

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Regime *Copyright Act*, Section 70.2
Application, pursuant to subsection 70.2(1) of the *Copyright Act*, to fix the royalties for a licence and their related terms and conditions.

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

**Society for Reproduction Rights of Authors, Composers and Publishers in Canada
(SODRAC) v. MusiquePlus inc.**

Reasons for decision

I. INTRODUCTION

On August 31, 1999, pursuant to subsection 70.2(1) of the *Copyright Act* [the *Act*], the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) asked the Board to set the royalties and related terms and conditions for a licence for the use of its repertoire by MusiquePlus inc. between September 1, 1999 and August 31, 2002. On November 22, 1999, the Board issued an interim decision authorizing MusiquePlus inc. to use the repertoire in consideration of a monthly royalty of \$1 and compliance with a number of conditions.

These reasons settle the dispute between the parties. From the outset, their limited scope should be emphasized. This is the first time that the Board deals with the reproduction right for musical works, as opposed to performance or communication rights. It is also the first time that the Board addresses a matter governed by section 70.2 of the *Act*. It is not certifying a tariff applicable to all users within a given group; it settles a dispute between a collective society and a user unable to reach an agreement which would have prevented the Board from disposing of the matter. As a result, the Board has opted to endorse the understandings reached by the parties without feeling the need to consider their appropriateness.

Finally, the determinations reached in these reasons are solely based on the record of these proceedings. In spite of abundant evidence, many questions remain unanswered. It would have been useful to learn more about the aggregate royalties that MusiquePlus inc. pays for the broadcast of video-clips and the underlying intellectual property. It would also have been useful

to be better informed of the nature of the rights which the rights holders purport to assign in this manner.

Therefore, any attempt at characterizing the present reasons as a precedent, whether generally or in the matter of reproduction rights, would be ill-advised.

II. LEGISLATIVE FRAMEWORK

Subsection 3(1) of the *Act* spells out the various components of copyright, including the right to reproduce and to communicate a work. These are “distinct rights in theory and practice ... sufficiently distinct that they are generally assigned separately, and administered by different entities.”¹

Pursuant to section 70.2 of the *Act*, the Board can fix the royalties for a licence and their related terms and conditions, at the request of a user or of a collective society that administers a licensing scheme, when the user and the collective cannot agree on the terms of that licence. The decision sets the terms and conditions for a minimum one-year period. Subsection 70.3(1) provides that the Board shall not proceed when advised that an agreement touching the matter in issue has been reached.

It may be noted that section 30.8 of the *Act* allows a programming undertaking to make ephemeral recordings under certain conditions. Subsection (8) provides that the section does not apply where a licence for making such copies is available from a collective society; consequently, it is not necessary to take this provision into account for the purposes of these proceedings.

III. THE FACTS

The record of these proceedings together with a visit to the premises of MusiquePlus inc. establish the following facts, most of which are not in dispute.

A. SODRAC

SODRAC is a collective society which administers the reproduction right in musical works. It acts for thousands of Canadian rights owners and administers in Canada the constantly evolving repertoire of a number of foreign societies. Unlike the situation in the performance rights sector,² SODRAC is not alone in the business of the collective administration of reproduction rights. While its Canadian repertoire is essentially comprised of works in French, the Canadian Musical Reproduction Rights Agency (CMRRA) acts on behalf of a majority of Canadian rights holders for works in English. Indeed, SODRAC does not invariably hold all of the rights on titles that are part of its repertoire.

¹ *Bishop v. Stevens*, [1990] 2 S.C.R. 467, 477-478.

² The Society of Composers, Authors and Music Publishers of Canada (SOCAN) administers the performance and communication rights of practically all Canadian and foreign rights holders.

B. MUSIQUEPLUS AND MUSIMAX

MusiquePlus inc. operates two French-language specialty television services: MusiquePlus and MusiMax (the services). The Canadian Radio-television and Telecommunications Commission licensed the former in December 1987, the latter in 1996. These services derive their revenues from advertising and subscriptions. MusiquePlus inc. is a partner in TV MaxPlus Production inc. (TV MaxPlus), which produces programs designed mainly for the services, and occasionally retailed to other broadcasters.

At the core of the services' programming is the video-clip featuring a musical work. Programs that consist of back-to-back video-clips account for 77 per cent of air time.³ Other programs also have a high musical content. Given the absence of more reliable data, the Board accepts SODRAC's analysis that music represents 90 per cent of the services' air time. For the same reasons, and after considering the many adjustments made to the data, the Board accepts the evidence submitted by SODRAC to the effect that its repertoire represents 27.67 per cent of air time at MusiquePlus, and 32.37 per cent at MusiMax.

While their programming cycles are not identical, both services rely heavily on program repetition during their broadcast day. With a few exceptions, MusiquePlus repeats twice the programming originally delivered between noon and 8 p.m. MusiMax also repeats original programming, albeit on a less rigid rotation pattern. MusiquePlus airs weekly 64 hours of "original" programming (excluding repeats over the week) and MusiMax, 60 hours.

C. REPRODUCTION OF MUSICAL WORKS

Because of the manner in which they operate, the services make a lot of copies of musical works. In fact, they broadcast only copies they have made.

For instance, each video-clip received is first reproduced on a new magnetic tape and given the getup and formatting required for broadcast. A backup copy is made if extensive use of the clip is anticipated. Those clips that are expected to be in lesser use are often grouped on the same tape. These copies are stored for an indefinite period of time in the video library of MusiquePlus inc.,⁴ which also copies third-party programming broadcast by the services.

