Copyright Board Canada

Commission du droit d'auteur Canada

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Regime Public Performance of Musical Works
Copyright Act, section 67.1 *et seq.*

Members Mr. Justice John H. Gomery
Mrs. Sylvie Charron
Ms. Brigitte Doucet

Proposed Tariffs Considered JURISDICTIONAL ISSUE

Statement of Royalties to be collected for the public performance or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works

Reasons for decision

I. INTRODUCTION

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed its proposed Tariff No. 4 (Live Performances at Theatres or Other Places of Entertainment) for 2003 (the "2003 Concert Tariff") pursuant to section 67.1 of the *Copyright Act* (the "*Act*"). The 2003 Concert Tariff was duly published by the Copyright Board (the "Board") in the Supplement to the *Canada Gazette*, Part I, dated May 11, 2002.

The proposed 2003 Concert Tariff provides for the payment of fees "for a licence to perform, at any time and as often as desired in 2003, any or all of the works in SOCAN's repertoire..." at popular or classical music concerts.

Maple Leaf Sports & Entertainment Ltd. (MLSE), which operates a venue (Air Canada Center in Toronto) that is sometimes used for concerts, has filed an objection to the 2003 Concert Tariff pursuant to subsection 67.1(5) of the *Act*. MLSE's objection to the 2003 Concert Tariff is based on various grounds, including a question as to the Board's jurisdiction with respect to the authorization right. This objection is formulated as follows:

> "The Copyright Board has no jurisdiction under s. 68(3) of the *Act* to certify a tariff that targets the authorization right. The Board's jurisdiction is confined to a tariff that only applies to the public performance or communication right."

This ground of objection raises an issue of law, namely the Board's alleged lack of jurisdiction to certify a tariff that targets the right to authorize the performance in public, or the communication to the public by telecommunication, of a musical work. SOCAN and MLSE have agreed, and the Board has ordered, that the jurisdictional issue be dealt with as a preliminary matter in advance of a full hearing on the 2003 Concert Tariff. The hearing on this issue took place on June 19, 2003.

II. LEGAL FRAMEWORK

Section 3(1) of the *Act* sets out the exclusive rights of the owner of copyright. The relevant portions read as follows:

> "3. (1) For the purposes of this *Act*, "copyright"... means the sole right... to perform the work... in public... and includes the sole right
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> [...]
>
> (*f*) ... to communicate the work to the public by telecommunication,
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> [...]
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> and to authorize any such acts."

Accordingly, pursuant to subsection 3(1) of the *Act*, the exclusive rights of the owner of copyright include the right to perform a musical work in public (the "Public Performance Right"), the right to communicate the musical work to the public by telecommunication (the "Communication Right") and the right to authorize such a performance or communication (the "Authorization Right").

The relevant portions of the definition of "collective society", such as SOCAN, found in section 2 of the *Act*, reads as follows:

> "... a society... that carries on the business of collective administration of copyright... for the benefit of those who... authorize it to act on their behalf in relation to that collective administration, and
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> (*a*) operates a licensing scheme, applicable in relation to a repertoire... pursuant to which the society... sets out classes of uses that it agrees to authorize under this *Act*, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, ..."

In the general provisions applicable to its proposed tariffs for 2003, SOCAN includes the following paragraph:

> "As used in these tariffs, the terms "licence", "licence to perform" and "licence to communicate to the public by telecommunication" mean a licence to perform in public or to communicate to the public by telecommunication *or to authorize the performance in public or the communication to the public by telecommunication*, as the context may require." (Our emphasis)

Sections 67 to 68.2 of the *Act* envisage the collective administration of the Public Performance and Communication Rights with respect to musical works. This scheme is referred to by MLSE in its written submission as the "statutory regime" and by SOCAN as "the SOCAN regime"; the latter designation is more appropriate since it is the one commonly used. The relevant portions of section 67 describe the societies subject to the SOCAN regime as:

> "67. Each collective society that carries on (*a*) the business of granting licences or collecting royalties for the performance in public of musical works,... or (*b*) the business of granting licences or collecting royalties for the communication to the public by telecommunication of musical works,..."

Subsection 67.1(1) in turn provides that "Each collective society referred to in section 67 shall, ... file with the Board a proposed tariff ..."

Subsection 67.1(4) sanctions the collective's failure to file a tariff as follows: "Where a proposed tariff is not filed ... no action may be commenced ... for (a) the infringement of the rights, referred to in section 3 ..."

