

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2016-06-27

Citation Files: 70.2-2008-01; 70.2-2012-01; 70.2-2016-01

Regime Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21
Fixing of Royalties in Individual Cases
Copyright Act, ss. 66.51 and 70.2

Members Mr. Justice Robert A. Blair
Mr. Claude Majeau
Mr. J. Nelson Landry

Proposed Tariffs Considered Redetermination (2008-2012); Determination (2012-2017)

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

Reasons for decision

I. INTRODUCTION

[1] Subsection 70.2(1) of the *Copyright Act*¹ (the “*Act*”) allows a collective society or any person not otherwise authorized to do an act mentioned in sections 3, 15, 18 or 21 of the *Act*, as the case may be, to apply to the Copyright Board of Canada (the “Board”) if they are unable to agree on the royalties to be paid for the right to do the act or on their related terms and conditions. The Board then acts as arbitrator between the collective society and the user of the content protected by the *Act* for the purpose of fixing these royalties or terms and conditions.

[2] Pursuant to this provision, on November 14, 2008, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) filed a licence arbitration application for the period from November 14, 2008 to March 31, 2012 (“the 2008-2012 period”), authorizing

¹ R.S.C. 1985, c C-42.

the Canadian Broadcasting Corporation (CBC) to use its repertoire. Under section 66.51 of the *Act*, SODRAC also applied for an interim licence for this period, effective from that same date.

[3] The licence was to allow CBC to reproduce works from the SODRAC repertoire in the course of the following activities: radio and television broadcasting; synchronization; sales of programs (DVD or download); licensing of programs; Internet audio and audiovisual service; radio, television and Internet broadcast-incidental copying; and heritage conservation (archives).

[4] Before the matter was brought before the Board, relations between SODRAC and CBC had been governed by agreements. The first agreement, signed on March 19, 1992, authorized the use of the SODRAC repertoire on the radio, on television and for certain incidental purposes (“the 1992 agreement”). More specifically, it granted to 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 CBC, by all means in use or to be used, the current and future repertoire of SODRAC.” The second agreement allowed the use of the SODRAC repertoire in CBC programming merchandise, such as DVDs. This agreement was reached on October 29, 2002 and expired on June 30, 2005.

[5] The 1992 agreement set a flat annual royalty, which reached \$520,000 in 1995, and was renewable by tacit renewal every 12 months.

[6] In a decision dated March 31, 2009, the Board maintained the status quo established in the 1992 agreement, setting an interim licence for the 2008-2012 period with a flat annual royalty of \$520,000 for any activities that existed or were foreseeable in 1992. Symbolic additional royalties for new uses (e.g., Internet audio and audiovisual, Internet simulcasting of radio, etc.) were applied.²

[7] That interim licence was renewed by an interim decision of the Board dated April 30, 2012 (the “2008-2012 interim licence”), pending a final decision by the Board for the 2008-2012 period.³

[8] On March 26, 2012, 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 2012-2016 period”).

² *Application to fix royalties and their related terms and conditions in respect of a licence (SODRAC v. CBC)* (March 31, 2009) Interim Decision of the Copyright Board.

³ *Application to fix royalties and their related terms and conditions in respect of a licence (SODRAC v. CBC)* (April 30, 2012) Interim Decision of the Copyright Board.

[9] On April 30, 2012, the Board accepted this request. It extended the interim licence for the 2008-2012 period to the 2012-2016 period, until the Board rendered a final decision for the 2008-2012 period.

[10] On November 2, 2012, the Board rendered its final decision on the licence application dated November 14, 2008⁴ (the “November 2, 2012 decision”), and delivered the corresponding licence (“the 2008-2012 licence”). The next day, SODRAC asked the Board to order that, effective November 3, 2012, the 2008-2012 licence govern 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.

[11] The 2008-2012 licence fixes the royalty rates for reproductions of works in the SODRAC repertoire made in the course of the following activities of CBC:

- a. the production of a CBC program for exploitation purposes, in any form or for any market, for the duration of the copyright in the work;
- b. the production of an audio or audiovisual montage, of four minutes or less, of footage from a radio or television program, or of several programs from the same series, for the purpose of promoting that program or series (self-promotion);
- c. the production of an audiovisual montage referred to in paragraph (b) for the purpose of promoting the programming of the service on whose frequency the program is broadcast, if the work remains associated with footage from the program or series in which the work is included;
- d. the preparation of an audio montage, compilation, mix or medley for broadcasting on the Internet or on CBC radio;
- e. the broadcasting of programming on CBC radio, on CBC television services (conventional and specialty) and on the Internet, including backup copies;
- f. the sale on a physical medium or online of a program, regardless of whether it is a CBC program;
- g. the sale or licensing of a program, regardless of whether it is a CBC program; and
- h. the conservation of CBC’s radio-television heritage (archival copies).

