

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**Date of Reasons** 1999-01-27

**Date of Decision** 1998-12-24

**Citation** FILE: 76(1)-1998-1

**Regime** *Copyright Act*, subsection 76(1)  
Claims by Non-members in Retransmission

**Members** Michel Hétu, Q.C.  
Ms. Adrian Burns  
Mr. Andrew E. Fenus

**Application by the société des auteurs, recherchistes, documentalistes et compositeurs  
(SARDeC)**

**Reasons for decision**

**I. INTRODUCTION**

On December 15, 1998, the Société des Auteurs, Recherchistes, Documentalistes et Compositeurs (SARDeC) requested that, pursuant to subsection 76(1) of the *Copyright Act* (the *Act*), the Board designate the Canadian Retransmission Right Association (CRRA) as the collective society from which owners of copyright in texts used in the production of television programs produced by the Canadian Broadcasting Corporation (CBC) or by the Société de télédiffusion du Québec (STQ) could claim a share of royalties that were paid for the retransmission of distant signals between January 1, 1990 and December 31, 1997.

SARDeC argues that it represents authors of all texts targeted in the motion and holds a mandate from such authors of those texts that are its members. It also argues that those authors are not represented with respect to those works for the purposes of the retransmission regime by any of the collective societies authorized to collect royalties pursuant to the tariffs certified by the Board and have not filed any claims with them. Finally, it argues that it reached with CBC and STQ agreements that clearly state that authors of those texts are the first copyright owners in them.

On December 23, 1998, CRRA relied on five reasons to object to the motion. First, the record as constituted did not make it possible to determine whether SARDeC does indeed hold the relevant

rights on the relevant works. Second, if it does, then it is a collective society subject to the provisions of sections 71 and following of the *Act*, and the motion is an attempt to circumvent those provisions, including the requirement to file proposed statements of royalties. Third, the motion does not specify which works are targeted in it, and as such constitutes a hypothetical claim with respect to an undetermined body of works. Fourth, CRRA's constitution requires that it only represent interests held by its broadcaster members; it has never claimed to represent, or sought royalties on account of anything else, or anyone else. Fifth, all royalties received by CRRA for the relevant period have already been distributed in application of CRRA's distribution policy. Any remedies SARDeC may have lie with the broadcasters themselves, be they as a result of collective agreements between them and SARDeC or otherwise.

On December 24, 1998, the Board issued the following order.

Pursuant to subsection 76(1) of the *Copyright Act*, the Board hereby designates the Canadian Retransmission Right Association (CRRA) as the collective society from which the following copyright owners, and any person claiming under them, are entitled to be paid retransmission royalties, subject to the same conditions as those to which a person who has so authorized that collective society is subject.

Targeted owners: owners of copyright in texts, written pursuant to the agreement managed by SARDeC, used in the production of television programs produced by the Canadian Broadcasting Corporation or by the Société de télédiffusion du Québec and retransmitted on distant signals between January 1, 1990 and December 31, 1997, if those owners did not authorize a collective society named in Appendix A of the Retransmission of Distant Radio and Television Signals Tariff certified by the Board for the years 1990 to 1997 to collect royalties on account of those texts.

Reasons to follow.

The following are the reasons for the Board's order.

## **II. RELEVANT STATUTORY AND REGULATORY PROVISIONS**

The relevant provisions of the *Copyright Act* are as follows:

31(2) It is not an infringement of copyright to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if,

(a) the communication is a retransmission of a local or distant signal;

(b) the retransmission is lawful under the *Broadcasting Act*;

(c) the signal is retransmitted simultaneously and in its entirety, except as otherwise required or permitted by or under the laws of Canada; and

(d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act.

...

71(1) Each collective society that carries on the business of collecting royalties referred to in ... paragraph 31(2)(d) shall file with the Board a proposed tariff, but no other person may file any such tariff.

...

