

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Regime Fixing of Royalties in Individual Cases
Copyright Act, sections 66.51 and 70.2

Members Mr. Justice William J. Vancise
Mrs. Francine Bertrand-Venne
Mrs. Jacinthe Thériège

**L'association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ) v.
SODRAC 2003 inc. and society for reproduction rights of authors, composers and
publishers in Canada (SODRAC)**

Reasons for decision

[1] On March 6, 2009, the *Association québécoise de l'industrie du disque, du spectacle et de la vidéo* (ADISQ) filed, pursuant to subsection 70.2 (1) of the *Copyright Act* (the "Act"), a request for arbitration of the royalties, terms and conditions of a licence allowing its members to reproduce on phonograms works in the repertoire of SODRAC 2003 Inc. and of the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (jointly SODRAC) from January 1, 2009 to December 31, 2012. On March 19, SODRAC requested in turn that the Board set the royalties, terms and conditions of a licence allowing members of ADISQ to reproduce in videograms works from the repertoire of SODRAC from January 1, 2004 to December 31, 2012.

[2] On April 6, at the request of the parties and to allow record producers to continue to receive public financing made available to assist in creating sound recordings to which producers are entitled only if they comply with the terms of licences authorizing the use of works protected by copyright, the Board rendered the following decision:

[1] The Board adopts as an interim decision taking effect on January 1, 2009 the licences filed by *L'Association québécoise de l'industrie du disque, du spectacle et de la vidéo* (ADISQ) as Exhibit RP-1 and by SODRAC 2003 Inc. and Society for Reproduction Rights of Authors, Composers and Publishers in Canada (jointly SODRAC) as Exhibit S-3.

[2] This decision is made to respond to the situation described in paragraphs 41 to 44 of the ADISQ application, as an emergency measure. The applications for interim decisions by ADISQ and SODRAC will be examined later; that examination may or not lead the Board to amend this decision.

[3] For the following reasons, the decision of April 6, 2009 is maintained.

I. PHONOGRAMS

[4] Until December 31, 2008, the parties were subject to the master licence filed as Exhibit RP-1. The last rate set in the agreement was 9.1¢ per track. Article 11 of the licence is a parity clause: SODRAC grants in advance to members of ADISQ the “[TRANSLATION] most favourable conditions” that it may afford to third parties. SODRAC argues that one must always look at the terms of a licence overall to determine whether or not it triggers the parity clause; ADISQ counters that under certain circumstances, a single condition could trigger the clause.

[5] Members of the Canadian Recording Industry Association (CRIA) currently pay SODRAC 8.1¢ per track. Relying on the parity clause, ADISQ requests that the interim licence be set at that rate. ADISQ also relies on a number of other factors to request that one fourth of the amounts paid pursuant to the interim licence be held by a trustee until the Board renders its final decision.

[6] For its part, SODRAC requests that the *status quo* be fully maintained. It argues that the rates paid by CRIA members are provisional and that whether the parity clause warrants a rate cut can only be determined after a complete analysis of the relevant contracts and of the discounts they provide. The master licence provides that disagreements on the interpretation or application of the licence are to be referred to arbitration. SODRAC argues that it would not be appropriate for the Board to take on that role. Finally, SODRAC argues, for reasons that need not be stated here, that placing a share of the royalties in trust is not justified.

[7] The parties argued at length the lack of diligence that one or the other might have displayed in the course of bargaining, as well as alleged assurances that royalties were to be set as a percentage of wholesale price rather than a set amount per track. The matter is not relevant at this stage, supposing that it has any relevance at all.

[8] The parties disagree on the interpretation of the parity clause as well as on its application insofar as the royalties payable by CRIA members have yet to be finalized. We do not intend to embark on this debate in the context of an interim decision. The evidence available to us is far from clear and the parties’ arguments need to be seriously fleshed out. Apparently, SODRAC allowed some users to pay royalties at a lower rate than those set in the master agreement even before it agreed to the parity clause. ADISQ never asked that the matter be sent to arbitration even though the CRIA rates appear to have been widely known. The parties are free to refer the

issue to arbitration if they wish to settle the issue at this stage of the process. They will have no other choice with respect to transactions that occurred before the licence the Board has been asked to issue comes into force. Under the circumstances, we prefer to impose on the parties precisely what they had already agreed upon. It will be up to the Board to decide whether to deal with the issue in its final decision.

[9] The request that a share of the royalties be paid in trust is not justified. ADISQ argues that it will be much easier for one of its members to make a single payment for additional royalties than for SODRAC to ask for refunds from a large number of rights holders. This is not how to approach the issue. SODRAC is not a mere agent, it owns the rights. If the final royalties are lower than those paid pursuant to the interim decision, it will have to refund the excess by using everything that it collects, irrespective of source; a music label that paid too much will not have to wait for SODRAC to seek refunds. Furthermore, if the Quebec record industry is in the precarious situation that ADISQ describes, it is probable that one or more of its members will find it difficult to fulfil its obligations if the licence rate increases. Consequently, it seems wiser to require that royalties be paid without delay than to risk being confronted with an insolvent debtor. Finally, as SODRAC points out, it would be illogical to presume that the rate of 9.1¢ is a ceiling. SODRAC could demonstrate that its repertoire is worth more; put another way, by accepting interim payments of 9.1¢ from financially challenged labels, SODRAC risks not being able to collect any royalty increase from January, 2009.

[10] We extend on an interim basis the application of the master agreement in full. The April 6, 2009 decision already does so. As a result, there is no need to revisit the issue.

II. VIDEOGRAMS

[11] Since September, 2005, the parties have been negotiating the terms of a master licence for video-clips and CD/DVD sets. On July 1, 2007, they signed an interim master licence dated back to July 1, 2004. SODRAC requests that the licensing terms of the interim agreement become an interim decision of the Board until a final decision is reached. ADISQ agrees that an interim licence should be issued but argues that some provisions of the interim agreement may not be compatible with the powers that the *Act* grants to the Board. The decision should reflect the terms of the agreement, not duplicate them. The agreement was also meant to interrupt the limitation period with respect to reproductions made since July, 2004 while ending any legal action with respect to at least some previously made reproductions. ADISQ wonders how to account for those provisions. To some extent, SODRAC agrees with ADISQ, but adds that at this stage of the process, it is quite possible to continue to do business according to the terms of the agreement.

[12] We agree with SODRAC. The interim agreement clearly includes provisions that would not find their way in a final decision. These probably include a number of “whereas clauses”, article

6.2, which allows SODRAC to terminate the agreement unilaterally, as well as any other provision granting one of the parties a discretion which the Board will now be called upon to exercise. That being said, the only object of this interim decision is to maintain the *status quo* until the Board reaches a final decision. The parties want an interim decision so that the market can continue to function; it will remain possible to revisit the issue if SODRAC or a music label attempts to interpret unreasonably the provisions of the interim agreement that has become an interim decision of the Board. The other course of action is to rewrite the licence, which could prove both long and difficult. We choose to simply provide that the interim agreement will continue to apply on an interim basis insofar as it is compatible with the powers that the *Act* confers upon the Board. We leave the rest to the parties' common sense.

III. DECISION

The decision of April 6, 2009 is maintained. The licences mentioned in paragraph 1 of the decision will continue to apply on an interim basis insofar as they are compatible with the powers that the *Act* confers upon the Board.

A handwritten signature in black ink that reads "Claude Majeau". The signature is written in a cursive, flowing style.

Claude Majeau
Secretary General