[12] On December 3, 2012, CBC filed with the Federal Court of Appeal an application for judicial review of the November 2, 2012 decision.

[13] In a decision dated January 16, 2013,⁵ the Board extended the 2008-2012 licence on an interim basis (with two amendments: a 20 per cent discount on the royalty applicable to synchronization activities and a symbolic royalty of \$1 per month for television broadcast-

⁴ *Applications to fix royalties for a licence and its related terms and conditions for 2008-2012 (SODRAC v. CBC and SODRAC v. Astral)* (November 2, 2012) Decision of the Copyright Board.

⁵ *Application to fix royalties and their related terms and conditions in respect of a licence (SODRAC v. CBC)* (January 16, 2013) Interim Decision of the Copyright Board.

incidental copying for the Explora channel). The licence came into effect on November 3, 2012, and was to last until the date of the Board's final decision in this arbitration application (the "2012-2016 interim licence").

[14] On February 28, 2013, the 2008-2012 interim licence was extended by a decision of the Federal Court of Appeal granting motions to stay the 2008-2012 licence and the 2012-2016 interim licence.⁶ The Federal Court of Appeal ordered that the status quo, based on the 1992 agreement, be maintained pending final judgment on the applications for judicial review of the Board's November 2, 2012 decision regarding the 2008-2012 licence, and January 16, 2013 decision regarding the 2012-2016 interim licence.

[15] On March 31, 2014, the Federal Court of Appeal rendered its decision with respect to the judicial review applications, and dissolved the stays of execution of the licences issued by the Board on November 2, 2012, and January 16, 2013.⁷

[16] On May 30, 2014, CBC asked the Supreme Court of Canada leave to appeal the decision of the Federal Court of Appeal dated March 31, 2014. That decision was itself stayed by operation of subsection 65(1) of the *Supreme Court Act*⁸ and by the filing of the May 30, 2014 notice of appeal.

[17] On November 26, 2015, the Supreme Court of Canada (the "Court") rendered its decision in *Canadian Broadcasting Corporation v. SODRAC 2003 Inc.*,⁹ and disposed of the appeal regarding the judicial review of the Board's decisions concerning the 2008-2012 licence and the 2012-2016 interim licence.

[18] Essentially, the Court set aside in part the 2008-2012 licence and the 2012-2016 interim licence, and remitted both of these decisions to the Board for reconsideration. Justice Rothstein, writing on behalf of the majority, held as follows:

[114] The Board did not take account of the principles of technological neutrality and balance in valuing the licence fees for CBC's television and Internet broadcast-incidental copies. I would allow the appeal, set aside the 2008-2012 statutory licence as it relates to the valuation of CBC's television and Internet broadcast-incidental copies and remit the Statutory Licence Decision to the Board for reconsideration of that valuation in accordance with the principles of technological neutrality and balance.

⁶ *Canadian Broadcasting Corporation and Astral Media Inc. v. SODRAC Inc.*, 2013 FCA 60 and 2013 FCA 61.

⁷ *Canadian Broadcasting Corporation and Astral Media Inc. v. SODRAC Inc.*, 2014 FCA 84.

⁸ R.S.C. 1985, c S-26.

⁹ 2015 SCC 57. [*SCC Decision*]

[115] To the extent that the interim licence fees were based on the valuation of the broadcast-incident copies in the 2008-2012 statutory licence, I would set aside the interim licence and remit the Interim Licence Decision for reconsideration consistent with the principles guiding the redetermination of the 2008-2012 licence.

[19] The decision at hand deals with the reconsideration of the 2012-2016 interim licence. It also addresses SODRAC's application dated March 24, 2016, to extend the conditions established under the 2012-2016 interim licence, as reviewed hereafter, from April 1, 2016, until a final decision is made. CBC did not object to this application, without prejudice however to its submissions already in the record.¹⁰

II. PARTIES' ARGUMENTS

A. SODRAC'S APPLICATION

[20] SODRAC asks the Board to review the interim licence and proposes that the interim royalties for incidental television broadcast reproductions be fixed at 20 per cent of the rates prescribed in paragraphs 5.03(1)(a) and of the 2008-2012 licence. The reduced rates would be as follows:

- a. for conventional television, 2.90 per cent of what CBC pays under SOCAN Tariff 2.D (Commercial television), that is, \$200,755 per year;¹¹ and
- b. 0.043 per cent for RDI, 0.019 per cent for News Network and 0.069 per cent for Documentary Channel, of the service's gross income during the reference month.