All of these copies are, subsequently and as necessary, recopied during the first eight-hour broadcast cycle of the MusiquePlus service, reproduced in programs featuring clips or clip excerpts, incorporated within programs produced by TV MaxPlus, digitized in the video server used for editing and broadcasting MusiMax programming, and even digitized in a computer when a show sold to a third party must be reformatted to meet the latter's requirements. MusiquePlus inc. stores in its video library copies of programs with an editorial content aired by the services as well as original tapes subsequently used for making programs.

³ All references to air time discount the time allocated to commercials.

⁴ In fact, it is the existence of this practice, leading to the building of a significant collection of older works, that allowed the creation of MusiMax.

MusiquePlus inc. also copies musical works when producing clip compilations for in-flight viewing and includes a number of musical or clip excerpts on the Internet site of MusiquePlus.

A decision of the Board authorizes MusiquePlus inc. to communicate musical works that form part of the SOCAN repertoire.⁵ It also holds a licence from the Audio Visual Licensing Agency (AVLA) for the reproduction and communication of the video-clip as a cinematographic work. It has never held a licence from a collective society allowing it to reproduce musical works.

IV. THE PARTIES' ARGUMENTS

SODRAC seeks to receive 1.58 per cent of the revenues of MusiquePlus and 1.8 per cent of those of MusiMax. It also requests inclusion in the licence of several conditions dealing with, among other things, the fixation, reproduction, use and storage of authorized copies. Its claims are essentially based on an evaluation prepared by its consultant, Mr. Paul Audley.

While acknowledging its obligation to pay royalties to SODRAC, MusiquePlus inc. argues, based on the testimony of Mr. Farès Khouri, an economist, that the amounts sought are unreasonable. It proposes instead a flat rate of 0.15 per cent. It also questions SODRAC's right to control the use of the reproductions it authorizes or to be remunerated for such use.

The parties agree to take as a starting point the royalties that SODRAC receives from the TVA and TQS networks, adjusted to take into account the fact that the services make greater use of music than TVA or TQS. They also agree that the royalties should be based on the revenues of the services.⁶ There is no need to explain how the experts reached these conclusions.

Where the experts disagree is on the adjustments they would subsequently make. Mr. Audley would increase the rate to take into account the fact that the services make greater use of foreground music (by contrast to background or production music) than conventional television. He justifies this by arguing that music is necessarily worth more when it is the cornerstone of programming than when it is used as an accompanying component. Mr. Khouri would lower the rate to take into account the fact that the services air the same programs several times. He claims that a repeated program has essentially no residual value.

The parties also disagree on the value to be assigned to intermediate copies. SODRAC argues that the large number of copies made of the same clip (six or more) must be taken into account; MusiquePlus inc. claims that intermediate copies have no intrinsic value.

Finally, there is disagreement on the issue of fair dealing. MusiquePlus inc. requests an

⁵ Although the holder of a licence from SOCAN is the party that delivers the services to the consumer, the networks are jointly and severally liable for paying the fees. See the April 19, 1996 decision certifying SOCAN Tariff 17, www.cb-cda.gc.ca/decisions/19960419-m-b.pdf, [1996] 70 C.P.R. (3^d) 501.

⁶ This does not entail merging reproduction and performing rights. Remunerating the holder of the reproduction right *on the basis* of the broadcast is not tantamount to remunerating him *for* the broadcast. The fee to be collected by SODRAC is for the act of copying, in spite of the fact that the rate base is in respect of broadcasting and the revenues derived therefrom.

adjustment in this respect; SODRAC maintains that the requirements for availing oneself of this exception are not met.

V. ANALYSIS

Had it been necessary to do so, the Board would have rejected the approach put forward by Mr. Khouri because of the many difficulties it involves. His is a three-step approach. First, he calculates a minute rate payable for the use of sound recordings. Second, the amount of minutes to which the rate is applicable is determined (he excludes repeat use). Finally, he proposes a process to be used for collection of the royalties.

A review of previous Board decisions dealing with commercial television reveals a diametrically opposite approach: the starting point is always the tariff applicable to commercial stations, calculated as a percentage of the revenues of broadcasters. There has never been an attempt to determine the amount that a specific broadcaster should pay for one minute of music.⁷ In any event, considering that the experts come essentially to the same conclusions, further analysis of their reports is not necessary.

The parties concur that MusiquePlus inc. needs access to the repertoire of SODRAC. By far the most important element of production of the services is the video-clip, which relies on musical content for its very existence. The services use the reproduction right in such way as to generate, by virtue of the licence, significantly greater added value, compared to conventional broadcasters.

The principal issues to be decided here are the importance to be given to the number of copies made, the value of intermediate copies, and proposed adjustments with respect to foreground music and repeat programs. The Board intends to reject any adjustment for these factors.

The number of copies is of little importance, especially since SODRAC does not seek payment on this basis, but according to the revenues generated by broadcasting activities. For the same reason, there is no need to evaluate intermediate copies, although it would be a fallacy to claim that they are of little or no value. The business model of the services depends upon reproduction, which allows them to generate profit. It may be noted that programming costs represent a much smaller share of their expenditures than that of other French-language specialty services.⁸ These savings are largely attributable to the use of the reproduction right, and to repeat programming:

Counsel for the appellant emphasized several times that, in acting as it did, his client had not obtained any unjust enrichment at the respondent Bishop's expense. That is not only

⁷ See, for example, note 5 above. This attempt to determine a rate per minute is all the more surprising since Mr. Khouri recognizes that a rate based on income automatically takes into account the varying ability to generate advertising revenues and that the rate per minute, all things being equal, already fluctuates according to sales: Exhibit MusiquePlus-20, paragraph 42, note 17 and paragraph 23.1.