It will be noted at once that sections 67 to 68.2 of the *Act* do not mention the Authorization Right.[1] By way of contrast, in sections 70.1 *et seq.*, which govern the collective administration of copyright generally (the "general regime"), the authorization to do an act protected by copyright is addressed. The relevant portions of section 70.1 read as follows:

> "70.1 Sections 70.11 to 70.6 apply in respect of a collective society that operates
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> (*a*) a licensing scheme, applicable in relation to a repertoire of works ..., pursuant to which the society ... agrees to authorize the doing of an act mentioned in section 3 ...".[2]

MLSE and SOCAN agree that the right to authorize an act protected by copyright is distinct from the right to do the act. Each right can be assigned separately. Each gives rise to a separate cause of action.

MLSE argues that since the provisions of the *Act* dealing with the SOCAN regime do not specifically mention the Authorization Right, the Board is without jurisdiction to certify a proposed SOCAN tariff which purports to target that right, pursuant to that regime.

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[1] Neither do the retransmission and private copying regimes.

[2] Since the Authorization Right is "an act mentioned in section 3", the provision applies when the Authorization Right is administered by a collective society.

SOCAN, for its part, argues that the granting of licences, which is the business it carries on pursuant to the SOCAN regime, is essentially the granting of authorizations to perform or communicate musical works, and that the Authorization Right is accordingly included, by implication, in the ambit of these provisions. The argument is summarized at paragraph 7 of its written argument as follows:

> "7. At the heart of collective administration of copyright lies the concept that the entity carrying out the collective administration on behalf of the copyright owners authorizes others to use the rights of copyright. In the case of SOCAN, those rights are to perform in public and to communicate to the public by telecommunication, and to authorize such activity. Apart from the right to authorize, **the collective administrator does not itself exercise the other two exclusive rights: it does not perform in public, nor does it communicate to the public**. The collective administrator's sole purpose is to allow (authorize) others to use the right (to perform in public) and thereby generate royalties for the owners on whose behalf the rights are administered. Indeed, SOCAN would not need any tariffs at all if it itself performed in public the works in its repertoire. It is only when SOCAN as collective administrator *authorizes (licenses)* members of the public to perform or to communicate its musical works that the tariffs come into play." (SOCAN's emphasis)

Before analyzing the respective positions of the parties, a brief review of the history of the regulation of collective administration is useful to better understand the proper interpretation of the relevant sections of the *Act*.

III. THE HISTORY OF THE REGULATION OF COLLECTIVE ADMINISTRATION

The first Canadian collective society, the Canadian Performing Rights Society (CPRS), was created in 1925. The right to control public performances of musical works was unregulated until 1931. From then on, if the Minister responsible for the application of the *Act* thought the society was acting against the public interest, he was empowered to trigger an inquiry into the activities of CPRS; which he did as a result of complaints by some users. As of 1936, the societies were prevented from prosecuting an action for infringement of the performing right without either a tariff certified by the Copyright Appeal Board (which became the Copyright Board in 1989) or the authorization of the Minister responsible for the application of the *Act*. This was the genesis of the SOCAN regime.

In 1989 and in 1997, Parliament added other regulatory schemes to the *Act*. There are now four regulatory regimes, all administered by the present Board. First, the SOCAN regime [3] governs the public performance or the communication to the public of musical works as well as the remuneration rights for the performance or communication of sound recordings, i.e., the neighbouring rights. That regime provides for the compulsory filing of tariffs. Second, the retransmission of works in broadcast radio and television signals [4] is subject to a compulsory licensing scheme which necessarily involves one or more collective societies; individual rights

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[3] Sections 67 to 68.2 of the *Act*.
[4] Sections 71 to 76 of the *Act*.

holders are legally prevented from exercising those rights on their own. That regime now also applies to the copying of broadcast programs and the performance of such copies by educational institutions. Third, Parliament legalized the private copying [5] of sound recordings and subjected blank audio recording media to a levy, which is set pursuant to a regime that closely resembles the retransmission regime. Finally, all other collective societies administering a licensing scheme are subject to the general regime. [6] These societies have the option of reaching agreements with individual users or filing proposed tariffs with the Board. In the first scenario, the Board intervenes on request, when a society and a user are unable to agree on the royalties and the terms and conditions of a licence. In the second, the review and certification process for such tariffs is the same as under the specific regimes. A certified tariff is enforceable against all users; however, agreements take precedence over the tariff.