The 4 per cent Internet royalty fixed in the 2008-2012 licence (section 5.05) would not change, since it is a percentage of the royalties payable under section 5.03, not of revenue.

[21] In support of its proposal, SODRAC submits the following arguments:

- the proposed 20 per cent level is based, by analogy, on the Board's decision regarding the interim licence relating to Astral. The Board had determined that this rate was, on its face, reasonable;
- the use of the SODRAC/SOCAN ratio as the basis for interim royalties (but discounted by 80 per cent) is also reasonable, given that the Court did not invalidate this ratio but required the Board to apply the principles of technological neutrality and balance in its valuation; and
- the recent use (2009 to 2012) of the SODRAC repertoire by CBC is known and is not much different from the levels used by the Board in the 2008-2012 licence.

¹⁰ Correspondence from CBC dated March 29, 2016.

¹¹ The initial rate was 14.478 per cent. The amount paid under Tariff 2.D (SOCAN-CBC) was \$6,922,586 per year. This would therefore amount to an annual payment of approximately \$1 million at the regular rate.

[22] Moreover, SODRAC rejects the symbolic royalty principle because the right of reproduction applies and the level of use of the repertoire is known. SODRAC notes in conclusion that the proposed royalties are modest and reasonable.

B. CBC'S RESPONSE

[23] In its response, CBC submits that even the reduced royalties, as proposed by SODRAC, are still significant. It further argues that the Board must reconsider the 2012-2016 interim licence not only with regard to television and Internet broadcast-incidental copies, but also with regard to radio broadcast-incidental copies and synchronization rights, in accordance with the principles outlined in the Court decision.

[24] CBC argues that the royalties should be symbolic (\$100 for all incidental copies) because SODRAC has not presented any evidence, according to the principles set out by the Court, of the incidental copies' economic value. In this respect, relying on ratios is insufficient.

[25] CBC further submits that the royalties should be symbolic because of the high likelihood that the incidental copies (i) are covered by the new copyright exceptions that came into effect in November 2012; or (ii) do not have independent economic value. In addition, royalties other than symbolic ones would be difficult or impossible to reimburse after the fact, which would cause irreparable harm for CBC.

[26] In the alternative, the reduced rate proposed by SODRAC should apply to all incidental copies. A valuation of all types of incidental copies, including for radio, should be governed by the principles set out by the Court.

[27] Finally, the interim licence should not include a blanket synchronization licence, given the decision of the Court that the terms and conditions of a licence cannot be imposed on a user. Excluding the comprehensive licence gives the parties an incentive to negotiate synchronization rights based on their real needs.

C. SODRAC'S REPLY

[28] SODRAC submits that the Court did not set aside all the terms and conditions of the 2012-2016 interim licence. The Court set aside only the part of the interim licence concerning television and Internet broadcast-incidental royalties, and ordered that it be reconsidered by the Board. The Court did not rule on the validity of the rates or the findings of fact based on the evidence. The Court remitted the matter to the Board for valuation in light of the principles of *technological neutrality* and *balance* and the underlying factors, as well as any other relevant factor, including applying a ratio.

[29] SODRAC is of the view that the Court did not suggest that the royalties be symbolic. The Court rather referred to “relatively low” licence fees. Only an *ex post facto* application of the Court’s factors will allow the appropriate royalty to be determined.

[30] SODRAC states that the evidence in the record does not address investments or risks. Furthermore, the evidence in the record does not support the finding that the internal efficiencies would be low.¹² Finally, the Board’s ratio analysis does not involve royalties that are proportional to the number of copies.

[31] A \$100 royalty for all types of incidental copies is not “relatively low,” but rather “infinitesimal.” The Court did not require SODRAC to prove at that stage that the royalty should be more than symbolic. Rather, pending a full reconsideration of the case on the merits, the Board has to fix a reasonable interim royalty. The example of symbolic royalties cited by CBC involves a decision on the merits. The Court did not require the Board to change its approach at the interim stage. At that stage, the Board can make a *prima facie* decision based on the status quo.

[32] SODRAC states that it is not relying solely on the ratio: it is proposing a reduced rate derived from the ratio analysis made by the Board, given that the Court did not reject the ratio as a relevant factor.