⁸ Mr. Audley submits that the services would have spent an additional amount of 2.2 million dollars in 1999 on programming if the share of income allocated to these expenses had been the same as for other French-language specialty services.

irrelevant but incorrect. If the appellant recorded Bishop's work, it did so because it was in its interests to do so. It thereby ensured that its broadcasts would be of a better quality and could later be rebroadcast more cheaply. It is quite understandable that the appellant should have to pay for these benefits.⁹

Likewise, there is no need to reduce the rate on the ground that the services rerun the same programs and frequently repeat the most popular clips. First, if reruns occur, it is because the services see them as a means of generating additional income. A rate based on income takes this factor into account. Popular reruns generate more revenue; unpopular ones generate less. Second, some repetitions have greater value because they are familiar and remind the viewer that an event is pending (the start of a program, for instance); again, the adopted formula takes this into account. Third, as already noted, the fact that the services are able to rerun a copy, instead of starting from scratch, allows them to benefit from significant savings.¹⁰ Fourth, as Mr. Khouri admits, the target audience of the services frequently wants to hear the same works repeated.¹¹ Fifth, it may be presumed that viewers attach greater value to the broadcast they are watching, no matter whether or not it is a rerun, than to an alternative program.¹² Sixth, licences negotiated freely usually limit the number of authorized broadcasts, which shows that reruns have value.

The Board does not propose to take into account the fact that the services use a high proportion of foreground music. This is a relevant factor for purposes of distribution: SODRAC and many other collectives remunerate foreground music more than accompaniment music. This being said, the fact that licensees agree among themselves to proceed in this manner in the allocation of royalties does not automatically imply that the same should be done in setting the rate payable by the user, for the reasons that follow.

First, accepting this factor for the sole reason that it applies to the allocation process would be to rely entirely on one of the parties in the choice of one of the key components in setting a rate. Second, it has not been shown that it is relevant from the user point of view. Third, applying this factor is likely to give rise to practical difficulties which might themselves negate any related benefit. At least, this cannot be envisaged without a reliable means of identifying the uses of musical works and sound recordings. Fourth, there are, as already mentioned, certain forms of production music (such as the theme in a newscast) that merit special treatment because of their power to draw an audience, giving rise to further complications at a practical level.

The Board does not intend, finally, to take into account the laws and regulations which make it

⁹ *Bishop v. Stevens*, [1987] 18 C.P.R. (3^d)257, 260 (F.C.A.).

¹⁰ Mr. Khouri even declared that the rights owners of SODRAC should participate in the added value deriving from their rights, adding that there can be no increase in productivity, in spite of all technological innovations, without the authorization of SODRAC: tr. p. 573. Since SODRAC did not press this point, it is not taken into account in these reasons.

¹¹ Exhibit MusiquePlus-20, paragraph 38.

¹² Mr. Khouri dealt at length with the relative prices paid by MusiMax and TQS when they jointly purchased the same program. For the present purposes, it is sufficient to note that if the relative revenues of the two broadcasters and their business models (individual broadcasts vs broadcast days) were to be taken into account, much closer rates per unit of use would have been obtained than by relying merely on raw data.

mandatory for the services to use more Francophone material. Their obligations towards rights holders with regard to the remainder of the repertoire are accordingly diminished. In any case, the Board has always refused to discount the value of a repertoire for this reason alone.

There remains the issue of fair dealing. Sections 29.1 and 29.2 of the *Act* provide, among other things, that fair dealing for the purpose of criticism, review or news reporting does not infringe copyright if the source and, if provided, the name of the author, are mentioned. MusiquePlus inc. argues that four of its programs, representing seven per cent of the air time of MusiquePlus, constitute fair dealing.

The programs concerned are focussed on criticism, review and news reporting. It is therefore probable that they involve instances of fair dealing. Nevertheless, there should be no reduction of the magnitude requested for the following reasons.

First, even if it is accepted that the programs mentioned fill the air time indicated, the instances of fair dealing involved necessarily represent much less than the seven per cent share of air time. To begin with, nothing shows that all of the uses that could be termed fair dealing are actually so. After viewing the programs, the Board notes that the name of the author is seldom mentioned; this must be done if the information has been provided, as one may presume occurs.¹³ Further, these programs involve uses of works that do not qualify as fair dealing, since the works in question (production music, for example) are not being criticized, reviewed or reported upon. Finally, although music usually accounts for 90 per cent of the services' air time, the notion of fair dealing implies a lower rate of music use during the program concerned, precisely to make room for criticism, review or reporting.

Second, it may be assumed that TVA and TQS also practice fair dealing with the SODRAC repertoire, but such uses have not been discounted when calculating the use of the repertoire by these two networks.

As we shall see later, the Board will adjust the formula it applies to calculate the rate so as to take into account the instances of fair dealing that actually occur. This rounding off results in a rebate of one fifth of one per cent.