73(1) On the conclusion of its consideration of proposed tariffs, the Board shall

(a) establish

(i) a manner of determining the royalties to be paid by retransmitters ...

...

(b) determine the portion of the royalties referred to in paragraph (a) that is to be paid to each collective society;

...

76(1) An owner of copyright who does not authorize a collective society to collect, for that person's benefit, royalties referred to in paragraph 31(2)(d) is, if the work is communicated to the public by telecommunication during a period when an approved tariff that is applicable to that kind of work is effective, entitled to be paid those royalties by the collective society that is designated by the Board, of its own motion or on application, subject to the same conditions as those to which a person who has so authorized that collective society is subject.

...

(3) The entitlement referred to in subsections (1) ... is the only remedy of the owner of the copyright for the payment of royalties for the communication, making of the copy or sound recording or performance in public, as the case may be.

(4) The Board may, for the purposes of this section,

...

(b) by regulation, establish periods of not less than twelve months within which the entitlements referred to in subsections (1) ... must be exercised, in the case of royalties referred to in

...

(v) paragraph 31(2)(d), beginning on the communication to the public by telecommunication.

Furthermore, pursuant to paragraph 76(4)(b) of the *Act*, the Board made the following regulations.

## REGULATIONS ESTABLISHING THE PERIOD FOR ROYALTY ENTITLEMENTS OF NON -MEMBERS OF COLLECTING BODIES<sup>1</sup>.

1. An owner or person claiming under the owner of the right referred to in paragraph 3(1)(f) of the *Copyright Act* in respect of a work who does not authorize a collecting body to collect, for that person's benefit, royalties for the communication of the work in the manner described in subsection 28.01(2)<sup>2</sup> of the same Act is, if that work is so communicated, entitled to be paid those royalties by the collecting body that is designated by the Board, of its own motion or on application, if this entitlement is exercised

(a) no later than December 31, 1998, where the retransmission occurred before January 1, 1997; and

(b) within two years after the end of the calendar year in which the retransmission occurred, where the retransmission occurred on January 1, 1997 or after.

2. These Regulations come into force on March 19, 1997.

### III. ANALYSIS

The retransmission regime is a universal, statutory licence scheme. Any retransmitter who meets the conditions set out in subsection 31(2) of the *Act* acquires the retransmission right for all works embedded in the signals he or she retransmits. The licence is free with respect to local signals; distant signals command the payment of royalties set by the Board. The amount of royalties is set at a level sufficient to compensate all works carried on distant signals.

Conversely, all copyright owners in all works carried on a distant signal are entitled to a share of the remuneration as long as they comply with the *Act*. They can get paid in one of two ways. The vast majority have formed collective societies that filed proposed statements of royalties, thereby becoming entitled to collect from retransmitters a share of the royalties, which the societies then distribute to their members. Rights owners who have not joined a collective (sometimes referred to as "orphans") can avail themselves of subsection 76(1) of the *Act* and claim their share from one of the societies targeted in the tariffs.

It is within that framework that the Board fulfills its role pursuant to section 76 of the *Act*, by designating the society which rights owners will be entitled to approach to claim their share of the royalties. It is important therefore to clearly understand the nature of the relationship created by the *Act* between orphan rights owners and the societies designated by the Board. On the one hand, an orphan simply cannot file a claim unless a designation is in place<sup>3</sup>: without a designation, the orphan claimant has no remedies. On the other hand, orphans allowed to claim under a designation do not need anyone's permission to file such a claim.

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<sup>1</sup> SOR/97-164.

<sup>2</sup> Now subsection 31(2) of the *Act*.

<sup>3</sup> The person whose claim is already covered in a designation made before the claim arose need not ask the Board for a further designation.

From the foregoing, the following conclusions can be drawn.