[33] The Court did not address whether the new exceptions to incidental reproductions apply, and the Board refused to entertain this argument in its interim decision dated January 16, 2003, regarding the 2012-2016 period.¹³

[34] Regarding incidental copies, SODRAC concludes that the status quo should be maintained with regard to the royalties applicable to radio, for the following reasons:

- the Court did not order the reconsideration of this part of the interim licence;
- the Court validated the approach of basing the status quo on the 2008-2012 licence, given that the Court did not invalidate the royalties for radio;
- the effect of the exceptions and the Court’s factors should be dealt with on the merits, with the benefit of a complete record; and
- radio royalties are directly based on the CMRRA/CBC agreement for the same type of reproductions. They therefore represent a market rate. As such, it must be presumed at the interim stage that this rate is technologically neutral and balanced.

¹² Exhibit SODRAC-181, pp. 8-10; Testimony of Michael Murphy, transcripts, June 1, 2010, Vol. 1 (confidential), pp. 33-37; Exhibit SODRAC-81 at para 89.

¹³ *SCC Decision*, *supra* note 9 at para 108.

[35] Regarding synchronization rights, SODRAC argues that CBC's request to depart from the interim licence provisions relating to synchronization is unjustified for several reasons. First, the Court did not set aside the synchronization provisions, contrary to what CBC asserts. The Court did not remit these provisions for reconsideration. The Court merely set aside the provisions relating to incidental copies. Second, the Court explicitly held that the Board can fix royalties for a given activity but cannot force a user to accept the terms of the licence after reviewing them. Third, withdrawing authorization to make synchronization copies would create a legal vacuum and engage CBC's liability for infringement. Finally, the licence to make synchronization copies is a comprehensive licence, but its rate (i) reflects a reduced use of synchronization copies; and (ii) in practice means that CBC would pay in accordance with a transactional rate (the rate is based on two per-copy rates multiplied by the number of synchronization copies made from 2006 to 2008).

[36] SODRAC states in conclusion that it will not grant a synchronization licence that does not comply with the provisions of the existing interim licence.

III. ANALYSIS

[37] The issues in dispute thus concern the scope of the reconsideration, the application of the principles and criteria of technological neutrality and balance, the claim for symbolic royalties, and the exclusion of the synchronization licence. We will deal with these issues in this same order.

A. SCOPE OF THE RECONSIDERATION

[38] The parties disagree on the scope of the reconsideration of the 2012-2016 licence. According to CBC, the impact of the Supreme Court judgment is such that the interim royalties for all incidental copies, including for radio, and for synchronization copies should be reviewed. We disagree, for the following reasons.

[39] First, radio broadcast-incidental copies were not at issue in the applications for judicial review before the Federal Court of Appeal. Accordingly, the Supreme Court set aside the 2008-2012 licence solely "as it relates to the valuation of CBC's television and Internet broadcast-incidental copies."¹⁴ The Court then stated that it would set aside the 2012-2016 interim licence only "[t]o the extent that the interim licence fees were based on the valuation of the broadcast-incidental copies in the 2008-2012 statutory licence."¹⁵

¹⁴ *Ibid* at para 114. For the reasons given in its decision dated April 4, 2016, the Board interprets paragraph 114 of the *SCC Decision* as not setting aside the royalties for incidental copies for onlineaudio services.

¹⁵ *Ibid* at para 115.

[40] The Court also confirmed that the interim licence could maintain the elements of the 2008-2012 licence that had not been set aside:

[100] I find nothing unreasonable in the Board's approach to identifying and using the 2008-2012 statutory licence as the status quo in this case. However, in view of the fact that I would remit the matter for reconsideration of the 2008-2012 licence as set out above, it will be necessary for the Board to reconsider the terms of the interim statutory licence to ensure that it is consistent with the Board's redetermination of the 2008-2012 licence fee.

[41] Therefore, it seems clear that the only potential changes to the interim licence are those necessary to ensure consistency with the points submitted for reconsideration in the 2008-2012 licence, namely, television and Internet broadcast-incidental copies.¹⁶ All the other interim royalties, including those applicable to radio and synchronization copies, are therefore not subject to reconsideration. Accordingly, the 2008-2012 licence can validly represent the status quo, except with regard to television and Internet broadcast-incidental copies.

