

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Regime *Copyright Act*, Sections 66.51 and 70.2
Application, pursuant to subsection 70.2(1) of the *Copyright Act*, to fix the royalties for a licence and their related terms and conditions.

Members Mr. Justice John H. Gomery
Mr. Stephen Callary
Mrs. Sylvie Charron

**Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada (Sodrac)
v. l'association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ)**

Reasons for decision

I. ORDER

At the request of the *Société du droit de reproduction des auteurs, compositeurs et éditeurs du Canada* (Sodrac) and pursuant to sections 66.51 and 70.2 of the *Copyright Act* (the *Act*), the Board adopts as an interim decision the agreement dated January 5, 1995 between Sodrac and *l'Association québécoise de l'industrie du disque, du spectacle et de la vidéo* (ADISQ). Consequently, that agreement will apply to record companies that are members of ADISQ and wish to use the repertoire of Sodrac for purposes of mechanical reproductions until the Board issues its final order in these proceedings, unless another interim decision is issued in the meantime.

II. REASONS

A. INTRODUCTION

On June 15, 1999, Sodrac asked that the Board, pursuant to section 70.2 of the *Act*, fix the royalties and related terms and conditions for a licence authorizing member record companies of l'ADISQ to reproduce musical works in Sodrac's repertoire in 1999, 2000 and 2001. Sodrac also asked that the Board, pursuant to section 66.51 of the *Act*, issue an interim decision according to the same terms as those set out in the agreement reached on April 20, 1995 between Sodrac et ADISQ, which expired on December 31, 1998. Sodrac finally asked that the interim decision expire no later than December 31, 1999. Sodrac elaborated on the reasons for its request in a

letter dated July 6, 1999.

ADISQ outlined its reasons for objecting to the issuance of an interim decision in letters dated June 29 and August 20, 1999 arguing that since the agreement already maintains the *status quo ante*, the decision would be superfluous. It would also be inappropriate as it would substitute the judgment of the Board to a freely negotiated agreement. Finally, the conditions that would empower the Board to issue an interim decision would not have been satisfied in two respects. First, since the agreement maintains the *status quo*, Sodrac would not be prejudiced by the Board's delay in reaching a final conclusion in this matter. Second, given that the parties agree on the maintenance of that *status quo*, the question would be academic.

ADISQ finally asks that any interim decision remain in place until the Board issues its final decision so as to avoid any potential legal void.

i. Relevant statutory and contractual provisions

Sections 66.51 et 70.2 of the *Act* read as follows:

66.51 The Board may, on application, make an interim decision.

70.2(1) Where a collective society and any person not otherwise authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, in respect of the works, sound recordings or communication signals included in the collective society's repertoire are unable to agree on the royalties to be paid for the right to do the act or on their related terms and conditions, either of them or a representative of either may, after giving notice to the other, apply to the Board to fix the royalties and their related terms and conditions.

(2) The Board may fix the royalties and their related terms and conditions in respect of a licence during such period of not less than one year as the Board may specify and, as soon as practicable after rendering its decision, the Board shall send a copy thereof, together with the reasons therefor, to the collective society and the person concerned or that person's representative.

Section 11 of the agreement dated April 20, 1995 between Sodrac and ADISQ reads as follows:

Duration

11.1 This agreement comes into force on January 1, 1994 and expires on December 31, 1998.

11.2 Until a new agreement has been executed, the conditions set out in this agreement remain in force.

B. ANALYSIS

The purpose of an interim decision is first and foremost to avoid any negative consequences

caused by the length of proceedings.¹ ADISQ correctly noted that until now, all of the Board's interim decisions have been issued to prevent legal voids. This does not mean that the Board's power to render such decisions is limited to such circumstances.

In this case, the time required to reach a final decision may prejudice Sodrac not because of some legal void, but, quite to the contrary, because of the restrictions to which its past contractual arrangements may confine it against its will.

Section 11.2 of the agreement which expired last December provides that its conditions remain in force until a new agreement is signed. The provision does not specify, however, whether these conditions are binding and final for an interim period, or whether they might be modified or replaced later, with retroactive effect. The Board opts for the second interpretation, given that the first would allow one of the parties to transform an agreement with a set time frame into one of undetermined duration by merely avoiding the conclusion of a new agreement.

Moreover, the issue of whether a decision made pursuant to section 70.2 of the *Act* can take effect on the date a request is made or retroactively remains open. If such a decision can take effect only when issued, then the only way to prevent the *statu quo ante* from becoming a *fait accompli* is to issue an interim decision. Essentially, all interim decisions may be reviewed in the final order; consequently, issuing the decision preserves the power of the Board to make its final order effective as of the date of the interim decision, if it feels justified to do so. In other words, to deny the request may result in Sodrac being forced to live with royalties that are less than what the Board considers fair and equitable for the period between now and the issuance of the final order.²

Considering these factors, there should be no need to explain further why this decision is neither superfluous nor academic. Furthermore, the Board does not feel constrained by the fact that its decision is a substitute for a freely negotiated agreement. There are two reasons for this. First, the statutory regime to which the parties are subject should not be interpreted in a way that would allow one of them to gain a disproportionate advantage over the other, which is precisely what might happen if ADISQ is allowed to avail itself of the 1995 agreement for an indeterminate period of time. Second, that regime exists precisely with a view to allowing the Board to substitute its decision to the will of the parties.

This interim decision does not expire on a fixed date. ADISQ is correct in stating that if it did so, this would open the door to the risk of a legal void. In any event, the Board can substitute a further interim decision to another. Consequently, it is open to Sodrac to ask that the situation be reassessed before the Board reaches its final decision if the circumstances warrant.



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

² *Retransmission of distant radio and television signals, 1992-1994* [1990-1994] Copyright Board decisions, 240, 242.

Claude Majeau
Secretary to the Board