

Update

Communications

October 27, 2008

Tariff 22.B-G: Copyright Board Applies Existing Royalty Rates to Internet Broadcasting Activities; Majority Refuses to Set Rates for Sites Such as Facebook, MySpace and YouTube

In the long-awaited second part of its decision establishing rates for the communication of music over the Internet, the Copyright Board determined Friday that broadcasters' online use of music should attract essentially the same liability as their traditional broadcasts.

In an additional, interesting twist, the majority of the Board determined that it did not have enough information respecting music use by certain miscellaneous sites. It accordingly declined to certify a tariff for these users, including businesses that use music primarily to publicize a brand or a store, amateur podcasts, social-networking sites such as Facebook and MySpace and even video sharing sites such as YouTube.

The Decision

In *Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-musical Works*, issued October 24, 2008 (Decision), the Copyright Board finally established the rates for the use of SOCAN's repertoire under Tariffs 22.B to 22.G, a tariff going back 12 years to 1996. Rates applicable to online music services, such as Apple's iTunes, were established by the Board's decision related to Tariff 22.A, dated October 18, 2007. The issue of the Board's jurisdiction to certify royalties for

Internet uses at all, as well as the appropriate target of the tariff, had been the subject of lengthy appeals that resulted in a decision of the Supreme Court of Canada in 2004.

In the Decision, the Board determined that it would certify a user-based tariff, in other words, a tariff that established royalties by user, rather than by use. We will focus on the rates established for commercial radio and commercial television. Rates were also established by the Board for non-commercial radio; CBC, TVO and Télé-Québec; audio websites such as Iceberg; and game sites. A table summarizing the various rates certified by the Board can be found on the Board's website at <http://www.cb-cda.gc.ca/decisions/iifs200810240062008-e.pdf>.

Commercial Radio

In relation to audio simulcasting, the Board rejected SOCAN's proposal that radio broadcasters pay higher rates for their online use of music due to higher profitability. SOCAN's proposal was based on their expert's theory that creative and administrative costs of online simulcasts were sunk costs because the Internet signal is the same as the conventional signal. The Board held that costs could only be considered sunk for a specific limited period of time, and only a relatively permanent increase in revenues, arising, for example, from more efficient technology, could lead to an increase in the remuneration for all inputs, including music.

The Board accordingly applied the effective rate applicable to a commercial radio station's conventional signal: 1.5% of internet-related revenues for low music use stations and 4.2% for all others. In recognition that revenues from general advertising on a website may be generated by website pages that contain no sound, the Board established that the rate base will consist at most of 50% of the station's Internet-related revenues. Broadcasters are permitted to further discount the rate base if less than 50% of the site's web pages contain sound, by monitoring and reporting the ratio of audio page impressions to all page impressions on their site.

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For audio webcasting, audiovisual webcasting, games and other uses, the Board applied the same rate as that applicable to a simulcast of a commercial radio station's conventional programming.

Commercial Television

As with radio simulcasting, the Board rejected SOCAN's argument that audiovisual simulcasting is "almost pure profit" because the signal is the same. Accordingly, the Board found that for all of the different types of music use by a conventional television, pay or specialty broadcaster on its website, the existing SOCAN tariff rate of 1.9%, with discounts for lower music use, will apply. In the case of television station websites, the evidence was that as little as 1.3% of all pages viewed involve audio streaming. Accordingly, the Board again adjusted the rate base to which the rate would apply, to capture only 10% of the revenues of a commercial television website, and permit further discounting by stations through monitoring and reporting.

The Board also determined that pay audio and satellite radio services should pay at the same rate as for their main SOCAN tariff, subject to further discounting upon adequate monitoring and reporting.

Miscellaneous Sites

As indicated above, the majority of the Board declined to certify a tariff for what it described as "disparate sites that use music in different ways but for which the main activity is not related to the use of music." It provided the example of a restaurant that uses music on its site to publicize the restaurant itself. It also pointed to amateur podcasts, as well as social networking sites such as Facebook and MySpace and video sharing sites such as YouTube, as well as sites operated by individuals that use music.

Although the majority conceded it believes a tariff is justified for this category, it felt it did not have sufficient evidence regarding the music use by these sites. It therefore concluded that it would be "foolhardy" to set a tariff when the consequences might be "overwhelming" and "socially unfair". The Board gave four reasons for not setting a tariff under these circumstances: First, it would be "highly disruptive" and therefore unfair to

"blindly" set a tariff, among other things, targeting the "hundreds of thousands" of users who make use of music that "either are extremely modest or that attract little or no attention"; second, given the absence of any reliable evidence, any tariff would have to be *de minimus*, yet the implication would be to make the thousands of individuals involved in these communications individually responsible; third, social networking and video sharing sites are a "relatively new phenomenon"; and fourth, the Board would, in the absence of evidence, be unable to discharge its obligation to provide adequate reasons explaining how it arrived at the rate of the tariff.

Conclusion

The Board's decision largely determines that conventional uses of music, when transmitted over the Internet, do not attract a different liability. For uses that are anything but conventional, however – such as those on social networking and video sharing sites – the Board has cited its expectation that parties will provide the necessary evidence to allow the Board to properly assess the situation in the future. It is difficult to escape the conclusion that the "foolhardiness" and potentially "overwhelming" and "socially unfair" consequences of attempting to set a tariff for certain of these uses will present no less of a challenge to the Board once it is faced with the evidence.

If you would like to know more about the Decision or have any questions with respect to the foregoing, please do not hesitate to contact:

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