B. APPLICATION OF THE PRINCIPLES AND CRITERIA OF TECHNOLOGICAL NEUTRALITY AND BALANCE

[42] The Court asked the Board to reconsider the terms of the 2012-2016 interim licence in accordance with the principles guiding the redetermination of the 2008-2012 licence, namely, the principles of technological neutrality and balance.¹⁷

[43] CBC has already stated that it intends, during the redetermination of the 2008-2012 licence, to file evidence demonstrating its levels of investment in digital broadcasting technology, the lack of investment by and risk to SODRAC with respect to CBC's adoption of this technology and the nature and relative value of television broadcast-incidental copies.

[44] SODRAC intends to file additional or further evidence relating to the technological neutrality and balancing tests for television and Internet broadcast-incidental copies. SODRAC is planning a further technical report and a further economic report relating to the impact of these two tests.

[45] As with any decision establishing interim royalties, the Board does not yet have all of the evidence that will allow it to render a final decision. The Board must therefore act on the basis of the information it has before it.¹⁸

¹⁶ This means Internet television. On this point, see paragraphs 7 and 26 of the *SCC Decision*; paragraphs 146 *et seq.* of the Board decision dated November 12, 2012; and paragraphs 11 and 29 of CBC's *Factum on Appeal to the Supreme Court* (http://scc-csc.ca/WebDocuments-DocumentsWeb/35918/FM010_Appellant_Canadian-Broadcasting-Corporation.pdf).

¹⁷ *SCC Decision*, *supra* note 9 at paras 100 and 115.

[46] The evidence filed in the record so far reveals that radio and television broadcasters have adopted digital technology designed to modernize the broadcasting process, particularly through the use of computer servers and automated information management systems.¹⁹

[47] The evidence also shows that these digital broadcasting technologies had yet to be deployed by CBC in 1992.²⁰ However, at the time, CBC was reproducing the SODRAC repertoire for time-shifted broadcasting and activities incidental to CBC's objectives.²¹

[48] The principle of technological neutrality requires a comparison of the value to the user of the use of different technologies.²² In cases where there is no difference in value to the user, one technology should not result in higher royalties than another, no matter what differences there may be between them:

[...] While highly unlikely, where users are deriving the same value from the use of reproductions of copyright-protected works using different technologies, technological neutrality implies that it would be improper to impose higher copyright-licensing costs on the user of one technology than would be imposed on the user of a different technology. To do so would privilege the interests of the rights holder to a greater degree in one technology over the other where there is no difference between the two in terms of the value each user derives from the reproductions.²³

[49] Conversely, where the value to the user of the reproductions is higher with one technology than with another, the principle of technological neutrality justifies a larger royalty:

[...] Where the user of one technology derives greater value from the use of reproductions of copyright-protected work than another user using reproductions of the copyright-protected work in a different technology, technological neutrality will imply that the copyright holder should be entitled to a larger royalty from the user who obtains such greater value. Simply

¹⁸ *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at p 1754.

¹⁹ See in particular, Exhibit SODRAC-82, *Report on Contemporary Broadcasting Technology*, prepared for SODRAC by Michael J. Murphy, February 1, 2010; Exhibit SODRAC-181: PowerPoint presentation of Michael J. Murphy during his testimony; Testimony of Michael J. Murphy, transcripts, June 1, 2010, Vol. 1 (Confidential) at pp 28:7 *et seq.*

²⁰ Exhibit SODRAC-94, CBC's response to SODRAC's interrogatory 64: [TRANSLATION] "[TV] There was no content management system in 1992 because there was no server"; CBC's response to SODRAC's interrogatory 70: [TRANSLATION] "What does MEO mean? Explain precisely what you are referring to. A.: MEO refers to a 'mise en onde' (broadcasting) system. The content management systems. Your answer for March 19, 1992, regarding MEO: 'none' means none of what? A: Simply that there were no shows saved on servers."

²¹ Exhibit SODRAC-16: R-1 *Convention concernant la télévision et la radio entre la SODRAC et la SRC, intervenue à Montréal le 19 mars 1992* [French only].

²² *SCC Decision*, *supra* note 9 at para 70 and 79.