A. CALCULATION

The licence rate should then be the average of the percentage of the revenues earned by TQS and TVA and paid to SODRAC, adjusted for the relative use of the SODRAC repertoire. The data provided by the parties to the Board correspond sufficiently to allow those put forward by SODRAC to be used; they are more complete, and there is no prejudice to MusiquePlus inc.

These data give rise to certain methodological difficulties. For example, a four-year average is used to obtain a repertoire use rate for TVA and TQS, but only a three-year average to calculate

¹³ Forty per cent of video-clips mention the name of the right holder in the musical work: tr. page 385. Furthermore, the name of the author appears on the sleeve of most, if not all, popular music CDs. It is therefore easy for the host to mention this name when he has in hand the CD he is commenting upon.

the use rate of the services. Since this approach is to the advantage of the services, there is no harm in using the data put forward by SODRAC.

Also, SODRAC uses for its calculations simple averages that are not weighted according to viewing or revenue. Yet, TQS' revenues represent at most 25 per cent of those of TVA. As for the revenues of the services, they stood at \$13.5 million for MusiquePlus and \$5.3 million for MusiMax for the fiscal year ending August 31, 1999.

Weighting based on revenues yields the following figures:

| CALCULATION OF THE ROYALTY RATE CALCUL DU TAUX DE REDEVANCES | | | | |
|--|---|------|-------------|----------|
| | TVA | TQS | MusiquePlus | MusiMax |
| 1. Use of the SODRAC repertoire (% of air time) Utilisation du répertoire SODRAC (% du temps d'antenne) | 8.35 | 5.32 | 27.64 | 32.37 |
| 2. Royalties paid to SODRAC (% of revenues) Redevances versées à la SODRAC (% des revenus) | 0.24 | 0.21 | | |
| 3. Revenue ratios/Rapports de revenus | 4/5 | 1/5 | 13.5/18.8 | 5.3/18.8 |
| 4. Weighted average use of the SODRAC repertoire (% of air time) [1 × 3] Moyenne pondérée d'utilisation du répertoire SODRAC (% du temps d'antenne) [1 × 3] | 6.68 | 1.06 | 19.84 | 9.13 |
| 5. Weighted average of royalties paid to SODRAC (% of revenues) [2 × 3] Moyenne pondérée des redevances versées à la SODRAC (% des revenus) [2 × 3] | 0.18 | 0.05 | | |
| 6. Royalty: $\frac{[(5 \text{ TQS} + 5 \text{ TVA}) \times (4 \text{ Mpls} + 4 \text{ Mmax})]}{(4 \text{ TQS} + 4 \text{ TVA})}$ Redevance: $\frac{[(5 \text{ TQS} + 5 \text{ TVA}) \times (4 \text{ Mpls} + 4 \text{ Mmax})]}{(4 \text{ TQS} + 4 \text{ TVA})}$ | $\frac{0.233 \times 28.97 = 0.872\%}{7.74}$ | | | |

Rounding to 0.87 per cent is a means of taking into account the fair dealing which the services claim to practice. The setting of a single rate for the two services avoids the possibility of assigning revenues to the account of the service having a lower rate for the sole purpose of reducing the amount of the royalties.

The total royalties for the fiscal year ending August 31, 1999 would thus be \$163,560.

B. THE INTERNET

Although each service operates an Internet site, it appears that only the MusiquePlus site contains copies of musical works. MusiquePlus inc. requests that the licence apply to all copying activity based on a single formula. SODRAC requests \$1,200 per site annually, or one per cent of revenues for a licence allowing a surfer to hear copies carried on a site, not to include downloading. The only comparison to what is proposed is a licence issued to a record retailer, at

a price lower than that requested in these proceedings.

It is premature to deal with the issue of downloading. First, it appears that this is not as yet allowed by the services. Second, downloading is already the subject of a proposed tariff from SODRAC; to address the issue at this point would be tantamount to denying SODRAC a right clearly granted to it exclusively under the *Act*.

It is however appropriate to deal with the issue of copies available for listening on the Internet site of the services. At present, these sites are used to attract viewers. Consequently, the value of the copy made should be assessed on the basis of the viewing value of the program towards which an attempt is made to attract the visitor, rather than according to its listening value on the site. The formula to be adopted already fulfills that objective.

C. MUSIC COMPILATIONS INTENDED FOR AIRLINES

The parties agree that the royalties in respect of compilations intended for airlines should be based on the proportion of the SODRAC repertoire used in a given compilation. SODRAC requests a base rate of six per cent, while MusiquePlus inc. would set it at one per cent.

Compilations designed for airlines contain video-clips only. AVLA collects six per cent of the revenues from the sale of such compilations. Setting the base rate of the SODRAC licence at the same level is tantamount to ruling, implicitly, on two issues in respect of which the record of these proceedings is much too incomplete: the relative value of the reproduction right for video-clips and of the underlying musical work, and that of the reproduction right granted by AVLA compared to the communication right. Having said this, applying the formula chosen by the Board would result in a royalty rate of approximately three per cent if all of the music used by the services belonged to SODRAC.¹⁴ It is this rate, therefore, which will be used for the purposes of musical compilations.

The parties agree to determine how much of SODRAC's repertoire is used in a compilation by using the duration of the compilation as the standard. They also agree on how to exchange relevant information. MusiquePlus inc. will first provide SODRAC with information allowing SODRAC to determine what it owns. SODRAC will then provide to MusiquePlus inc. a list of works that are part of its repertoire. Finally, MusiquePlus inc. will calculate and pay royalties using the information received from SODRAC.

