

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Regime Reproduction of Musical Works
Copyright Act, section 70.15

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Statement of Royalties to be collected by SODRAC for the reproduction, in Canada, of musical works embodied in cinematographic works in view of their video-copy distribution for the years 2004 to 2008

Reasons for decision

On March 27, 2003, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) filed a proposed tariff for the reproduction in Canada of cinematographic works embodying musical works for video-copy distribution in 2004 to 2008, pursuant to subsection 70.13(1) of the *Copyright Act* (the *Act*). There has been no objection to the proposal which was published in the *Canada Gazette* on May 24, 2003.

The proposed tariff provides for a royalty of 1.8 per cent of the distribution revenues from video-copies containing at least one work in the SODRAC repertoire. On July 23, 2003, SODRAC reached an agreement with the Canadian Association of Film Distributors and Exporters (CAFDE). The agreement essentially replicates the wording of the proposed tariff, while lowering the royalties to 1.2 per cent. It also requires that the parties ask the Board to certify a tariff at that rate. On October 27, 2003, SODRAC informed the Board that it had signed a similar agreement with Imavision Distribution, which is not a member of CAFDE.

The Board asked SODRAC and CAFDE a number of questions about the proposed tariff. The answers they provided helped the Board understand more clearly several aspects of the proposal and the industry to which it applies.

The Board therefore certifies for the years 2004 to 2008, a tariff at the rate of 1.2 per cent, the terms and conditions of which essentially reflect the proposed tariff. This tariff applies only to users who have not concluded an agreement with SODRAC. In fact, section 70.191 of the *Act*

stipulates that the approved tariff does not apply where there are agreements in effect during the period covered by the approved tariff.

The rest of these reasons examines certain replies that SODRAC gave to the Board's questions, states reservations that the Board continues to entertain in regard to the tariff and explains some of the differences that exist between the proposed and certified tariffs.

I. TARIFF TITLE

The title of the proposed tariff refers to the "reproduction of cinematographic works". This could leave the impression that it covers the video-copy reproduction of the entire audiovisual work as such, instead of just the reproduction of the musical works it contains. The title of the tariff has been adjusted to reflect its purpose more clearly.

II. CERTIFICATION OF A SINGLE TARIFF FOR TWO COLLECTIVE SOCIETIES OWNING COMPLEMENTARY REPERTOIRES

The certified tariff is unusual in that it seeks to facilitate the major reorganization currently being carried out by SODRAC. SODRAC has established a new society, SODRAC 2003 Inc., which will eventually manage the entire SODRAC repertoire. Meanwhile, the societies co-operate, complementing each other. They have therefore requested that a single tariff be certified for the whole of both repertoires. This decision grants this request, which will ensure a smooth transition for both rights holders and users. In the remainder of these reasons, SODRAC designates SODRAC and SODRAC 2003 Inc. acting jointly and severally, consistent with the tariff wording.

III. AUDIOVISUAL WORKS COVERED

The tariff only deals with video-copies of cinematographic works initially intended for distribution in theatres or television and containing at least one musical work in the SODRAC repertoire. It allows only the reproduction of musical works already embodied in the cinematographic work, and therefore excludes the so-called right of synchronization of a musical work in a cinematographic work. It does not cover works that are initially intended to be marketed as video-copies.

For a number of reasons, it is difficult to assess, even very approximately, the percentage of the Canadian video-copy market affected by the tariff.

According to SODRAC, Canadian distributors acting for the major American studios¹ make up between 75 and 80 per cent of the market. They did not object to the proposed tariff because they anticipate being able to avoid it completely. Yet, films produced by the "majors" sometimes use at least one work in the SODRAC repertoire. In such a case, if reproductions of video-copies of

¹ Buena Vista International Inc., Columbia Picture Industries Inc., Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporations, Twentieth Century Fox International Corporation, Universal International Films Inc., and Warner Bros. Entertainment Inc.

these works are being made in Canada, the tariff would apply unless the distributor can show that the rights have already been cleared.

The Board is told that members of CAFDE, who are subject to the agreement with SODRAC and not the tariff, hold the lion's share of what remains of this market. SODRAC estimates the total annual amount of the royalties payable under the agreements and the tariff to be between \$425,000 and \$450,000.

Moreover, there is a significant discrepancy between the value Statistics Canada attributes to the Canadian video-copy market and SODRAC's estimate of the royalties it expects to collect in this market. This discrepancy was only partially explained by the fact that less than a majority of the titles that CAFDE members distribute contain at least one SODRAC work, or by the other answers given by SODRAC.

The Board accepts SODRAC's replies for the purposes of these proceedings. The remaining uncertainties can be addressed further during a forthcoming review of this tariff.

IV. COMMISSIONED WORK, PUBLISHERS' REPERTOIRE AND SODRAC'S REPERTOIRE

The Board sought to understand how an author brings a commissioned work to the repertoire of SODRAC or its foreign sister societies. It appears that this happens automatically, pursuant to the terms on which the author assigns his future works to the collective society.