²³ *Ibid* at para 70.

put, it would not be technologically neutral to treat these two technologies as if they were deriving the same value from the reproductions.²⁴

[50] The principle of balance, which the Board must also apply, may have an impact on the value enjoyed by the user and therefore on the amount of the royalties:

[...] the Board must have regard to factors it considers relevant in striking a balance between the rights of users and right holders. Relevant factors will include, but are not limited to, the risks taken by the user, the extent of the investment the user made in the new technology, and the nature of the copyright-protected work's use in the new technology. The Board must assess the respective contributions of, on the one hand, the risks taken by the user and the investment made by the user, and on the other hand, the reproductions of the copyright-protected works, to the value enjoyed by the user. In this case, where the financial risks of investing in and implementing new technology were undertaken by the user and the use of reproductions of copyright-protected works was incidental, the balance principle would imply relatively low licence fees to the copyright holder.²⁵

[51] However, the Court noted that the royalty will never amount to zero:

[...] it will never be the case that, because a user makes a significant investment in technology or assumes substantial risk, royalties for the rights holder will amount to zero. From the moment the right is engaged, licence fees will necessarily follow. The amount of the fee will depend upon the Board's consideration of the evidence in each case, always having regard to the principles of technological neutrality and balance and any other factors it considers relevant.²⁶

[52] In this context, the interim rate proposed by SODRAC—namely, the initial rate discounted by 80 per cent, or \$200,755 per year—appears reasonable for the purposes of the interim licence, for several reasons. First, the 1992 SODRAC-CBC agreement included an overall amount of \$520,000 per year. This lump-sum payment allowed for certain types of reproductions other than those incidental to television broadcasting. While royalties for television broadcast-incidental reproductions were not explicitly allocated, they were probably similar to the amount of \$200,755 per year. This amount therefore takes into account the theoretical possibility that the analysis on the merits, guided by the principles of technological neutrality and balance, will establish a lack of difference in value for CBC despite the technological differences. For example, there will be no reason to depart from the level of royalties corresponding to the

²⁴ *Ibid* at para 71.

²⁵ *Ibid* at para 75.

²⁶ *Ibid* at para 77.

systems used in 1992 if the new systems have no “functional differences” or do not generate different “internal efficiencies.”²⁷

[53] Furthermore, this discounted rate represents a reasonable “floor” value. First, it was proposed by SODRAC. Secondly, for CBC, the 1992 agreement already authorized all of the types of copies made by the producers and television broadcasters.²⁸ The discounted rate therefore approaches that which CBC was prepared to pay. In fact, CBC has regularly taken the position that the 1992 agreement represented the status quo for the purposes of an interim licence.²⁹ Finally, this discounted rate reflects (i) the finding that broadcast-incidental copies engage the reproduction right³⁰ and (ii) the benefits derived from digital technology. The Board wrote about these benefits in the following terms:

[...] The adoption of copy-dependent technologies allows broadcasters to remain competitive and to protect their core business even when it does not generate direct profits. These technologies are necessary for Astral and CBC to remain relevant so that services continue to be seen by the public. These are clear benefits arising from the copy-dependant technologies. Since these technologies involve the use of additional copies, some of the benefits associated with the technologies must be reflected in the remuneration that flows from these incidental, additional copies.³¹

[54] This is not an isolated finding; it has also been applied to commercial radio tariffs. For example, the Board held in 2010 in the file relating to the statement of royalties to be collected by CSI from commercial radio stations for the years 2008-2012³² that the evidence presented on both sides confirmed that reproduction technologies allowed radio stations to increase their efficiency and profitability.³³ Given the similarity between the technologies used by CBC for its television broadcasting activities and modern radio broadcasting technologies,³⁴ we are of the view that there is no basis to assume at this stage that broadcast-incidental copies in relation to television and the Internet are of no value to CBC.

²⁷ *Ibid* at para 79. See also *supra* note 20.

²⁸ Testimony of Chantal Carbonneau (counsel), transcripts, June 15, 2010, Vol. 11 at pp 2179 (line 13)-2180 (line 10).

²⁹ See *supra* note 2 at para 7; see Appellant’s Factum on Appeal to the Supreme Court by CBC (see *supra* note 16) at paras 137, 144 and, in particular, 160, in which CBC in its conclusions expressly asks that the 1992 agreement continue in force as the 2012-2016 interim licence.

³⁰ *SCC Decision, supra* note 9 at para 55: “Accordingly, the Board was correct in proceeding on the basis that broadcast incidental copies engage the reproduction right under s. 3(1)(d) of the *Copyright Act*.”

³¹ *Supra* note 4 at para 81.

³² *Commercial Radio – SOCAN: 2008-2010; Re:Sound: 2008-2011; CSI: 2008-2012; AVLA/SOPROQ: 2008-2011; ArtistI: 2009-2011* (July 9, 2010) Decision of the Copyright Board.

³³ *Ibid* at para 222.

³⁴ *Supra* note 19.