Under the licence, only the making of a master tape is allowed; copies made by the airlines are not authorized. This is logical in that the licence pertains exclusively to MusiquePlus inc. It is up to the airlines to go to SODRAC if they need a licence in this regard.

D. SALE OF PROGRAMS

MusiquePlus inc. asks that it be allowed to reproduce its programs for sale to other broadcasters

¹⁴ This result is obtained by dividing the rate set by the Board by the percentage of air time that the SODRAC repertoire represents, i.e. $0.872/0.2897 = 3.01$.

in exchange for one per cent of the proceeds of such sales. SODRAC is reluctant to grant a blanket licence for the sale of such programs on the ground that the price of the licences it issues in this market fluctuates according to certain criteria such as duration or the number of airings. SODRAC adds that the Board cannot oblige it to grant a blanket licence covering all of its repertoire, especially in this context.

The Board has the power to issue the licence requested. The conditions set out in paragraph 70.1(a) and subsection 70.2(1) of the *Act* are fulfilled: SODRAC administers a licensing scheme covering the contemplated use and MusiquePlus inc. wants a licence. It is the blanket character of the licence requested that SODRAC challenges, arguing that it would not be appropriate.

The Board will allow the resale of programs first produced for broadcast by the services. The factors to which SODRAC refers (duration, number of broadcasts, size of the target audience) are precisely those that MusiquePlus inc. will take into account in its negotiations with potential buyers. MusiquePlus inc. agrees to pay a percentage of the sale price, regardless of the fact that the program buyer might already be a SODRAC licensee. SODRAC states that it issues gratuitously licences to producers of programs designed for one of its licence holders. It is thus difficult to understand in what respect the licence contemplated might be prejudicial to SODRAC.

On the other hand, it appears that neither MusiquePlus inc. nor TV MaxPlus currently produce programs designed exclusively for third parties. Under these circumstances, it seems to be preferable to limit the scope of the licence to the known activities of MusiquePlus inc.

The latter will be free to sell these programs to whoever it thinks fit, without having to first ensure that the buyer holds a SODRAC licence. However, it will be required to keep SODRAC informed of program sales, so that SODRAC can take any measures it deems necessary.

With regard to royalties, they should be the same as those that apply to compilations intended for airlines. The parties agree to determine how much of SODRAC's repertoire is used in a program by using as the dominator music airtime for programs containing less than 50 per cent of music, and program airtime in all other cases. The information exchange mechanism will be the same as for compilations.

E. SETTING LIMITATIONS TO CONTEMPLATED USES: THE DESTINATION RIGHT

MusiquePlus inc. claims that SODRAC, in an attempt to limit the purposes for which copies made pursuant to the licence might be used, seeks to introduce the notion of a destination right. SODRAC argues that it merely seeks to include in the licence terms and conditions that are customary in the business. The Board agrees with SODRAC. What follows will suffice to dispose of this question for the purpose of the present decision.

Some foreign copyright legislation makes any assignment of copyright contingent upon specifying, among other things, the extent and purpose (or destination) of the rights being

assigned. The conditions of contracts dealing with the destination of copies can thus be enforced against third parties, despite the principle of privity of contract.¹⁵ The rights holder is in a position to demand additional royalties from third parties when there is a change in the destination of an otherwise legally acquired copy (for example, when a copy sold for private listening is used to effect a public performance).

These concepts are not relevant to the present proceedings. SODRAC is not requesting that MusiquePlus inc. pay for copies it acquires from third parties, but only for those copies that it acknowledges making itself. Neither does it ask to be paid for any subsequent changes of destination of the copies made pursuant to this licence, presuming that MusiquePlus inc. might dispose of them. It does not request, finally, control of the use of copies made by parties other than MusiquePlus inc., but only control of the use made by MusiquePlus inc. of the copies it makes.

Since what is involved here is a contractual issue, a determination must be made as to whether SODRAC can, contractually, seek to oversee the use made by MusiquePlus inc. of the copies it makes. In this regard, the principle of freedom of contract should prevail: the contracting parties may stipulate anything upon which they may agree, as long as it is not contrary to law or public policy.

In any event, the evidence presented in these proceedings tends to demonstrate the opposite of what MusiquePlus inc. argues. First of all, copyright includes the right to prohibit use. Anyone having this power is consequently able to establish the conditions under which permission to use is granted. Further, Canadian copyright law appears to allow, but does not require, the setting up of such contractual conditions when it refers, in subsection 13(4) of the *Act*, to licence assignments for “any interest in the right”.¹⁶ Finally, agreements by which MusiquePlus inc. acquires programming, like those under which it licenses its own, appear to include provisions dealing with the uses that may be made of a copy.

MusiquePlus inc. also argues that if SODRAC can proceed in this manner by virtue of the law of contract, it follows that, since what is involved is not a right created by the *Act*, this matter is beyond the competence of the Board under section 70.2. Courts of law have interpreted very broadly the power of the Board to establish the terms and conditions of a tariff.¹⁷ Since what is

¹⁵ The right of destination is especially relevant to third party users of copies of a work: Frédéric Pollaud-Dulian, *Le droit de destination*, Bibliothèque de droit privé, Volume 205, Paris, LGDJ paragraphs 179 *in fine*, 184 *in fine*.

¹⁶ Even those regimes that provide for the right of destination acknowledge the efficacy, though limited, of the law of contract in this respect. See, among others, Pollaud-Dulian, paragraphs 199, 231.