The Board also sought to discover to what degree SODRAC holds the rights in works in the catalogue of publishers who are not SODRAC members. In the Board's view, once an author has assigned his future works exclusively to SODRAC, he is simply unable to assign anything to his publisher other than the right to ask SODRAC to pay him the royalties. Yet, SODRAC says it administers only the so-called composer's share as provided in the publishing contract when the publisher is not a SODRAC member. It seems that until quite recently, SODRAC was indeed collecting the publisher's share and then passing it on to the publisher. It seems as well that the articles of SODRAC 2003 Inc., which is to take the place of SODRAC, provide that an assignment is now made without prejudice to the publisher's right to control the use of the work once the publisher is not (or is no longer) a member of the society. This could involve a major change in the legal relations between the collective society, the author and his publisher.

V. TARIFF BASE AND FORMULA

The distributors and SODRAC agree that royalties should be a share of distribution revenues. Other valuation bases are of course possible. The one proposed by the parties has the merit of being simple. The Board therefore accepts it although the collection of distribution revenues is necessarily subsequent to the activity permitted by the tariff, i.e., the reproduction.

The tariff provides a fixed rate, irrespective of the number of works used. However, the use of

the SODRAC repertoire varies considerably from one cinematographic work to another. This kind of situation often calls for a tariff that varies according to the extent to which the relevant repertoire is used in a particular work.² That being said, the distributors subject to an agreement have agreed on a fixed rate although they are aware of these variations. The Board can therefore, for the time being, treat the rates established in the tariff as being based on an average use of the repertoire.

VI. ROYALTY RATE

The Board was unable to determine the actual basis for the rates agreed to by the parties. At most, SODRAC indicated that it is a compromise more or less corresponding to average rates included in an agreement in force in the 1990s.

The Board sets the rate at 1.2 per cent, as the parties requested. However, it notes that there is no indication as to whether this rate represents the true value of the relevant right.

VII. MUSICAL AUDIOVISUAL WORK

The proposed tariff does not target so-called musical audiovisual works, for which SODRAC prefers to grant licenses individually. The proposed tariff defines a musical audiovisual work as one “where the music/oral expressions ratio is at least 60/40”. This wording corresponds to the definition of a program with a significant musical content that is included in one of the conditions of license imposed by the Canadian Radio-television and Telecommunications Commission (CRTC) on MusiquePlus and MusiMax.

The definition is ambiguous. Moreover, the way in which SODRAC interprets it could produce some unexpected results.

On the one hand, the term “oral expression” is taken from a CRTC policy directed at FM radio. It refers to any content that is not music or advertising, including silences. This inclusion is justified in radio, where silence is to be avoided at all costs. The situation is quite different in the case of audiovisual content where silence may make a significant dramatic contribution.

On the other hand, SODRAC argues that the scene in which the dialogue is superimposed on the musical content must be counted as music *and* oral expression. Conceivably, however, there are at least two other ways to proceed. The first would be to omit the part entirely from the calculation, the second to count it as half of each side. In certain instances, each method produces quite different results.

SODRAC argues that the definition in question is already being used in the market and that its interpretation has not caused any problems. For this reason, the definition is the same in the tariff. The Board could examine this question again should interpretation problems arise.

² That is what the Board did in the case of the SODRAC-MusiquePlus license in regard to compilations of video-clips prepared for airlines: SODRAC-MusiquePlus license, section 3.2, www.cb-cda.gc.ca/decisions/a16112000licence-f.pdf; decision, page 14.

VIII. AUTHORIZED MEDIA

The proposed tariff defines a video-copy as a copy in any video-format such as a videocassette, a DVD, a videodisk or any other known or to be discovered similar format. The Board prefers to define a video-copy as being a copy on “any video recording medium” in order not to limit its scope.

IX. IMPOSITION OF ROYALTIES ON IMPORTED VIDEO-COPIES

The proposed tariff provides for the payment of royalties on video-copies made abroad, unless the distributor demonstrates that the royalties have been paid in another country. The Board still does not understand how the act of reproduction, when performed abroad, could trigger liability under the Canadian legislation on copyright. After a few exchanges on the matter, SODRAC asked that the reference to an imported video-copy be withdrawn from the certified tariff.

X. IMPOSING CONDITIONS ON THE USE OF VIDEO-COPIES

Section 3.1 of the proposed tariff provides for the issuance of a license “authorizing... the reproduction of cinematographic works embodying musical works of the repertoire and the sale by the distributor of such video-copies to wholesalers or retailers in view of their sale or rental to consumers for their private use.”

SODRAC administers only the right of reproduction. Nevertheless, it maintains that it can control sales or rentals by relying on subsection 13(4) of the *Act*, which allows the use of copyright to be broken down in terms of market sector, for example. It also cites paragraph 70.1(a) and section 70.12 of the *Act*, which allow the use of a collective society’s repertoire to be allocated according to “classes of uses”. It notes, moreover, that the Board has previously decided that a license may impose conditions on what a user does with the copies it makes. It states, finally, that the provision corresponds to the usual customs of the trade.

