Copyright Board Canada

Commission du droit d'auteur Canada

Date	2006-11-30
Citation	Files: Public Performance of Musical Works 2003-2007 and Public Performance of Sound Recordings 2003-2007
Regime	Collective Administration of Performing Rights and of Communication Rights *Copyright Act*, subsection 66.7(1)
Members	Mr. Justice William J. Vancise Mrs. Sylvie Charron Mr. Stephen J. Callary

Application by standard radio inc. for a ruling re: the "regulations defining advertising revenues" and royalties to be paid under SOCAN-NRCC commercial radio tariff, 2003-2007

Reasons for decision

I. INTRODUCTION

[1] Standard Radio Inc. (Standard) applied for a ruling that the *Regulations Defining Advertising Revenues*[1] (the "*Regulations*") permit radio broadcasters to deduct the fair market value of production services provided under "turnkey" contracts with advertisers from the advertising revenues upon which the royalties are to be paid under the *SOCAN-NRCC Commercial Radio Tariff, 2003-2007* (the "*Commercial Radio Tariff*").

[2] Beginning in 2003, commercial radio stations were required to calculate the royalties payable to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and to the Neighbouring Rights Collective of Canada (NRCC) as a percentage of "advertising revenues". Standard contends that this change permits radio stations to deduct the fair market value of certain services they provide advertisers from the rate base used to calculate their royalties. SOCAN

[1] SOR/98-447, Canada Gazette, Part II, Vol. 132, No. 19, p. 2589.

argues that nothing has changed in practice and that it remains entitled to collect the same amount of royalties as in the past.

[3] For the reasons set out below, we conclude that the Board does not have the power to grant the relief that Standard requested.

II. FACTS

[4] Commercial radio stations have paid royalties to broadcast musical works (the "performing" or "communication" right) since at least the 1920s. For many years until 2002, the royalties were calculated as a percentage of "gross income" as defined in the relevant tariffs. Beginning in 1998, commercial radio stations also paid royalties to broadcast the sound recording on which musical works are embedded (the so-called "neighbouring rights" of performers and record labels). These royalties have always been calculated as a percentage of "advertising revenues" as this term is defined in the *Regulations*.

[5] On October 14, 2005, the Board certified the *Commercial Radio Tariff*. That tariff provides that royalties payable to both collectives are now to be calculated using "advertising revenues" as the term is defined in the *Regulations*. The tariff has been the object of an application for judicial review which resulted in the tariff being set aside and remitted to the Board for reconsideration on issues that are not relevant to the issue at hand.

[6] Standard operates 51 radio stations and, as many other radio stations, sells advertising under two types of contractual arrangements. The normal contract is one where the advertiser purchases airtime through an accredited agency or produces its own advertisements in-house. In recognition of the contribution provided by the advertiser or agency, the advertiser receives a discount of 15 per cent from the normal advertising rates. Large local advertisers and national firms typically qualify for such a rate. Standard also offers a turnkey contract for those advertisers who have the station produce their commercials. Local advertisers typically sign this type of contract and pay the full advertising rate.

[7] Standard contends that the definition of "advertising revenues" in the *Regulations* permits it to exclude from the rate base the fair market value of the production services provided pursuant to turnkey contracts. That fair market value can be determined using a number of methodologies, which need not be reviewed here. Using any one of them would result in removing between $6.8 and $10.7 million from the rate base in 2005, with the average being approximately 5 per cent of Standard's reported radio revenues. The savings generated by excluding production services from the rate base are impossible to estimate with any accuracy, because of the manner in which the tariff is structured. They may very well be in the order of several hundreds of thousands of dollars for Standard alone and more than a few million dollars for all commercial radio stations if the industry's practices track those of Standard.

[8] SOCAN and NRCC disagree with the position of Standard. They contend that production revenues are included in the rate base. This creates a dilemma for Standard. It can continue to pay royalties on the value of its production services, or it can start deducting that value from the rate base, leaving itself open to a lawsuit that could result in "an award of statutory damages in a sum of not less than three and not more than ten times the amount of the applicable royalties" pursuant to subsection 38.1(4) of the *Copyright Act* (the "*Act*").

[9] As a result, on July 13, 2006, Standard asked the Board for a ruling that the *Regulations* permit radio broadcasters to deduct the fair market value of production services provided under turnkey contracts with advertisers from the advertising revenues upon which the royalties are to be paid under the *Commercial Radio Tariff*. Standard has not asked the Board to rule on the methodology that should be used in calculating that fair market value.

[10] On July 19, 2006, the Board asked SOCAN, NRCC and the Canadian Association of Broadcasters (CAB) to comment on Standard's application. On July 24, the Board asked the parties to limit their comments to the issue of whether the Board had the power to grant the application. The collectives submit that the Board does not have the power to issue the requested ruling. The CAB supports Standard's application.

