tariffs certified by the Copyright Board. Moreover, the proposed reporting, disclosure, interest on late payments and indemnity obligations, or essentially identical provisions, have been part of the media monitoring tariffs since they were first certified in 2005. We therefore continue to certify a provision for interest for late payments in this tariff.

[29] Given the type of evidence provided by the parties, we believe that it is appropriate to set a rate of 14 per cent, thereby certifying the non-commercial media monitoring rate based on the filed agreements.

ii. Commercial media monitoring tariff

[30] We find that the evidence presented does not clearly demonstrate that an increase in the tariff rate would financially prejudice the commercial media monitoring industry. In particular, the evidence fails to establish that the increased rate will be borne by the media monitors and not

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[4] The 2006-2008 non-commercial media monitoring tariff was broadened to include municipal governments as potential tariff users. However, the records indicate that no municipal governments are currently users of the non-commercial tariff. Therefore, we do not think that their non-representation in the current proceedings is an issue. *Media Monitoring 2006, 2007-2008* (20 June 2008) Copyright Board Decision at para. 8.

[5] The Board issued the reasons of the decision on March 15, 2012. *Access Copyright – Provincial and Territorial Governments Tariffs 2005-2014 (Crown Immunity Application)* (15 March 2012) Copyright Board Decision.

by their clients, as was suggested in past proceedings.[6] In light of conflicting parties' submissions regarding the impact of the proposed rate increase on the non-commercial media monitoring industry and given that no other commercial media monitor objected to the increase, we believe it is best to conserve the parity between the non-commercial and commercial media monitoring tariff and to certify a tariff rate of 14 per cent. However, we look forward to receiving evidence on the impact of the tariff rate on the financial viability of commercial media mediators in the next media monitoring tariff proceedings.

III. MEDIA MONITORING TARIFFS, 2014-2016

[31] We also certify the commercial and non-commercial media monitoring tariffs for the years 2014 to 2016 as proposed by the CBRA. First, the proposals are essentially identical to the 2011-2013 proposed tariffs with tariff rates remaining at 14 per cent of the CBRA-related gross income (commercial) and 14 per cent of the CBRA-related monitoring costs (non-commercial). Second, there were no objections to these tariffs.

Gilles McDougall
Secretary General

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[6] In its 2005 decision, the Board stated that "comments to the effect that the rate is unreasonably high were not supported by evidence or argument. By contrast, the record establishes that monitors representing the lion's share of the market have been able to pay that rate. The record also tends to establish that in this tariff as in some others, the royalty burden is often passed on to the payor's customers." *Media Monitoring 2000-2005* (29 March 2005) Copyright Board Decision at 10-11.