The terms and conditions of a license or tariff may provide that a copy made in accordance with its provisions may be used for certain purposes and not others. But that does not necessarily mean that SODRAC is in a position to authorize these uses. Rather, it means providing that the tariff authorizes only reproduction of musical works embodied in video-copies intended for sale or rental to consumers for their private use. The text of the certified tariff has been adjusted accordingly.

XI. TRANSFERABILITY OF THE LICENSE

Section 3.1 of the proposed tariff provides that the license is non-transferable. SODRAC has since agreed that this provision has no place in a tariff that covers the whole of an area of activity. The provision has therefore been removed from the certified tariff.

XII. APPLICATION OF THE TARIFF TO COPIES MADE BEFORE IT COMES INTO FORCE

Section 3.4 of the proposed tariff purports to apply to sales made after the date when the tariff

comes into force irrespective of when the copy was made. SODRAC argues that this does not necessarily mean that the license covers acts done before the tariff became effective. It did argue that the license is necessary whenever the distributor uses a copy irrespective of when the copy was made.

This is not the Board's opinion, at least in principle. The tariff targets the act of reproduction. It applies to copies made while it is in force. The terms of payment or other terms to which the copy subsequently is subject are simply terms and conditions.³ They in no way alter the fact that the act authorized by the license has been performed. The tariff thus allows distributors to avail themselves of the tariff for the copies made from its coming into force.

On the other hand, one could doubt that the Board, in a tariff, can authorize the copies made before this tariff comes into force. In practice however, a user who has not obtained a license has an interest in being able to regularize its situation. In its proposed tariff wording, SODRAC shows its willingness to authorize reproductions made before but exploited after the coming into force of the tariff. There is therefore no need for the Board to analyze further the course of action proposed by SODRAC. Consequently, the tariff the Board certifies offers the option for distributors to avail themselves of the tariff for copies sold after its coming into force, regardless of when they were made.

XIII. REPORTING REQUIREMENTS AND SUB-DELEGATION

The certified tariff regulates the exchange of information needed to establish the amount of royalties. Each semester, the distributor gives SODRAC a copy of the box of the audiovisual works delivered for the first time during that semester in the form of a video-copy. SODRAC then informs the distributor of the titles containing at least one work in its repertoire. The distributor pays its first royalties in the following semester. Subsequently, payment of royalties for works previously identified by SODRAC is made according to the revenues generated by those works at the end of the relevant semester.

The proposed tariff also contains a number of reporting requirements in relation to, *inter alia*, the number of copies made, the number delivered, the sales price, the distribution revenues, withdrawals from the catalogue and destruction of copies. It even provides that the destruction of copies shall be supported by a written sworn statement. These requirements seem to reflect those found in the sound recording market. Not all of this information is needed for the distribution of royalties, but SODRAC contends that it helps improve the follow-up on the use of the copies. Moreover, CAFDE and its members have agreed to comply with these requirements. The Board agrees that this information may be useful in developing an understanding of a market that has not been explored much to this point. In these circumstances, it agrees to certify the requirements as filed.

Finally, section 6.4 of the proposed tariff would allow SODRAC to require that the distributor

³ Accordingly, the tariff could provide that a copy made while the tariff applies is subject to royalties that are payable after the tariff has expired.

provide it with any other required relevant information for the purposes of this tariff. The Board remains convinced, on considerations of both law and public policy, that a tariff should not give a collective society discretionary authority to add to the reporting requirements imposed on users. SODRAC did not provide the Board with any reason that would persuade it to act otherwise in this specific instance. The provision has therefore been omitted from the certified tariff.

XIV. RETURN OF VIDEO-COPIES WHEN THE LICENSE IS TERMINATED

Section 8.2 of the proposed tariff requires that a distributor whose license has been terminated shall see to the immediate withdrawal from the market of all video-copies subject to the tariff. The Board wondered whether this provision might impose the withdrawal of copies that are no longer the property of the distributor or in regard to which royalties had already been paid.

SODRAC argues that this provision is essential and is one of the provisions that CAFDE has already agreed to have added. Once again, the measure is common in the sound recording market. SODRAC does agree that it may not demand the return of copies that have been sold and for which it has received the applicable royalties.

This reply is unsatisfactory. A possible explanation for the fact that the provision applies to relations between SODRAC and the recording companies is that the latter remain the owners of the records delivered to the retailer until they are sold to consumers. There is no indication that this is the case in the video-copy market.

Furthermore, the Board fails to see how SODRAC could request the withdrawal of video-copies that have become the property of the retailer or, *a fortiori*, the consumer, even if royalties have not been paid. This scenario is all the more likely in that the first payment of royalties on a new title may not occur until a year after it is put on the market. Absent any other justification, SODRAC will have to be content with the status of an unsecured creditor. However, SODRAC will be entitled to require the withdrawal of copies still owned by the distributor.

XV. TRANSITIONAL MEASURES

The certified tariff provides some transitional measures pertaining to reporting requirements and payment of royalties to reflect the fact that certification comes more than one year after the tariff becomes effective, on January 1, 2004.



Claude Majeau
Secretary General