IV. ANALYSIS

It is a well-established principle of the interpretation of statutes that the apparent purpose of the legislation should always be borne in mind. In *Jodrey Estate v. Nova Scotia (Min. of Finance).*, [7] Mr. Justice Dickson writes:

> "The correct approach, applicable to statutory interpretation generally, is to construe the legislation with reasonable regard to its object and purpose and to give it such interpretation as best ensures the attainment of such object and purpose."

More recently, Mr. Justice Iacobucci in *Bell ExpressVu Limited Partnership v. Rex et al.*, [8] endorses Driedger's formulation of the rule:

> "Today there is only one principle or approach, namely, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of Parliament." [9]

The purpose of sections 67 to 68.2 of the *Act* is to create a means whereby a collective society, in this case SOCAN, is allowed to collect from users of works protected by copyright, for the benefit of those who own the rights in those works, fees fixed in a tariff certified by the Board. Since the Authorization Right is included in the rights which SOCAN administers, it may logically be targeted in the proposed tariffs which it files in accordance with section 67.1 of the *Act*.

This is not the first time the Board has had to deal with the authorization issue. In *SOCAN Statement of Royalties, Public Performance of Musical Works, 1996, 1997, 1998 (Tariff 22, Internet),*[10] the Board considered the question of whether SOCAN administers the right to

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[5] Sections 79 to 88 of the *Act*.
[6] Sections 70.1 to 70.6 of the *Act*.
[7] (1980) 2 S.C.R. 744 at 807.
[8] (2002) 2 S.C.R. 559 at 580.
[9] E. Driedger, *Construction of Statutes*, (2nd ed., 1983) at 87.
[10] (2000) 1 C.P.R. (4th), 417.

authorize a communication in addition to the Communication Right, and concluded that it did.

The Board remains of the same opinion and still considers that "the internal logic of the *Act* dictates that the right to authorize an act subject to the SOCAN regime be itself subject to that regime. Any other interpretation would allow a performing rights society to do an end run on the legislation and deprive users of the protection afforded to them by these statutory requirements."[11] Nevertheless, for the sake of completeness, the Board will analyse the authorization issue in detail.

At first, there seems to be a tendency to confuse the Authorization Right with something else. This probably arises because the verb "to authorize" has at least two meanings in the *Act*. The first, as in the definition of "collective society", involves the granting of a permission. The second, as in subsection 3(1) of the *Act*, involves a protected form of use, an act for which permission can be given. For example, if a copyright owner licences a promoter to have a band play the owner's songs, the owner is granting the permission to authorize (an act protected in subsection 3(1) of the *Act*) the band to perform. On the other hand, if that same owner licences the band directly, then it is a permission to perform (another act protected in subsection 3(1) of the *Act*) that is granted.[12] Both examples involve the granting of a permission, but only the first one involves the Authorization Right as defined in subsection 3(1) of the *Act*.

It is generally accepted that all acts protected in subsection 3(1), including the Authorization Right, are distinct. Even though it exists separately, the Authorization Right is, in the Board's view, of a different nature since it is directly linked to the act being authorized. For one thing, the Authorization Right exists only if the act being authorized is itself protected by copyright. For example, the Public Performance Right can exist without the Communication Right being protected, but the right to authorize a communication cannot exist if the Communication Right is not protected.

MLSE argues that, in view of the separate nature of these rights and of the relevant provisions of the SOCAN regime, the Board's jurisdiction under subsection 68(3) does not extend to certifying tariffs filed under subsection 67.1(1) which target the Authorization Right. If the Board had that jurisdiction, it would be under subsection 70.13(1).

This is incorrect. All of the regimes in the *Act* that regulate collective administration, with the exception of the general regime, do not mention the Authorization Right. Parliament has provided that the general regime should coexist with specific regimes that are more targeted and more demanding as regards tariff filing and protection of users. This must mean that the extent of the protection granted to users and the level of autonomy enjoyed by a collective society is to vary somewhat from one regime to another. Were the Board to accept MLSE's argument, the societies would be able to change the level of regulatory protection: all they would have to do is to stop licensing the act under a specific regime, and start licensing the Authorization Right for

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[11] *Ibid*., 461.

[12] The situation also must not be confused with the infringement that occurs when, as provided in subsection 27(5) of the *Act*, a person, for profit, permits a theater or other place of entertainment to be used for an unauthorized performance in public. That form of infringement has nothing to do with the Authorization Right.

the same act, under the general regime.

