

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Regime Fixing of Royalties in Individual Cases
Copyright Act, sections 66.51 and 70.2

Members Mr. Justice William J. Vancise
Mr. Stephen J. Callary
Mrs. Sylvie Charron

SODRAC 2003 inc. and society for reproduction rights of authors, composers and publishers in Canada (SODRAC) v. Canadian broadcasting corporation (CBC)

Reasons for decision

[1] On November 14, 2008, pursuant to section 70.2 of the *Copyright Act* (the “*Act*”), SODRAC 2003 Inc. and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (jointly SODRAC) asked the Board to set the terms and conditions of a licence for the reproduction of musical works in its repertoire by the Canadian Broadcasting Corporation (CBC) from that date until March 31, 2012. SODRAC also asked, pursuant to section 66.51 of the *Act*, that the Board issue an interim licence effective from that same date.

[2] Two agreements trigger these applications.

[3] The first, effective as of August 17, 1990, was reached on March 19, 1992. It would have expired on August 17, 1995 had it not been for a provision stating that it continued to apply until replaced. It granted to the CBC “[TRANSLATION] for all its services, components and networks as well as to all its affiliate stations, [...] the authorization [...] to reproduce: (a) for delayed radio or television broadcasting or by any other technical means of broadcasting, or (b) for use on any other mechanical medium in connection with activities ancillary to the purposes of the CBC, by all means in use or to be used, the current and future repertoire of SODRAC [...]”

[4] The second was reached on October 29, 2002 and expired on June 30, 2005. It allowed the use of the SODRAC repertoire in CBC programming merchandise such as DVDs.

[5] SODRAC is asking the Board to set the following interim royalties:

- a. for conventional television, La Première Chaîne radio, Radio One and Radio-Canada International, the flat annual royalty of \$520,000 set in the 1992 agreement;
- b. for video-copies of programs, the rates set in the 2002 agreement;¹
- c. for RDI and NewsWorld, \$100 per month payable in advance on the first day of each month;
- d. for Espace Musique and CBC Radio 2, \$100 per month payable in advance on the first day of each month;
- e. for audio and audiovisual webcasting, \$650 per month payable in advance on the first day of each month;
- f. for radio simulcasting, \$1 per month payable in advance on the first day of each month;
- g. for the sale and licensing by CBC of CBC programs to third-party broadcasters and carriers, \$1 per transaction payable within fifteen days of signing the agreement.

[6] The terms of the 1992 agreement would apply to uses targeted in paragraphs (a), (c), (d), (e) and (f); those of the 2002 agreement would apply to uses targeted in paragraph (b). The terms applicable to uses targeted in paragraph (g) would be similar to what the Board applied to the same use by MusiquePlus. CBC would provide to SODRAC information allowing it to track licences issued by CBC and to determine the extent of the use of its repertoire in each program. SODRAC would then inform CBC of the share of rights it owns in each work.

[7] CBC agrees to go to arbitration and does not object to the issuance of an interim licence. It argues however that it would be more appropriate to extend on an interim basis the application of the 1992 and 2002 agreements without any changes.

[8] The terms that SODRAC seeks for the final licence are not relevant.

I. ANALYSIS

[9] An interim decision is used to avoid any negative consequences caused by the length of proceedings. In most cases, the best way to achieve this is to maintain the *status quo* while preventing a legal vacuum. Sometimes, changes in circumstances tend instead to favour the adoption of new rules. In this instance, it seems appropriate to do a bit of both.

[10] The parties disagree on the ambit of the 1992 agreement. CBC maintains that its ambit is sufficiently wide to allow it to use the SODRAC repertoire in all of its operations; SODRAC disagrees.

[11] For CBC's argument to be valid, the reach of the 1992 agreement would have to be such as to allow the use of the SODRAC repertoire in activities, including Internet, that the parties could

¹ Those are per-minute rates that vary according to the importance and duration of music.

not have contemplated when they reached an agreement. If CBC is wrong, to simply extend the licence on an interim basis would leave a legal vacuum: CBC would infringe copyright when it engaged in these new uses. Consequently, it seems important that the interim measure we are being asked to adopt dispose of this troublesome ambiguity.

[12] SODRAC asks for additional royalties in respect of two types of activities: those that could not have been contemplated when the 1992 agreement was reached and others that existed or could be foreseen at the time. Some activities that existed in 1992 are now much more important than in the past. That being said, the additional royalties requested by SODRAC for the interim licence are nominal (higher than a symbolic \$1 value).

[13] Consequently, unless the context requires a different approach, we will not set additional royalties for an activity that existed or was foreseeable in 1992, because the agreements already clearly targeted them. However, we will set symbolic additional royalties for new uses. There is no doubt that CBC will comply with the decision of the Board when it is issued. Therefore, we dispose of the application of SODRAC as follows.

[14] The application dealing with conventional television, La Première Chaîne radio, Radio One and Radio-Canada International (a set annual royalty of \$520,000) is granted. That amount is already provided for in the 1992 agreement.