The authorities that MusiquePlus inc. refers to in paragraph 15 of its brief merely go to establish that copyright does not limit the use that can be made of a copy. Neither Fox (*The Canadian Law of Copyright and Industrial Design*, 2nd ed., Toronto, Carswell, 1967, 340) nor Goudreau (*Les droits patrimoniaux* (1984), 1 R.C.D.A. 25, 34) address the possibility of achieving the same result by way of the law of contract. The decision in *CBS Songs Limited v. Amstrad Consumer Electronics PLC*, [1988] 1 A.C. 1013, 1031 is to the same effect: “the proprietor of an intellectual property right may not use it to prevent or control dealings in non-infringing activities”.

¹⁷ *Maple Leaf Broadcasting Company Limited v. CAPAC*, [1954] S.C.R. 624; *CAPAC v. Sandholm Holdings Limited*, [1955] Ex.C.R. 244; *PROCAN v. Canadian Broadcasting Corporation*, [1986] 7 C.P.R.(3^d) 433 (F.C.A.); *SOCAN v. Canadian Association of Broadcasters*, [1999] 1 C.P.R. (4th) 80 (F.C.A.),

involved here is an arbitration, the Board finds itself substituted to the will of the parties. It can accordingly impose on them whatever they could have agreed to themselves.

F. USING A WORK FOR ADVERTISING PURPOSES

The parties agree to allow the making of copies intended for self-promotion only. They also agree not to allow the use of works that are not already included in a program. SODRAC proposes the synchronization of the work with the same images as appear in the audiovisual work it intends to promote.¹⁸ MusiquePlus inc. would like to be able to synchronize any musical work used in a program with images excerpted from the same program.

The Board accepts that it cannot grant more than SODRAC could. Agreements entered into with Canadian rights owners do not appear to limit the uses for which a licence may be issued. Agreements entered into with foreign collective societies seem, however, to provide that contracting societies “notify the other in writing of any limitation or reservation in the contents of its repertoire and in its administrative rights”. Only eight out of a total of 39 reciprocal agency agreements on file contain such a statement or provisions to like effect.¹⁹ Both the Board and MusiquePlus inc. are entitled to presume that SODRAC is able to authorize use for purposes of self-promotion where no documents to the contrary have been filed. Consequently, SODRAC will be required to provide such documentation to MusiquePlus inc. so that it can act accordingly.

The possibility of synchronizing selected segments of a program with the music already contained therein allows the highlighting of moments that are most likely to incite the viewer to view the complete work. Since SODRAC’s revenues are based on those of the services, it is in SODRAC’s interest that this be done. Furthermore, the Board does not see how such practices might be prejudicial to the moral right of the composer of a musical work who has already agreed to the incorporation of the work in the program being promoted. For these reasons, the licence will authorize the use requested by MusiquePlus inc.

G. COMING INTO FORCE

The parties agree that the licence is to come into force on September 1, 1999, that is on the day following the filing of SODRAC’s application. The Board has never had to decide whether or not a decision rendered pursuant to subsection 70.2(2) of the *Act* comes into force on the date of the filing of the request; it has limited itself to speaking in terms of uncertainties in such cases.²⁰ However, the Board has already come to the conclusion in this decision that it can impose on the parties whatever they could have agreed to. There is no doubt that the parties could, here and

www.fja.gc.ca/fr/cf/1999/orig/html/1999fca24162.o.en.html.

¹⁸ According to a provision of its contract with TQS: SODRAC-60, Appendix C.

¹⁹ The countries involved are Spain (SODRAC-22, p. 144), Switzerland (SODRAC-24, p. 151), Israel (SODRAC-27, p. 167), Hungary, (SODRAC-30, p. 179), Austria (SODRAC-31, p. 185), Hong Kong (SODRAC-34, p. 201), the Philippines (SODRAC-36, p. 210) and Roumania (SODRAC-50, p. 278).

²⁰ See, among others, the interim decision issued in these proceedings www.cb-cda.gc.ca/decisions/a22111999-b.pdf, [1999] 3 C.P.R. (4th) 487.

now, agree to a licence coming into force on September 1, 1999.

MusiquePlus inc. requests that the royalty for the period from September 1, 1999 to the date of this decision be that established in the interim decision of November 22, 1999, or \$1 a month. It perceives this as a way of penalizing SODRAC for having failed to fulfil certain information requirements incumbent upon it under section 70.11 of the *Act*. SODRAC initially provided an incomplete repertoire and only filed its complete repertoire close to the date of the hearings. The Board refuses to act in this manner. To begin with, the obligation incumbent upon SODRAC is to respond within a reasonable time to reasonable requests for information regarding its repertoire. Considering the extent of the information requested and the fact that this was unprecedented for both parties, it is not clear that SODRAC behaved in an unreasonable fashion. Even if such were the case, a penalty in the order of \$200,000 would be out of proportion with the alleged fault.

H. INTEREST

Usually, the Board includes in its decisions the payment of interest to account for the time elapsed between the effective date of the decision and the date on which it is issued. It also provides for interest on late payments. In this instance, however, SODRAC has not asked for interest and the Board will not follow its usual practice.

VI. WORDING OF THE LICENCE

The Board has reviewed the text proposed by SODRAC, mainly for the purpose of eliminating repetitions and accurately reflecting its decision. Each party received a draft of the licence so as to avoid any changes with unforeseen consequences. Their numerous suggestions have greatly helped to simplify and clarify the wording. The Board thanks the parties for their cooperation.