C. THE CLAIM FOR SYMBOLIC ROYALTIES

[55] CBC also argues that a symbolic royalty of \$100 for all of its reproduction activities is justified under the new copyright exceptions in effect since November 2012 that are applicable to incidental copies. It should be noted at the outset that this issue is not part of the reconsideration, as per the directions of the Court. Therefore, arguments and evidence falling outside of this framework cannot be raised during the reconsideration.³⁵

[56] The Board has already decided on two occasions that the potential application of new exceptions is not relevant at the interim stage.

[57] First, in its interim decision of December 21, 2012, pertaining to commercial radio, the Board rejected an application for a discount— at the interim stage—of 90 per cent of reproduction tariffs for protected content based on the new exceptions arising from amendments to the *Act* that came into effect in November 2012. Essentially, the Board found that it was not in a position to establish at the interim stage that the opponents were complying with all of the conditions of all the exceptions for all the reproductions they were making.³⁶

[58] Then, in this case, the Board reiterated this position:

[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. 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.³⁷

[59] The Federal Court of Appeal validated this approach:

[93] As for the changes in the way the parties do business in the future, in light of the 2008-2012 licence, legislative amendments and developments in the jurisprudence, this is a matter

³⁵ See *Re:Sound Tariff No. 6.B – Use of Recorded Music to Accompany Fitness Activities, 2008-2012* (March 27, 2015) Decision of the Copyright Board [Redetermination] at para 22.

³⁶ *Commercial Radio – SOCAN (2008-2010); Re:Sound (2008-2011); CMRRA/SODRAC inc. (2008-2012); AVLA-SOPROQ (2008-2011); ArtistI(2009-2011)* (December 21, 2012) Interim Decision of the Copyright Board at paras 6 *et seq.*

³⁷ *Supra* note 5 at para 20.

best considered by the Board in the hearings on the merits for the 2012-2016 licence which, as I understand it, were to begin within days of the hearing of this appeal.³⁸ [emphasis added]

[60] This passage from the Federal Court of Appeal decision was not challenged by the Supreme Court. Accordingly, there is no reason at this stage to consider whether copyright exceptions might apply as a justification for a symbolic royalty amount.

[61] CBC also argues that it would be difficult, if not impossible, to recover royalties that are other than symbolic after the fact. CBC relies on the Federal Court of Appeal decision in *Canadian Broadcasting Corporation and Astral Media Inc. v. SODRAC Inc.*³⁹

[62] That decision involved a suspension of the effects of a decision by the Board on the merits, namely the decision of November 2, 2012, relating to the SODRAC-CBC licence. It is therefore not about the legal framework applicable to interim licences. The Federal Court of Appeal also rendered a stay order following a motion by CBC for a stay of the Board's interim decision of January 16, 2013.⁴⁰ Again, the stay order applies a specific test (serious issue, irreparable harm, balance of convenience) that is not applicable to interim licences. The latter regime is governed by a different test (maintaining the status quo to prevent a legal vacuum, except where certain factors sometimes justify a departure from the status quo in light of the balance of convenience). Moreover, the stay order in that case was granted in a specific context of applications for judicial review that could justify a stay pending final judgment. However, this is no longer the case, the Court having ended the judicial review.

[63] Moreover, the very nature of an interim decision, as contemplated in section 66.51 of the *Act*, necessarily supposes that adjustments will be made at the time of the final decision. As the Court wrote in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*:⁴¹

It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order.

[64] The parties can organize their resources and accounting accordingly, by setting amounts aside, for example.

³⁸ *Supra* note 6.

³⁹ 2013 FCA 60.

⁴⁰ 2013 FCA 61.

⁴¹ *Supra* note 18. Case cited by the Board in its interim decision of February 17, 2012 pertaining to audiovisual webcasts and user-generated content transmitted over the Internet.

D. THE EXCLUSION OF THE SYNCHRONIZATION LICENCE

[65] CBC asks that the interim licence no longer include a comprehensive synchronization licence. It relies on the reasons of the Court stating that the terms and conditions of a certified licence cannot be imposed on a user. It argues that the presence of a comprehensive licence does not provide an incentive for parties to negotiate transactional licences. From CBC's point of view, only transactional licences guarantee that the price paid by CBC corresponds to its actual use of the SODRAC repertoire. CBC is of the view that the current comprehensive licence is based on obsolete data from 2008 because it has since drastically reduced its synchronization copies.

[66] For the reasons below, it would not be appropriate to alter the terms and conditions applicable to synchronization activities.

[67] As mentioned above, the terms and conditions of the 2012-2016 interim licence relating to synchronization activities are not subject to reconsideration.

