Copyright Board Canada

Commission du droit d'auteur Canada

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Regime Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21 *Copyright Act*, section 66.51

Members Mr. Justice William J. Vancise
Mr. Stephen J. Callary
Mrs. Sylvie Charron

Statement of Royalties to be collected by AVLA/SOPROQ for the reproduction of sound recordings, in Canada, by commercial radio stations for the years 2008 to 2011

Reasons for decision

[1] On March 30, 2007, the AVLA Audio-Visual Licensing Agency Inc. (AVLA) and the *Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec* (SOPROQ) ("the collectives") jointly filed, pursuant to subsection 70.13(2) of the *Copyright Act* (the "*Act"*) a first statement of proposed royalties for the reproduction of sound recordings by commercial radio stations. The statement, which covers the years 2008 to 2011, was published in the *Canada Gazette*. The Canadian Association of Broadcasters (CAB) objected to it.

[2] On December 18, 2007, the collectives applied for an interim tariff, pursuant to section 66.51 of the *Act*. The following day, the CAB opposed the application. On December 28, the collectives replied to the CAB's opposition.

[3] The application correctly states the test for granting interim relief as the Board has developed it. First, an interim order can be issued as long as the main application is not plainly without merit. The collectives meet this branch of the test. Second, granting the application will relieve the applicant from the deleterious effects caused by the length of the proceedings. We find that the collectives do not meet this branch of the test, because the arguments they rely on to conclude that deleterious effects exist are irrelevant, inapplicable to the collectives or just plain wrong.

[4] First, the collectives argue that neither has "tariff income" to fund the proceedings. To the contrary, we find the collectives are quite capable of supporting the financial burden of these

proceedings. They probably have significant licensing income. More importantly, and contrary to what they state, they are not without "tariff income". They jointly receive millions of dollars each year from the Neighbouring Rights Collective of Canada (NRCC) on account of the maker's share of royalties paid pursuant to section 19 of the *Act*. They also receive 15 per cent of the private copying levies, which also amounts to millions of dollars. Other collectives use their other incomes as a matter of course to subsidize proceedings before the Board.

[5] Second, the collectives note that interrogatories can be burdensome. That does not help them. The interrogatory process generally is of primary benefit to collectives; they are more interested (and justified) in seeking to understand the licensees' business model than the licensees are in seeking to understand the collectives' business practices. To the collectives, the availability of the interrogatory process is an advantage, not an inconvenience.

[6] Third, the fact that tariffs of first impression often are judicially reviewed is irrelevant at best. A certified tariff is enforceable even when challenged, unless the Federal Court of Appeal suspends its application.

[7] Fourth, the collectives argue that the CAB has contributed to significantly delay and increase the complexity of these proceedings by seeking to consolidate them with the proposed tariffs of the Society of Composers, Authors and Music Publishers of Canada (SOCAN), NRCC and CMRRA/SODRAC Inc. (CSI) for commercial radio stations. We do not view the issue in the same manner. The CAB's request was legitimate and in line with recent decisions of the Board which attempt to deal with all rights involved in a single use in the same proceedings. This is why the application was granted on February 22, last.

[8] Fifth, the collectives argue that since one of the purposes of the *Act* is to enable the collective administration of copyright, the Board should issue the interim decision so as to provide the collectives with an opportunity to recover some of their start up costs. Whatever the merits of this argument, it does not apply to these well-established collectives.

[9] The rulings of the Board on applications for interim decisions that the collectives rely upon do not help them. The *Application to Vary the Television Retransmission Tariff, 1992-1994* [1] merely made interim the certified tariff so as to allow a collective to make a claim for the broadcast day as a work of compilation from the date of the interim tariff. A certified tariff was in place, the law had changed, the collective wanted the apportionment of royalties in the certified tariff to be changed so as to reflect this change in the law, but the Board was uncertain whether it could do so retroactively while a certified tariff was in place. As for the decision of November 24, 2006 certifying the *SOCAN-NRCC Interim Commercial Radio Tariff, 2005-2007*, it was made for a

[1] (1994) 55 C.P.R. (3d) 55; (1990-1994) C.B.R. 239, February 28, 1994.

number of considerations, including to avoid money changing hands needlessly as well as numerous recalculations.[2] In the case at hand, setting an interim tariff achieves the opposite result: that tariff will almost certainly not be the same as the final one, requiring recalculations to be made.

[10] Finally, any analysis of the potentially deleterious effects of the length of the proceedings requires looking at the balance of convenience. In this instance, this balance favours the radio stations, not the collectives. As we just stated, setting an interim tariff will impose making payments that will necessarily need to be recalculated. Commercial radio stations are not legion, nor are they fly-by-night operations. Retroactive collection of the royalties should not create significant difficulties. The risk of the collectives not getting their money is non-existent. This is in clear contrast with, for example, the private copying regime, where absent a tariff it can be difficult, if not impossible, for the Canadian Private Copying Collective (CPCC) to collect the levy.

[11] Two points the collectives raised in their reply of December 28, 2007 merit attention. First, they state that the application for an interim tariff should be summarily granted because the CAB failed to show that the application does not meet the test for granting interim relief. That is looking at the issue from the wrong end of the telescope. The person who applies for interim relief bears the burden to show that relief is required, whether or not anyone else objects to the relief being granted. Second, contrary to what the collectives state, neither AVLA nor SOPROQ "are obliged to pursue proceedings before the Copyright Board in order to collectively administer their rights." These collectives are subject to the general regime. They are entitled to pursue licensing deals with individual users. Indeed, in the general regime, such agreements trump the tariff.

Claude Majeau
Secretary General

[2] Paragraph 15 of the decision.