Claude Majeau
Secretary General

Copyright Board
Canada



Commission du droit d'auteur
Canada

Ottawa, le 16 novembre 2000

DOSSIER : 70.2-1999-2

Licence autorisant MusiquePlus inc. à reproduire les œuvres faisant partie du répertoire de la Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) inc. pour la période du 1^{er} septembre 1999 au 31 août 2002

Article 1 : Définitions

1.1 Les définitions suivantes s'appliquent à la présente licence.

«Œuvre» : œuvre ou partie d'œuvre musicale ou dramatico-musicale dont la SODRAC est habilitée à autoriser la reproduction au Canada, dans la proportion des droits qu'elle détient et sous réserve des dispositions des ententes la liant à des sociétés de gestion étrangères;

1.2 «Rapport musical» : document énumérant entre autres, à l'égard de chaque œuvre utilisée durant une émission, son titre, sa durée de diffusion ainsi que les noms de son auteur et de son compositeur.

1.3 «Service» : MusiquePlus ou MusiMax.

Article 2 : Objet

2.1 La présente licence autorise MusiquePlus inc., les Services et TV MaxPlus Productions inc., sous réserve des dispositions qu'elle comporte et du droit moral de l'auteur, à fixer une Œuvre, sous quelque forme matérielle et par quelque procédé connu ou à découvrir que ce soit, en y associant ou non des images, pour

2.1.1 produire une émission de télévision destinée à être diffusée sur les ondes d'un Service;

2.1.2 diffuser la programmation d'un Service;

2.1.3 annoncer une émission ou la programmation d'un Service, dans la mesure où l'Œuvre utilisée est une Œuvre synchronisée dans l'émission ou la programmation ainsi annoncée;

2.1.4 rendre une Œuvre accessible sur le site Internet d'un Service, pour autant que des moyens techniques appropriés empêchent les visiteurs du site de la télécharger;

2.1.5 conserver le patrimoine télévisuel d'un Service (copies d'archives);

2.1.6 produire la bande maîtresse d'une compilation de vidéoclips destinée à l'écoute et au visionnement à bord des avions;

2.1.7 vendre ou concéder en licence à des tiers une émission visée à l'alinéa 2.1.1.

2.2 Sous réserve de l'alinéa 2.1.3, la présente licence n'autorise pas MusiquePlus inc. à fixer une Œuvre dans le but de promouvoir

2.2.1 une émission, la programmation d'un Service ou l'image corporative de MusiquePlus inc., ou

2.2.2 un produit, une cause, un service ou une institution.

Article 3 : Considération

3.1 Pour les copies effectuées en application des alinéas 2.1.1 à 2.1.5, MusiquePlus inc. verse à la SODRAC 0,87 pour cent des revenus reliés aux activités de diffusion et de production des Services, incluant mais sans s'y restreindre les revenus d'abonnement, les revenus de publicité ainsi que les revenus provenant d'activités reliées ou associées aux activités de diffusion, qui en sont le complément nécessaire, ou ayant comme conséquence l'utilisation des services et installations de diffusion, mais excluant les revenus provenant d'investissements ou de loyers ainsi que les sommes versées pour la réalisation d'une émission pour le compte d'un tiers et qui en devient le propriétaire.

3.2 Pour les copies effectuées en application des alinéas 2.1.6 et 2.1.7, MusiquePlus inc. verse à la SODRAC trois pour cent des revenus tirés de la vente ou concession de la compilation ou de la licence, multiplié par le ratio dont le numérateur est la durée des Œuvres utilisées dans la compilation ou l'émission, ajusté selon le pourcentage des droits détenus par la SODRAC dans celles-ci, et dont le dénominateur est soit

3.2.1 la durée totale des œuvres utilisées dans la compilation ou l'émission dont le contenu musical est de 50 pour cent ou plus, ou

3.2.2 la durée totale de toute autre compilation ou émission.

Article 4 : Modalités de paiement; obligations de renseignements et de rapport

4.1 La SODRAC fait parvenir à MusiquePlus inc., de temps à autre ou sur demande raisonnable, la liste à jour de ses membres, des sociétés étrangères qu'elle représente et de son répertoire, à moins que MusiquePlus inc. puisse consulter les renseignements pertinents sur le site Internet de la SODRAC.

4.2 La SODRAC fait parvenir à MusiquePlus inc., dans les dix jours de leur réception, copie de tout avis ou disposition d'entente limitant ou réservant les droits de la SODRAC à l'égard du répertoire d'une société étrangère, dans la mesure où cette limite ou réserve affecte la portée de la présente licence.

4.3 Pour les copies effectuées en application des alinéas 2.1.1 à 2.1.5, MusiquePlus inc. remet à la SODRAC, au plus tard le dernier jour du mois suivant le mois pertinent :

4.3.1 copie des Rapports musicaux des émissions qu'elle a produites, dans la mesure où MusiquePlus inc., détient l'information;

4.3.2 un rapport journalier de diffusion, sur support informatique, identifiant le titre, l'auteur, le compositeur, l'interprète et la maison de disque ou le producteur des œuvres diffusées sur les ondes d'un Service, dans la mesure où MusiquePlus inc. détient l'information;

4.3.3 copie des Rapports musicaux d'émissions acquises d'un tiers, diffusées sur les ondes d'un Service, dans la mesure où MusiquePlus inc. détient l'information;

4.3.4 copie de sa programmation saisonnière;

4.3.5 copie des communiqués fournis aux journaux publiant un guide horaire et concernant la programmation hebdomadaire d'un Service;

4.3.6 le titre, l'auteur, le compositeur, l'interprète et la maison de disque ou le producteur des œuvres ou des vidéoclips accessibles sur le site Internet d'un Service, dans la mesure où MusiquePlus inc. détient l'information;

4.3.7 les redevances payables à l'égard du mois pertinent.