[15] The application dealing with program video-copies is also granted, since it merely extends the 2002 agreement.

[16] The application for a separate rate dealing with RDI and NewsWorld is denied. In 1992, these uses either existed or were foreseeable. NewsWorld started broadcasting in 1989. The licence application for RDI was filed at the time when the 1992 agreement was reached.

[17] The application for a separate rate dealing with Espace Musique and CBC Radio 2 is denied. Though these networks existed long before 1992, the amount of protected music they use has changed significantly. However, we have no information that would allow us to assess the extent of the change, especially since SODRAC no longer acts for a number of large publishers.

[18] The application dealing with audio and audiovisual webcasting is granted, but at a rate of \$1 per month instead of the \$650 asked. The formula SODRAC proposed we use is based on how the Board set SOCAN Tariff 22.E (Internet – Other Uses of Music: Canadian Broadcasting Corporation, etc.). Yet, the repertoire of SOCAN is larger than that of SODRAC. Furthermore, the rate set in Tarif 22.E is a maximum: CBC can reduce the royalties it pays by tracking and accounting for the ratio of audio page impressions to total page impressions. It is better to remain with a symbolic royalty.

[19] The application dealing with radio simulcast (\$1 per month) is granted. This is a new use. Since we do not use the approach SODRAC proposed for webcasting, there is no duplication.

[20] The application dealing with the sale or licensing by CBC of CBC programs to third-party broadcasters and carriers (\$1 per transaction) is granted. The sale or licensing of programs probably occurred much less frequently in 1992 than today. A significant growth in these transactions and the need to impose immediately reporting requirements lead us to pay special attention to these dealings. A transactional model is most frequently used for this type of licence; this approach also makes it possible to set a new tariff without having to determine the extent to which this type of transaction has increased.

[21] The decision specifies that the interim licence targets every CBC activity that requires a SODRAC licence.

[22] All uses are subject to the terms and conditions (including payment deadlines) set in the 1992 agreement, except as follows. Uses targeted in the 2002 agreement are subject to the terms of that agreement. The sale and licensing of programs to third parties are also subject to the reporting requirements proposed by SODRAC.

[23] SODRAC asks that the licence apply as of the day it filed its application, November 14, 2008. CBC does not object to this. At one time, the Board doubted whether a decision issued pursuant to subsection 70.2(2) of the *Act*, or the interim decision that precedes, could apply retroactively to the date of the application.² This is no longer an issue. The Board, as arbitrator, finds itself substituted to the will of the parties. It can accordingly impose on them whatever they themselves could have agreed to.³ Clearly, a copyright owner and a user can agree to licence past uses.

II. DECISION

1. The application for an interim decision by SODRAC 2003 Inc. and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (jointly SODRAC) is granted in part. Subject to what follows, the Board adopts as an interim decision taking effect on November 14, 2008, the agreements reached on August 19, 1992 and October 29, 2002 between SODRAC and the Canadian Broadcasting Corporation (CBC). CBC will be allowed to use the repertoire of SODRAC for all of its activities pursuant to the terms and conditions set out in the agreements or in what follows until the Board issues its final decision in these proceedings, unless another

² See for example, *Application to fix royalties for a licence and its related terms and conditions (SODRAC v. MusiquePlus Inc.)*, [interim decision of the Board](#) dated November 22, 1999, at p. 2.

³ *Application to fix royalties for a licence and its related terms and conditions (SODRAC v. MusiquePlus Inc.)*, [decision of the Board](#) dated November 16, 2000, at p. 18.

interim decision is issued in the meantime.

2. CBC shall pay to SODRAC,
 - a. for video-copies of programs, the royalties set out in the 2002 agreement;
 - b. for audio and audiovisual webcasting, \$1 per month;
 - c. for radio simulcasting, \$1 per month;
 - d. for the sale or licensing by CBC of CBC programs to third-party broadcasters and carriers, \$1 per transaction; and
 - e. for any other CBC activity that requires a licence from SODRAC, a set annual fee of \$520,000.
3. The uses set out in paragraph 2(a) shall be subject to the terms and conditions of the 2002 agreement. Those set out in paragraphs 2(b), (c), (e) and, subject to section 4, 2(d) shall be subject to the terms and conditions of the 1992 agreement.
4. (1) Each time CBC performs a use set out in paragraph 2(d), CBC shall pay the royalties and provide to SODRAC the name of the program, the name of the buyer or licensee, the ambit and duration of the licence and the musical cue sheets. This is done no later than on the last day of the month following the month during which the sale was made or the licence was issued in the case of an existing program, and no later than on the last day of the month following the month during which the program is delivered in the case of a program yet to produce.

(2) Within sixty days of receiving the information set out in paragraph (1), SODRAC shall provide to CBC a list indicating, in respect of each work used in the program, the percentage of rights that SODRAC administers.



Claude Majeau
Secretary General