

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2001-11-23

Citation FILE: Public Performance of Sound Recordings 1998-2002

Regime Public Performance of Sound Recordings
Copyright Act, section 66.52

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

Proposed Tariffs Considered 1.C – CBC RADIO IN 1998, 1999, 2000, 2001 AND 2002

Application to vary the statement of royalties to be collected by NRCC for the public performance or the communication to the public by telecommunication, in Canada, of published sound recordings embodying musical works and performer's performances of such works

Reasons for decision

On September 29, 2000, the Board set at \$960,000 per year the royalties to be paid by the Canadian Broadcasting Corporation (CBC) to the Neighbouring Rights Collective of Canada (NRCC) for the years 1998 to 2002 [“the September 29 decision”]. On May 15, 2001, NRCC applied for a variation of the decision so as to increase the royalties for 2001. The sole reason for the application is that CBC has agreed to pay to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) royalties that are 11.65 per cent higher in 2001 than in 2000. A similar increase would result in CBC paying approximately \$112,000 more to NRCC. NRCC adds that it would ask for a variation in the 2002 tariff were the Board to certify a SOCAN-CBC tariff in that year that was significantly higher than the amount paid in 2000.

CBC asks that the application be denied for the reason, among others, that any such change is not material, as the NRCC tariff is not premised on SOCAN payments or derived from them. For one thing, the tariff is a set sum of money, not a tariff formula.

I. ANALYSIS

Pursuant to section 66.52 of the *Copyright Act* (the *Act*), the Board may, on application, vary a decision if, in the Board's opinion, there has been a material change in circumstances since the

decision was made. The *Act* does not dictate how the Board should proceed in these matters. One way of doing so, which the Board adopts in this case, is to first examine whether any change that may have occurred is sufficiently “important” (to quote the French version of the relevant provision) to justify revisiting the issue.

The September 29 decision does assume that royalties paid to SOCAN by CBC will remain fairly constant up to the end of 2002. In some circumstances, a 12 per cent variation *may* constitute a material change. However, the significance of a change has to be viewed in context. The September 29 decision makes it clear that the amount of SOCAN royalties is only one of three factors used in the equation developed by the Board, which the Board opted not to use; available data dealing with the other two factors (the relative use of the NRCC and SOCAN repertoires) were simply too unreliable. NRCC states that these numbers probably have not changed since the hearing; this misses the point. In the September 29 decision, the Board had no choice but to act as it did in order to deal with the complete absence of a tariff; here, a tariff is in place. There is no reason to revisit it based upon data which remain unsatisfactory. New, more reliable data are required, and this probably entails extensive research better left until the full examination of a new tariff.

CBC is also correct in pointing out that the Board declined for the time being to set the NRCC and SOCAN royalties in lockstep for this tariff, and used instead a single, fixed price for a five-year period. To repeat, the Board did not use the formula upon which NRCC relies to ask for a variance.

Lastly, the finality of decisions has intrinsic value. Reopening this matter would generate uncertainty not only for CBC and NRCC, but also for all owners and users of copyrights. Under the circumstances, the otherwise significant sum of \$112,000 is not sufficiently “material” to justify reopening the file. In the Board’s view, participants will be better served by concentrating their resources on developing the necessary data to test the Board’s assumptions in the next proceedings.

For the above reasons, the application to vary is denied.

A handwritten signature in black ink that reads "Claude Majeau". The signature is written in a cursive, flowing style.

Claude Majeau
Secretary General