4.4 MusiquePlus inc. s'engage à prendre tous les moyens raisonnables pour obtenir les renseignements visés aux alinéas 4.3.1, 4.3.2, 4.3.3 et 4.3.6 auprès, entre autres, des tiers qui lui fournissent des vidéoclips ou des émissions.

4.5 Pour les copies effectuées en application de l'alinéa 2.1.6,

4.5.1 MusiquePlus inc. inscrit sur le boîtier de la bande, sur la bande elle-même et sur la facture destinée à son client la mention suivante :

«Pour usage dans les avions seulement. Toute exploitation ou reproduction sont interdites sauf avec l'accord des titulaires de droits d'auteur ou de leurs représentants.»

4.5.2 MusiquePlus inc. remet à la SODRAC copie des Rapports musicaux des compilations produites durant un mois au plus tard le dernier jour du mois suivant;

4.5.3 la SODRAC remet à MusiquePlus inc. la liste des Œuvres utilisées dans chaque compilation et le pourcentage de droits détenus par la SODRAC dans les soixante jours qui suivent;

4.5.4 MusiquePlus inc. paie les redevances dues en vertu du paragraphe 3.2 selon ce que déclaré par la SODRAC à la liste visée au paragraphe 4.5.3 dans les quinze jours de la réception de celle-ci.

4.6 Pour les copies effectuées en application de l'alinéa 2.1.7

4.6.1 MusiquePlus inc. informe la SODRAC du nom de l'émission, de l'identité de la personne à qui la vente ou la concession en licence est faite, de la portée et de la durée de la licence et lui remet copie des Rapports musicaux, au plus tard le dernier jour du mois suivant celui durant lequel la vente ou concession est conclue s'il s'agit d'une émission déjà produite, et au plus tard le dernier jour du mois suivant celui durant lequel l'émission est livrée s'il s'agit d'une émission à produire;

4.6.2 la SODRAC remet à MusiquePlus inc. la liste des Œuvres utilisées dans chaque émission et le pourcentage de droits détenus par la SODRAC dans les soixante jours qui suivent;

4.6.3 MusiquePlus inc. paie les redevances dues en vertu du paragraphe 3.2 selon ce que déclaré par la SODRAC à la liste visée au paragraphe 4.6.2 dans les quinze jours de la réception de celle-ci.

Article 5 : Traitement confidentiel

5.1 Sous réserve des paragraphes 5.2 et 5.3, la SODRAC garde confidentiels les renseignements que MusiquePlus inc. lui transmet en application de la présente licence.

5.2 La SODRAC peut faire part des renseignements visés au paragraphe 6.1 :

5.2.1 à la Commission du droit d'auteur,

5.2.2 à une personne qui lui formule une réclamation, dans la mesure où cela est nécessaire pour effectuer la répartition,

5.2.3 si la loi ou une ordonnance d'un tribunal l'y oblige,

5.2.4 à toute autre société de gestion collective de droit d'auteur avec qui MusiquePlus inc. a une entente ou dont un tarif est applicable à MusiquePlus inc.

5.3 Le paragraphe 5.1 ne s'applique pas aux renseignements disponibles au public ou obtenus d'un tiers non tenu lui-même de garder confidentiels ces renseignements.

Article 6 : Garantie

La SODRAC garantit, dans la mesure des droits qu'elle représente détenir, MusiquePlus inc. et TV MaxPlus Productions inc. contre toute action pouvant leur être signifiée par un tiers, y compris par un ayant droit de la SODRAC, ayant pour fondement l'utilisation d'une Œuvre autorisée par la présente licence.

Article 7 : Incessibilité

La présente licence est incessible. Elle demeure en vigueur conditionnellement au maintien par le CRTC de la licence de diffusion accordée à MusiquePlus inc. pour les Services.

Article 8 : Arbitrage

Toute mécontente concernant l'interprétation ou l'application de l'une quelconque des dispositions de la licence est soumise à l'arbitrage à l'exclusion des tribunaux de droit commun.

Les dispositions du Code de procédure civile concernant l'arbitrage s'appliquent sauf que le tribunal est composé d'un seul arbitre, choisi dans les dix jours de la signification d'un avis de mécontente, parmi la liste d'arbitres établie par la Commission de reconnaissance des associations d'artistes et des associations de producteurs en vertu de l'article 56 - 6° de la Loi sur le statut professionnel et les conditions d'engagement des artistes de la scène, du disque et du cinéma (L.R.Q c. S-32.1).

Article 9 : Droit applicable

La présente licence est assujettie aux lois en vigueur dans la province de Québec.

Article 10 : Durée

La présente licence entre en vigueur le 1^{er} septembre 1999 et se termine le 31 août 2002.

Article 11 : Rétroactivité

MusiquePlus inc. verse à la SODRAC les paiements découlant de l'application de la licence entre le 1^{er} septembre 1999 et la date de la décision de la Commission du droit d'auteur dans les trente jours de la date de la décision.

Le secrétaire général,

Claude Majeau