III. RELEVANT LEGISLATION

[11] The relevant portions of the *Act* read as follow:

> 66.52 A decision of the Board [...] may, on application, be varied by the Board if, in its opinion, there has been a material change in circumstances since the decision was made.
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> […]
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> 66.7 (1) The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.
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> (2) Any decision of the Board may, for the purposes of its enforcement, be made an order of the Federal Court or of any superior court and is enforceable in the same manner as an order thereof.
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> (3) To make a decision of the Board an order of a court, the usual practice and procedure of the court in such matters may be followed or a certified copy of the decision may be filed with the registrar of the court and thereupon the decision becomes an order of the court.
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> (4) Where a decision of the Board that has been made an order of a court is varied by a subsequent decision of the Board, the order of the court shall be deemed to have been varied accordingly and the subsequent decision may, in the same manner, be made an order of the court.

> [...]
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> 68.1 (1) Notwithstanding the tariffs approved by the Board under subsection 68(3) for the performance in public or the communication to the public by telecommunication of performer's performances of musical works, or of sound recordings embodying such performer's performances,
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> (*a*) wireless transmission systems, except community systems and public transmission systems, shall pay royalties as follows:
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> (i) in respect of each year, $100 on the first 1.25 million dollars of annual advertising revenues,
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> […]
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> (3) The Board may, by regulation, define "advertising revenues" for the purposes of subsection (1).

[12] Until 2003, SOCAN's commercial radio tariff defined gross income as "the gross amount paid by any person for the use of one or more broadcasting services or facilities provided by the station's operator", subject to a certain number of exclusions.

[13] The relevant part of the *Regulations* reads as follows:

> 2. (1) For the purposes of subsection 68.1(1) of the *Copyright Act*, "advertising revenues" means the total compensation in money, goods or services, net of taxes and of commissions paid to advertising agencies, received by a system to advertise goods, services, activities or events, for broadcasting public interest messages or for any sponsorship.
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> (2) For the purpose of calculating advertising revenues, goods and services shall be valued at fair market value.

IV. ANALYSIS

[14] The Copyright Board only has such powers as are "[…] expressly granted to it by statute or impliedly necessary to the proper exercise of its core competence."[2] The Board clearly has the power to certify tariffs, to vary tariffs, to define in regulations what constitutes "advertising revenues" and to amend those regulations. The *Act* contains no provision that gives the Board a "standalone" power to interpret its own regulations; it can only do so in support of, or as a corollary to, the exercise of a power expressly granted to it.

[15] Standard's argument rests on the proposition that subsection 66.7(1) of the *Act* confers broad general powers upon the Board and that the interpretation of Board regulations is itself central to

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[2] Board's decision of January 19, 2004 on the *Private Copying Tariff Enforcement*, at p. 4.

the performance of the Board's mandate. Standard argues that this makes the power to clarify the Board's own regulations "[…] necessary or proper for the due exercise of its jurisdiction". The Board issued the *Regulations* in the first place, they were discussed by the Board in a number of decisions, the Board is an expert tribunal and as a result, the Board is best equipped to explain what it meant.

[16] In its decision on *Private Copying Tariff Enforcement*, the Board ruled that subsection 66.7(1) does not grant it the power to issue orders in aid of enforcing its tariffs. Briefly, the Board's ruling was that the powers granted by that subsection are limited to those required to help the Board fulfil its core purpose and must be understood in the context of both section 66.7 and the purpose of the *Act* as a whole. The wording of subsection 66.7(1) suggests that it contemplates a hearing or interlocutory proceeding where the Board is properly exercising its jurisdiction. The phrase "[…] the enforcement of its decisions" applies when the Board is exercising its core mandate, not to enforcement of its orders generally. The catchall allocation of power "[…] and other matters necessary or proper for the due exercise of its jurisdiction" must be read in this context.

[17] That reasoning is even more applicable here since subsection 66.7(1) includes a specific reference to the enforcement of the Board's decisions, but makes no mention of interpreting the Board's regulations. The *Private Copying Enforcement* decision therefore supports the proposition that the Board may interpret or clarify regulations only as a necessary incident to the exercise of a core mandate: certifying tariffs, varying tariffs, making and amending regulations. The resolution of disputes between parties concerning the interpretation of regulations is not such an exercise nor is it ancillary to such an exercise.

