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

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

**Society for reproduction rights of authors, composers and publishers in Canada v.
Canadian broadcasting corporation**

Reasons for decision

I. INTRODUCTION

[1] These reasons deal with the application for an interim licence by the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) for the use of its repertoire by the Canadian Broadcasting Corporation (CBC).

[2] On March 26, 2012, relying on sections 66.51 and 70.2 of the *Copyright Act*¹ (the “Act”), SODRAC asked the Board to set the interim and final terms of a licence authorizing CBC to reproduce works from the SODRAC repertoire from April 1, 2012, to March 31, 2016. The application also concerned the Explora channel from the time of its launch on March 28, 2012.

[3] On an interim basis, SODRAC proposed that the interim licence issued on March 31, 2009, and modified on October 13, 2009, be extended until the Board rendered a final decision in the November 14, 2008 application for arbitration filed by SODRAC for the period from November 14, 2008, to March 31, 2012. On April 30, 2012, the Board allowed the application and established a royalty of \$1 per month for the Explora channel.

¹ R.S.C. c. C-42.

[4] On November 2, 2012, the Board rendered its final decision on the November 14, 2008 licence application (the “2008-2012 licence”).² The licence authorizes the reproduction of works from the SODRAC repertoire in conjunction with the following activities: radio and television broadcasting; synchronization; sales of programs (DVD or download); licensing of programs; Internet audio and audiovisual content; radio, television and Internet broadcast-incidental copying; and heritage conservation (archives).

[5] The next day, SODRAC asked the Board that, effective November 3, 2012, the 2008-2012 licence frame its relationship with CBC on an interim basis pending the Board’s final decision with respect to the licence application for the 2012-2016 period. The application suggests an additional interim royalty of \$1 per month for activities related to the Explora channel, which was not targeted by the 2008-2012 licence.

[6] On November 16, 2012, CBC opposed SODRAC’s application. SODRAC filed its response on November 23.

II. THE PARTIES POSITION

[7] CBC claims that the 2008-2012 licence in no way represents the status quo, for three reasons. First, the 2008-2012 licence imposed a significant retroactive increase. Citing its difficult financial situation, CBC claims that it is being forced to review immediately its dealings and to adjust its operations, for example by switching to a transactional licensing model for clearing reproduction rights for synchronization purposes. Second, copyright case law has evolved. In particular, in *SOCAN v. Bell Canada*,³ the Supreme Court clarified the Canadian concept of fair dealing, with material consequences in this instance. Third, the *Copyright Modernization Act*⁴ came into force on November 7, last. This statute, particularly new sections 29.24 and 30.71 and section 30.9 as amended, also has material consequences in this instance.

[8] CBC claims that it will be able to show that no further royalties are due to SODRAC in the context of the application for arbitration, except with respect to four activities: the sale of physical or digital copies of a program, the sale or licensing of a program, archival copies and synchronization copies. With respect to synchronization, CBC intends to negotiate transactional licenses as of now. CBC thus claims that the royalties payable to SODRAC will be considerably less in the future than those provided for in the 2008-2012 licence.

² *Applications to fix royalties for a licence and its related terms and conditions for 2008-2012 (SODRAC v. CBC/SRC and SODRAC v. Astral)* (2 November 2012) Copyright Board [Decision](#). [*SODRAC v. CBC (2012)*]

³ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36.

⁴ S.C. 2012, c. 20.

[9] Without prejudice, CBC proposes to pay, for all of its radio, television and Internet (audio and video) reproductions of works from the SODRAC repertoire, either 10 per cent of what it was paying under the interim licence in effect until November 2, 2012, or no more than the total amount of royalties payable under that interim licence. This latter amount represents about half of the royalties fixed by the Board on November 2, last for radio and Internet audio uses.

[10] CBC agrees to pay on an interim basis the royalties fixed in the 2008-2012 licence for the sale of physical or digital copies of a program and for the sale or licensing of programs.

[11] SODRAC, on the other hand, claims that the 2008-2012 licence now represents the status quo.

[12] SODRAC argues that the interim application of the rates and terms of the 2008-2012 licence would harm no one. CBC remains free to adjust its practices and attempt to clear rights on a transactional basis. An adjustment can be made to the final licence if CBC is able to demonstrate changes in its actual use of the SODRAC repertoire.

[13] SODRAC also argues that eliminating the blanket licence at the interim stage could generate additional costs for the parties that could not be compensated if the Board ultimately finds in favour of SODRAC. In addition, and contrary to CBC's claims, SODRAC notes that the total amount of royalties might in fact increase.

[14] Finally, SODRAC notes that CBC's use of the SODRAC repertoire between now and the hearing is unknown and that it is preferable to rely on Board findings based on a review of the evidence rather than to speculate on this future use.

III. ANALYSIS

[15] Interim royalties for the sale or licensing of programs will remain as in the 2008-2012 licence, since CBC consents to this. The nominal interim royalty set out in the interim licence issued on April 30, 2012 for the Explora channel is maintained.

[16] Two categories of CBC activities remain, on which the parties' views diverge considerably on how to deal with it. They are CBC's incidental radio, television and Internet reproduction activities and CBC's synchronization activities.

[17] An interim decision serves chiefly to avoid the negative consequences caused by the length of the proceedings and may serve to avoid the legal vacuums created when protected works are used without authorization.

[18] In general, the best way to achieve the objectives of an interim decision is to maintain the status quo while avoiding a legal vacuum. The parties' claims may help to determine whether a change to the status quo is desirable on a balance of convenience.