The same would happen with other provisions of the *Act*. Every provision that creates protection for an act also protects the right to authorize the act.[13] By contrast, few provisions that qualify, restrict or regulate the protection of an act mention the right to authorize the act.[14] If MLSE is correct, every time the right to act is qualified, restricted or regulated, the right to authorize the act is not.

In the Board's view, the interpretation proposed by MLSE defeats the purpose of the regulatory regimes the Board administers and it is incompatible with the interpretation rule as outlined in *Bell ExpressVu* and *Jodrey Estate*. MLSE's argument focuses on the words of a single statutory provision instead of reading it in the entire context of the *Act*.

MLSE fears what it calls double jeopardy. It suggests that should the Authorization Right be targeted by the SOCAN regime, then SOCAN could refrain from filing a tariff dealing with the Authorization Right and would not be prevented by subsection 67.1(4) from commencing an infringement action for the Authorization Right; users would not benefit from the protection of subsection 68.2(2). Also, infringement proceedings dealing with the Authorization Right could be brought against a person even though someone has already paid the royalties for the Public Performance Right.

In the Board's view, these fears are unfounded. If the reference in section 67.1 of the *Act* to the Public Performance Right implicitly includes the Authorization Right, then the same is true of other such references within the SOCAN regime. As a result, subsections 67.1(4) and 68.2(2) would apply to the Authorization Right as well as to the Public Performance Right.

Furthermore, as it was explained in *Falcon*,[15] the Authorization Right exists as a separate right to impose liability on those who sanction in others conduct that would violate copyright. Therefore, it would make no sense to impose liability on a person who sanctions that which is already duly authorized. As a result, the person who has obtained the Authorization Right for a performance shields from liability the person who performs. Conversely, the person who would otherwise need a licence for the Authorization Right does not if the person performing "under him/her" already has a licence to perform, as there is nothing left to authorize: "[i]t cannot be a tort merely to authorize or cause a person to do something that person has a right to do." [16]

MLSE argues that *CAPAC* stands for the proposition that the right to authorize a performance is not subject to the SOCAN regime. This is incorrect. The passage quoted by MLSE merely states that helping someone to perform what is authorized by a valid Performing Right licence does not violate the Authorization Right, that CAPAC's tariffs did not then purport to target the

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[13] See subsections 3(1) *in fine*, 15(1) *in fine*, 18(1) *in fine*, 21(1) *in fine* and 26(1) *in fine*. The one exception concerns the right granted pursuant to paragraph 21(1)(*c*), which itself is a right to authorize.
[14] Section 2.3 appears to be the sole exception to this proposition.
[15] *Falcon v. Famous Players Film Co*., (1926) 2 KB 474, 491 (C.A.).
[16] *CAPAC v. CTV Television Network Ltd.*, (1968) 55 C.P.R., 132 at page 135. See also *CCH Canadian Ltd v. Law Society of Upper Canada*, (2002) 18 C.P.R. (4th), 161.

Authorization Right and that under the law as it stood then, the SOCAN regime applied to the Public Performance Right but not to the right to communicate by radio communication.

In the Board's view, the only way to address these questions is, as SOCAN proposes, to "read into" every mention of the right to do the right to authorize the doing. In that way, every provision that deals with an act [17] also applies to the authorization to do the act.

Other issues raised in the participants' pleadings remain to be addressed. First, SOCAN's proposition that the rights holder who assigns the right to perform also implicitly assigns the related Authorization Right is incorrect. Rights holders can assign the Performing Right and retain the Authorization Right; indeed, they could assign each right to different societies. Of course, given the relationship that exists between the two rights, the actions of one society could trump the ability of the other to act.

SOCAN seems to be of the view that a collective society simply cannot exist without having been assigned the Authorization Right. The Board disagrees. A society does not need the Authorization Right to be a collective society as defined in section 2 of the *Act*. The contrary interpretation would lead to absurd results: if a society that does not administer the Authorization Right is not a collective society within the meaning of the *Act*, then it could avoid any form of regulation under the *Act*.

Second, MLSE argues that while the ambit of a tariff certified pursuant to the general regime is limited to a particular repertoire of works, a tariff certified pursuant to the SOCAN regime is not. This is incorrect. A society acting pursuant to the SOCAN regime can obtain a tariff only with respect to the repertoire that it actually administers.[18] The same is true under the general regime.