[18] The decisions relied on by Standard and the CAB in support of their respective arguments are not relevant to the issue at hand. The decision of the Federal Court in *SOCAN v. Canada (Copyright Board)*[3] is of no assistance, since it focussed on the Board's powers to issue procedural orders, not to make substantive rulings. *CTV Television Network Ltd. v. Canada (Copyright Board),*[4] *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*[5] and *Maple Leaf Broadcasting Co. v. CAPAC Ltd.*[6] only serve to confirm that incidental powers must be linked by necessary implication to the exercise of core functions, which is not the case here. *Chrysler Canada v. Canada (Competition Tribunal)*[7] also is unhelpful, for the reasons clearly set out in the *Private Copying Enforcement* decision.[8]

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[3] (1993), 47 C.P.R. (3d) 297 (F.C.T.D.).
[4] [1993] 1 F.C. 115 (C.A.).
[5] [1989] 1 S.C.R. 1722.
[6] [1954] S.C.R. 624.
[7] [1992] 2 S.C.R. 394.
[8] *Supra* note 2, at pp. 5,7.

[19] Standard also relies on *CRTC v. CTV Television Network Limited* in which the court stated that "[...] if there was any doubt about the terms of the condition, it was open to resolution by referring the doubt to the Executive Committee for clarification."[9] This observation was based on paragraph 17(1)(*b*) of the CRTC's then constituent statute which provided that the Executive Committee could "upon application by a licensee, amend any conditions of a broadcasting licence issued to him."[10] Significantly, Standard offered no example of this being done except in the context of the CRTC being otherwise properly seized of an issue pursuant to one of its express powers. Standard noted that "the CRTC regularly issues decisions interpreting its own regulations *in the context of particular fact situations*". [not emphasized in the original] This statement reinforces the point that the power to settle a dispute involving the interpretation of regulations is not necessary for the Board to fulfil its mandate unless the Board is otherwise properly engaged in a matter that cannot be determined without interpreting the said regulations.

[20] Our refusal to deal with the issue does not leave Standard without alternative remedies. It could apply for the Board to vary the tariff, though this would only resolve the issue with respect to SOCAN, since the tariff cannot amend the *Regulations* in which NRCC's rate base is set. It could request that the Board amend the *Regulations*. If it wishes to seek a definitive ruling on the meaning of the *Regulations* while avoiding the punitive effect of subsection 38.1(4) of the *Act*, it could continue to pay royalties on the value of production services under protest and seek a declaratory judgment; indeed, it probably will have to do so in any event, if it wishes to obtain a binding ruling on which it can rely going back to 2003 in the case of SOCAN and to 1998 in the case of NRCC.

[21] Since we conclude that the Board does not have the power to issue the ruling that Standard asked for, we do not need to rule on the other issues raised by the parties, including the applicability of the principle of *functus officio.* The application is therefore denied.

CONCURRING REASONS BY VICE-CHAIRMAN CALLARY

V. INTRODUCTION

[22] I agree with Chairman Vancise and Member Charron that the Board does not have the power to issue the ruling asked for by Standard. Notwithstanding that, I am of the opinion that I should comment on the request for two reasons. First, doing so may assist the participants in deciding on their course of action. Second, I think that a court, if asked to rule on the issue, would benefit from the Board's point of view, especially given that the position of the Board to date on this issue may

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[9] [1982] 1 S.C.R. 530, at pp. 541-542.
[10] *Ibid*., at p. 537.

not appear consistent. In my opinion, the fair market value of production services can be deducted from revenues obtained from turnkey contracts for the reasons that follow.

VI. ANALYSIS

[23] Standard argues that the value of production services is not part of "advertising revenues" as this term is defined in the *Regulations*. SOCAN commented chiefly on the jurisdictional issue and argued that Standard was attempting to redefine the scope of the tariff. That argument relies on a statement, reproduced below, in the decision that certified the *Commercial Radio Tariff* to the effect that "gross income" and "advertising revenues" are the same. For its part, NRCC argues that Standard seeks to change a "long standing practice under the NRCC Commercial Radio Tariff 1998-2002" in a way that circumvents the requirements of section 66.52 of the *Act*.

[24] The definition of "advertising revenues" is clear. It targets "[…] compensation […] received by a system to advertise […]." Creating an advertisement is not advertising. It is entirely possible to offer production services and yet have no ability to advertise. These are separate, different activities. On an ordinary reading of the section, there is no reason to assume that production services were intended to be included in advertising revenues. Modifiers such as "[…] net […] and of commissions paid to advertising agencies" further point to the idea that extrinsic costs were meant to be excluded, leaving simply the amount paid to the radio station to advertise as the rate base. Revenues derived from broadcasting public interest messages and from sponsorships, which are included, clearly are similar in nature to advertising revenues; production revenues are not. The inclusion of the fair market value of "barter" goods received in return for advertising in the rate base is also indicative of the *Regulations*' intent.

[25] The Regulatory Impact Analysis Statement (RIAS) published with the *Regulations* succinctly expresses the opinion of the Board. The *Regulations* "allow a system to exclude from the rate base the fair market value of the production services provided under a 'key in hands' contract".[11] Courts used to view with some suspicion the use of extrinsic aids as interpretive tools. Recently, however, regulatory impact analysis statements have often been considered persuasive when resolving questions about ambiguous regulations.[12] The RIAS has made clear the intent of the Board in crafting this regulation.