First, since a claim can be filed only with a designated society, this can only occur *after* the Board has exercised its power of designation. Furthermore, a designation can be made absent any claim, upon request or on the Board's own motion. Therefore, it is not for the Board to decide whether or not the claim is valid.<sup>4</sup> All that the designation does is to allow a person purporting to own some rights to file a claim. It is for that person and the designated society and, ultimately, for the courts to determine whether the claimant truly owns the relevant rights.

Secondly, the information required to make a designation will vary from case to case. In this instance, since the designation is made for a category of works, there is no need to know who owns the rights in them or even whether those owners truly are orphans. Furthermore, since the Board's decisions certifying the relevant tariffs clearly directed all royalties flowing from the retransmission of programs produced by CBC or STQ<sup>5</sup> to CRRA, it is reasonable to designate it as the society with which persons who claim to own underlying rights in these programs will have to deal.

Third, the fact that a society's constitution prevents it from acting for certain rights owners cannot, of itself, immunize it from being designated under the *Act*: neither the Board's powers, nor the orphans' remedies, should depend on such considerations.

Fourth, the fact that the Board can proceed to a designation of its own can only further support the view that the Board can do so without knowing the extent of the targeted body of works and even without knowing what are those works or who owns rights in them. It is sufficient that the designation outlines criteria allowing orphans to know with whom eventual claims ought to be filed.

There are two further arguments of CRRA that must be dismissed.

CRRA argues that any remedies SARDeC may have lie elsewhere. This seems to ignore the wording of subsection 76(3), which states that filing a claim with a designated society is the only remedy open to orphan retransmission rights owners.

CRRA also argues that this motion constitutes an abuse of process. According to it, if SARDeC truly owns the rights it claims, it should have filed a proposed statement of royalties in a timely fashion and claimed a share of the royalties, as the societies identified in the Board's tariffs did; having refrained from doing so, it cannot today avail itself of the remedies available to orphan rights owners. The Board does not share this view. The right to file a claim pursuant to section 76 is necessarily linked to the tariffs certified by the Board. A person's status as an orphan claimant is to be determined by looking at those societies which receive a share of the royalties, not by looking at societies which could have filed a proposed statement but did not. Subsection 76(1) refers to subsection 32(1). A collective society that fails to file a proposed statement loses

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<sup>4</sup> Obviously, the Board is not required to proceed with a designation that is based on claims that are patently unfounded.

<sup>5</sup> With the exception of royalties paid on account of musical works.

the right to collect royalties from retransmitters. There is no reason to believe that rights owners who are members of such a society are thereby deprived from claiming what is owed to them from those societies which received royalties on account of the retransmission of these very owners' works. The universal character of the regime only serves to bolster this conclusion. In any event, the designation, as it is made & for the benefit of rights owners, and not of SARDeC as such & remains necessary even if the Board's analysis on this point is incorrect. To refuse to grant the motion would have necessarily resulted in a denial of justice.

One uncertainty remains, which it is not necessary to address and which ordinary courts of law are better equipped to deal with. It concerns the reconciliation of certain statements in subsection 76(1) and paragraph 76(4)(b). The first states that the orphan claimant's entitlement is "subject to the same conditions as those to which a person who has so authorized that collective society is subject": if those conditions include the distribution deadlines set out in a society's bylaw, then it may very well be the case that some of the claims that could be made pursuant to this decision of the Board may have already lapsed. The second empowers the Board to establish, by regulation, the period within which an orphan claimant's entitlement must be exercised. If, as the Board believes, such regulations prevail over a society's distribution rules, then the limitation period had not run on any of those claims at the time the Board issued the order, and the fact that CRRA may have distributed the sums it received before the dates set in the Board's regulations is simply irrelevant.

#### **IV. CONCLUSION**

This decision does not grant any remedies to the persons claiming to own rights in the relevant works; it merely allows the exercise of remedies already provided in the *Act*, if they exist. The interested rights owners, and anyone claiming under them, are now able to file a claim. It is now up to the interested parties, and eventually to the courts, to dispose of those claims.



Claude Majeau  
Secretary to the Board