In fact, the contrast that MLSE attempted to draw between the SOCAN regime and the general regime with respect to the extent of the repertoire is more apparent than real. The definition of "collective society", which provides that the licensing scheme is "applicable in relation to a repertoire of works",[19] is incorporated by reference to the SOCAN regime, as it is the case with any defined expression. In the general regime, section 70.1 refers to the "collective society" expression and defines it as well. The wording of the "collective society" definition parallels that of each paragraph of section 70.1 in all relevant respects. There is a simple explanation for what appears to be a redundancy: section 70.1 came into force in 1989, whereas the definition of a collective society was added in 1997, without providing appropriate adjustments to section 70.1.

Third, paragraph 2.4(1)(*b*) of the *Act* provides that "a person whose only act in respect of the

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[17] With the possible exception of paragraph 2.4(1)(*b*): see below.

[18] SOCAN had to prove it in the past, as well as the Neighbouring Rights Collective of Canada proved it recently. See Board's decision of July 31, 1991: Statement of royalties to be collected by SOCAN for the public performance in Canada of musical or dramatico-musical works in 1991, www.cb-cda.gc.ca/decisions/m31071991-b.pdf, (1991) 37 C.P.R. (3d) 385, and the Board's decision of August 13, 1999: 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 in 1998 to 2002 for Tariff 1.A (Commercial Radio), www.cb-cda.gc.ca/decisions/m13081999-b.pdf, (1999) 3 C.P.R. (4th) 350.

[19] *Act*, section 2.

communication of a work ... consists of providing the means of telecommunication necessary for another person to so communicate the work ... does not communicate that work ...” The Federal Court of Appeal stated that this provision applies to the act of communication, but not to the act of authorizing the communication.[20] MLSE submits that this conclusion also applies to other provisions of the *Act*. In the Board’s view, the matters can be distinguished in at least two respects. First, paragraph 2.4(1)(*b*) is part of the “definitional section of the *Act;*”[21] by contrast, the provisions under consideration in this decision regulate the conduct of collective societies and the doing of protected acts. Second, as was explained earlier, unless one reads a reference to the Authorization Right into every mention of the Performing or Communication Rights within the SOCAN regime, the very purpose of the regime is readily defeated. The same can be said of virtually every other provision of the *Act*, with the possible exception of paragraph 2.4(1)(*b*). As interpreted by the Federal Court of Appeal, that provision shields Internet service providers from liability only so long as they comply with it and at the same time, do not “sanction, approve or countenance” the infringing act of another person. This is clearly alluded to by the Court:

> “On the other hand, since host server operators can examine the content of material posted on their servers, and remove offensive material, an implicit authorization to communicate infringing material might be inferred from their failure to remove it after they have been advised of its presence on the server and had a reasonable opportunity to take it down.” [22]

Fourth, MLSE suggests that SOCAN has the option to file a tariff dealing with the Performing Right either pursuant to the SOCAN regime or to the general regime. This again is incorrect. If this were so, SOCAN could avoid the sanction that is part and parcel of the SOCAN regime for not filing tariffs and it would be free to deal with users individually and no longer be compelled to file proposed tariffs.

Fifth, MLSE raised the potential difficulties that may flow from the Authorization Right not being addressed in the same manner in foreign jurisdictions as in Canada. Foreign authors may have rights in Canada that they do not have in their country of residence, just as Canadian authors have rights in other countries that they do not have in Canada: this is a necessary consequence of the principle of national treatment. It is possible that, as a matter of contract, SOCAN administers the Authorization Right for some but not all rights holders. These matters have no bearing on the interpretation of the statute.

Finally, MLSE pointed out that the determination as to whether someone has authorized an act is complex and requires detailed and fact specific analysis. This is correct, but irrelevant. The issue was not whether the Authorization Right has been exercised or infringed. As well, the issue was not whether the concert tariff targets concert venues, or whether concert venues are liable for the performances of others. That is a matter for another day, and possibly another forum.

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[20] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers (C.A.)*, (2002) 4 F.C. 3, paragraphe 150. [hereafter *SOCAN v. CAIP*].
[21] *SOCAN v. CAIP* at para. 109.
[22] *SOCAN v. CAIP* at para. 160.

A. DISPOSITION

For these reasons, the Board rejects the grounds of objection raised by MLSE as to the Board's jurisdiction to certify the 2003 Concert Tariff proposed by SOCAN.

Claude Majeau
Secretary General