[26] The incongruity of including production services in advertising revenues is further highlighted by noting that the production costs of advertisements produced by large firms or by

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[11] *Supra* note 1, at 2591. The expression "key in hands" obviously refers to the French notion of "clés en mains" which is properly translated in English as "turnkey".

[12] See *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at ¶ 90-91. See also *Sullivan and Driedger on the Construction of Statutes* 4th ed. (2002), at pp. 499-500; France Houle, *Regulatory History Material as an Extrinsic Aid to Interpretation: An Empirical Study on the use of RIAS by the Federal Court of Canada*, (2006) 19 *Canadian Journal of Administrative Law and Practice*, 151.

advertisers who use the services of an agency are not captured by the definition. I see no reason why radio stations should be penalized for wearing two hats when they offer both production and advertising services to smaller local advertisers.

[27] SOCAN rightly points out that the Board made the following statements when it decided to use the same rate base for SOCAN's and NRCC's commercial radio royalties:

> SOCAN's royalties are a function of a station's "gross income" as this term is defined in the previous tariff. NRCC's royalties are a function of a station's "advertising revenues" as this term is defined in the *Regulations Defining "Advertising Revenues"* [...] The history behind the adoption of the regulations shows that the Board always intended that both definitions result in a single rate base.
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> [...]
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> SOCAN maintains that its definition of "gross income" may include income that is not included in the definition of "advertising revenues". The Board prefers to rely on its understanding that both definitions represent the same rate base.[13]

[28] That statement is correct if, and only if, "gross income" *does not include* production revenues. Whether it does remains uncertain, as the Board noted in its most recent decision certifying the tariff that commercial radio stations pay to reproduce musical works, issued five months after the Board certified the *Commercial Radio Tariff*:

> In CSI's 2001-2004 tariff, royalties were calculated on a station's "gross income" [...] The same was true of the commercial radio tariff of [...] SOCAN until 2002. On the other hand, the royalties of [...] NRCC, have always been calculated on a station's "advertising revenues" as this term is defined in the *Regulations Defining "Advertising Revenues"* (SOR/98-447).
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> In the decision certifying the *SOCAN/NRCC Commercial Radio Tariff, 2003-2007*, the Board opted to use advertising revenues for SOCAN as well as NRCC, as it saw no reason to impose separate calculations based on rate bases the Board viewed as similar or identical.
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> [...]
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> The Board now believes that harmonizing the rate bases could have some impact. CRTC statistics highlight certain revenues which may not be considered advertising revenues but which are clearly gross income.[14]

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[13] Board's decision of October 14, 2005 certifying SOCAN-NRCC Commercial Radio Tariff, 2003-2007, at p. 40.
[14] Board's decision of March 25, 2006 (Reasons dated March 31, 2006) certifying CMRRA/SODRAC Inc.'s Tariff for Commercial Radio Stations (2005 and 2006); [footnotes omitted].

[29] Irrespective of these statements, the Board's intent has remained clear. The rate bases for NRCC, SOCAN and CSI should be harmonized. Advertising revenues are a good substitute for audience share; production revenues are not. The former, not the latter, should be used to calculate the royalties payable to all collectives.

[30] Standard does not break out the value of production services in reporting its advertising revenues to Statistics Canada or the CRTC. This is not relevant for the purposes of interpreting the *Regulations*. The terminology used before other bodies carries little weight when evaluating the meaning of "advertising revenues" in the *Regulations*.

[31] The fact that radio stations may have paid royalties to NRCC on their production revenues in the past also is not relevant. As the Board recently showed, a certain state of confusion may well exist in this respect, and "[c]omparisons between the information provided by specific stations for specific months to the various collectives will help assess what has occurred in practice [...]."[15]

[32] Standard indicated in their submissions that apparent inconsistencies in their billing practices might lead to confusion. Standard charges local advertisers the same amount whether they use in-house production groups or radio station resources. Accredited agencies receive a discount that independent advertisers do not receive. The details of contracts and business decisions of a radio station might have some influence when deciding how much of any given contract can be attributed to production costs. However, some amount is spent on production costs when a radio station makes an advertisement. Some amount must be deducted for production services that are not captured in the definition of advertising revenues as discussed above. That amount should be the fair market value of the services provided but I decline to comment on how fair market value should be determined.

[33] The calculation of the fair market value of production services is not without controversy. Standard did not ask for a ruling on this point but in their submissions they included five possible methods for estimating the fair market value. It would be premature to comment on any of these methods or upon the range of valuations that have been proposed.

[34] Having said this, I am conscious that in the end, the matter will be settled definitely only through the means set out in paragraph 20 of this ruling. I too, therefore, would deny the application.

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[15] *Ibid*., at pp. 5-6.

Claude Majeau
Secretary General