[19] CBC claims, for the above-mentioned reasons, that the 2008-2012 licence does not represent the status quo. We disagree. In the context of an application for an interim decision, the status quo is the state of the relationship existing between the parties, whether recent or not. The 2008-2012 licence currently represents the status quo. What remains to be determined is whether the licence should continue to frame the relations between the parties or whether certain adjustments are in order.

[20] CBC's arguments on the impact of recent legislative and jurisprudential changes repeat almost word for word the arguments advanced by the Canadian Association of Broadcasters in another instance.⁵ The reasons that led the Board to set these arguments aside are equally relevant here. Users seeking to invoke an exception or "right" have the burden of establishing, on the basis of evidence, that they may avail themselves of that exception or right, and this is done more easily as part of the examination on the merits than at the interim stage. CBC's interpretation of some of the provisions it refers to is hardly non-contentious. Finally, in light of what we know of industry practices, it is not certain that CBC will always be able to rely on the invoked exceptions for all of its reproduction activities.

[21] The last statement is even more relevant to CBC than to the rest of the broadcasting industry. Thus, the particular context in which CBC operates raises the possibility that it will not be able to rely on section 30.9 of the *Act* for a significant portion of its reproductions. For example, because of its nature and mandate, CBC regularly engages in live-to-tape broadcasting, broadcasting in multiple time zones, rebroadcasting, studio recordings, etc. It is arguable, at the very least, that copies made in the course of these activities do not meet the requirements of section 30.9. It may well be that these same activities are targeted in section 30.8 of the *Act*; however, this exception is not applicable if a licence is available from a collective society.⁶

[22] CBC says it is convinced that the royalties for incidental reproductions will be significantly less in 2012-2016 than what the 2008-2012 licence provides. SODRAC favours the status quo, for the above-mentioned reasons. We agree with SODRAC. With respect to incidental reproductions, the 2008-2012 licence is hereby continued on an interim basis.

[23] Synchronization reproductions raise a particular issue. The fact that CBC intends to modify its operations in no way guarantees that this is indeed what will happen. There is no evidence before us to assess the extent and impact of these potential changes on its use of the SODRAC repertoire. An interim decision should focus not on what may be later, but on what is certain now: *Access Copyright (Post-Secondary Educational Institutions – 2011-2013)*.⁷ Furthermore,

⁵ *Statement of Royalties to be Collected by SOCAN, Re: Sound, CSI, AVLA/SOPROQ, and ArtistI in Respect of Commercial Radio Stations* (21 December 2012) Copyright Board [Interim Decision](#).

⁶ Subsection 30.8(8) of the *Act*.

⁷ (December 23, 2010) Copyright Board [Interim Decision](#) at para. 18.

SODRAC states that it has no intention of negotiating before the end of the proceedings terms and conditions different from those fixed by the Board, regardless of CBC's intention to negotiate transactional licences with SODRAC. In other words, SODRAC intends to rely on the lump-sum synchronization licence unless we force it to negotiate these licences on a transactional basis.

[24] Yet, as the Board stated in *SODRAC v. CBC (2012)*,⁸ the market for the use of music in television programs is highly amenable to transactional licensing. The concerns expressed by the Board in that decision with respect to lump-sum synchronization licences,⁹ which we need not repeat here, remain relevant.

[25] In light of the above, we can deal with synchronization rights in one of four ways.

[26] The first is to maintain the status quo. This solution has the advantage of being consistent with earlier Board decisions. In our view, however, this does not adequately reflect the misgivings expressed in *SODRAC v. CBC (2012)* regarding the lump-sum synchronization licence.

[27] The second is not to issue an interim licence for synchronization activities. CBC would have to licence rights on a transactional basis. There are several disadvantages to this approach, especially as an interim measure. It requires the implementation of administrative measures that would become useless if the Board ultimately accepts SODRAC's proposal. It assumes that the parties are in a position to make a complete and immediate switch to a transactional approach, and that is far from certain. It could also result in the very legal vacuum that an interim decision is meant to prevent.

[28] The third is to impose the transactional model in the interim licence. This could be achieved, for example, by applying on an interim basis the amounts¹⁰ used by the Board to calculate the lump-sum licence. This solution raises the same difficulties as the second. It would also result in rates regarding which the Board had expressed significant misgivings.¹¹

[29] The final solution is to extend the lump-sum synchronization licence at a discounted rate. There are several advantages to this approach. It communicates the Board's firm intention to consider, if not encourage, transactional dealings in the relevant rights. It leaves SODRAC essentially whole during the instance. It does not require the implementation of new administrative mechanisms, at least not for the moment, while it clearly communicates to CBC

⁸ *Supra* note 2 at para. 135.

⁹ *Ibid.* at paras. 134 to 138.

¹⁰ *Ibid.* at paras. 125 and 129.

¹¹ *Ibid.* at paras. 134 to 140.

the need to preserve data that may be needed to set up a transactional licensing regime. It gives CBC the opportunity and the motivation to adjust its practices as it claims it needs to do.

[30] We are of the view that, in this case, a 20 per cent discount would achieve the objectives described in the preceding paragraph.

IV. DECISION

[31] The Board extends on an interim basis the *Licence authorizing the Canadian Broadcasting Corporation to reproduce works in the repertoire of SODRAC for the period from November 14, 2008 to March 31, 2012* from November, 3, 2012 until the date of the Board's final decision in this application for arbitration file.

[32] The terms of the licence are the same as those of the 2008-2012 licence, with the following exceptions.

[33] Section 5.02 of the licence is replaced by the following:

5.02 In consideration of the rights conferred in paragraph 2.01(a), the CBC shall pay SODRAC a monthly fee of \$55,498.

[34] Paragraph 5.03(1)(c), below, is added to the licence:

(c) \$1 per month for Explora.



Gilles McDougall
Secretary General