[68] The Court also confirmed the Board's power to set the terms and conditions of a licence under section 70.2 of the *Act* that takes the form of a comprehensive licence, given that the user can still choose whether or not to comply with the terms and conditions of the licence:

[...] the Board does have the power under s. 70.2 to "fix the royalties and their related terms and conditions". That is, the Board may decide upon a fair royalty to be paid should the user decide to engage in the activity at issue under the terms of a licence. However, this power does not contain within it the power to force these terms on a user who, having reviewed the terms, decided that engaging in licensed copying is not the way to proceed. Of course, should the user then engage in unauthorized copying regardless, it will remain liable for infringement. But it will not be liable as a licensee unless it affirmatively assumes the benefits and burdens of the licence.⁴²

[69] The Court did not, however, determine whether the Board could impose on the collective society the type of licence— comprehensive or transactional—preferred by the user:

I conclude that the statutory licensing scheme does not contemplate that licences fixed by the Board pursuant to s. 70.2 should have a mandatory binding effect against users. However, this case does not require this Court to decide whether the same is true of collective organizations. It may be that the statutory scheme's focus on regulating the actions of collective organizations, and the case law's focus on ensuring that such organizations do not devolve into "instruments of oppression and extortion" (*Vigneux v. Canadian Performing Right Society, Ltd.*, [1943] S.C.R. 348, at p. 354, per Duff J., quoting *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109, at p. 128) would justify finding that the Board does have the power

⁴² *SCC Decision*, *supra* note 9 at para108.

to bind collective organizations to a licence based on the user's preferred model—transactional or blanket—on terms that the Board finds fair in view of that model. However, this issue was not argued in this case.⁴³

[70] This legal issue can be debated by the parties on the merits.

[71] Moreover, evidence of the reduction in the actual number of synchronization copies made by CBC as part of its audiovisual production activities since 2008 can also be debated on the merits. It should be noted that, as pointed out by SODRAC, the Board had already altered the status quo to take into account the alleged reductions in synchronization copies made by CBC by applying a 20 per cent discount to the 2008-2012 licence rate.

IV. DECISION

[72] The reasons set out above apply *mutatis mutandis* to the 2016-2017 period. The issues submitted to arbitration for the 2012-2016 period are identical, and the final licence applications for these two periods will be jointly examined in accordance with the Board's decision of April 4, 2016. The Board is establishing a single interim licence for these two periods (the "2012-2017 interim licence").

[73] The Board is extending on an interim basis the 2008-2012 licence, as modified at section 5.03(2) by the Federal Court of Appeal on March 31, 2014, from November 3, 2012 until the date of the Board's final decision for the 2012-2017 period or the date of expiration of the final licence, March 31, 2017, whichever comes first.

[74] The terms and conditions of the 2012-2017 interim licence are the same as those of the 2008-2012 licence, with the following exceptions.

[75] Paragraphs 5.03(1)(a) and (b) of the 2008-2012 licence are replaced by the following:

- a. for conventional television, 2.90 per cent of what the CBC pays under SOCAN Tariff 2.D;
- b. 0.043 per cent for RDI, 0.019 per cent for News Network, and 0.069 per cent for the Documentary Channel, of the service's Gross Income during the Reference Month.

[76] Moreover, it is appropriate to retain the amendments made to the 2008-2012 licence for the purposes of the 2012-2017 interim licence by the interim decision of the Board dated January 16, 2013.

[77] Accordingly, section 5.02 of the 2008-2012 licence is replaced by the following:

⁴³ *Ibid* at para 112.

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

[78] Similarly, paragraph 5.03(1)(c), below, is added to the 2008-2012 licence:

(c) \$1 per month for Explora.

[79] This is also an opportunity to correct a drafting error in the English version of paragraph 3.02(a). It is replaced by the following:

(a) does not authorize the CBC to reproduce a Work for the purpose of promoting a product, cause, service or institution, except to the extent provided in paragraphs (b) and (c) of section 2.01;

[80] CBC's request to have a section added stipulating the expiration date of the interim licence is satisfied by paragraph 73 of this decision.

[81] Finally, the address for notices to CBC set out at subsection 13(2) is modified as follows:

(2) Any communication addressed to the CBC shall be sent to Canadian Broadcasting Corporation, Legal Services, 1400 René-Lévesque East, 2nd floor, Montreal, Quebec, H2L 2M2, Fax: (514) 597-4087, with a copy to droitsau@radio-canada.ca, or to any other address of which SODRAC has been notified in writing.



Gilles McDougall
Secretary General