

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20101216

**Dockets: A-209-09
A-210-09**

Citation: 2010 FCA 348

**CORAM: SHARLOW J.A.
DAWSON J.A.
STRATAS J.A.**

Docket: A-209-09

BETWEEN:

SIRIUS CANADA INC.

Applicant

and

**CMRRA/SODRAC INC., SOCIETY OF COMPOSERS, AUTHORS AND MUSIC
PUBLISHERS OF CANADA, CANADIAN SATELLITE RADIO INC. and
NEIGHBOURING RIGHTS COLLECTIVE OF Canada**

Respondents

Docket: A-210-09

BETWEEN:

CMRRA/SODRAC INC. (CSI)

Applicant

and

**SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA
(SOCAN), NEIGHBOURING RIGHTS COLLECTIVE OF CANADA (NRCC),
SIRIUS CANADA INC. and CANADIAN SATELLITE RADIO INC.**

Respondents

Heard at Ottawa, Ontario, on September 7 and 8, 2010.

Judgment delivered at Ottawa, Ontario, on December 16, 2010.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

DAWSON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] These are two applications for judicial review of a decision of the Copyright Board of Canada dated April 8, 2009 (corrected May 6, 2009). The decision, reported as *Re Collective Administration of Performing Rights and of Communication Rights*, [2009] C.B.D. No. 4, certified certain royalty tariffs pursuant to section 70.15 of the *Copyright Act*, R.S.C. 1985, c. C-42, payable by Sirius Canada Inc. (“Sirius”) and Canadian Satellite Radio Inc. (“XM Canada”) in relation to their satellite radio services.

[2] The tariffs as certified are payable for the use of the repertoires of three collective societies: Society of Composers, Authors and Music Publishers of Canada (“SOCAN”) for the communication of musical or dramatico-musical works (2005-2009), Neighbouring Rights Collective of Canada (“NRCC”) for the communication of published sound recordings embodying musical works and performers’ performances of such works (2007-2010), and CMRRA/SODRAC Inc. (“CSI”) for the reproduction of musical works (2006-2009).

[3] It was undisputed before the Board that SOCAN and NRCC were entitled to communication royalties from Sirius and XM Canada, the only dispute being the amount. It was also undisputed that CSI was entitled to certain reproduction royalties, but the extent of its entitlement was in dispute. The present applications, one by Sirius (A-209-09) and the other by CSI (A-210-09), challenge the Board’s determination of a number of legal issues relating to the royalty entitlement of CSI. The applications were heard together. These reasons address both applications.

Facts

[4] The specific facts relating to each of the issues raised in these applications are set out with the analysis of each issue. The general background relating to the satellite radio services offered by Sirius and XM Canada during the years relevant to these applications is described by the Board in paragraphs 8 to 26 of its decision. The accuracy of that description is undisputed and it is reproduced here (footnotes omitted):

[8] The satellite radio services industry originated in the United States. XM Satellite Radio (XM) launched its operation on September 25, 2001 and Sirius Satellite Radio (Sirius U.S.) launched its operation on July 1, 2002. They were the first and remain the largest operators in the world.

[9] XM uses two high-powered geostationary satellites that rotate in synchronization with the earth and provide blanket coverage of the entire U.S. mainland and southern Canada.

[10] Sirius uses three satellites that move around the earth in an elliptical orbit. These satellites are called geosynchronous and orbit above the equator for 16 hours a day and below the equator for 8 hours permitting the satellite to sleep and conserve energy.

[8] L'industrie des services de radio par satellite a pris naissance aux États-Unis. XM Satellite Radio (XM) a commencé ses opérations le 25 septembre 2001 et Sirius Satellite Radio (Sirius U.S.), le 1er juillet 2002. Ces entreprises ont été les premières et demeurent les plus importantes du monde dans ce domaine.

[9] XM utilise deux satellites géostationnaires de grande puissance dont l'orbite autour de la terre est en phase et qui procurent une couverture englobant toute la partie continentale des États-Unis et le sud du Canada.

[10] Sirius utilise trois satellites qui circulent autour de la terre selon une orbite elliptique. Ces satellites sont appelés géosynchrones et sont placés en orbite au-dessus de l'équateur durant 16 heures par jour et sous celui-ci, pour les autres 8 heures, permettant ainsi au satellite d'entrer en état de veille et de conserver de l'énergie.

[11] The multiplex signal sent by satellite to the mobile receivers is encrypted so that only those receivers equipped with a decryption key which permits the unscrambling of the signal can receive and play the signal.

[12] The American services were able to expand into Canada by forming exclusive partnerships with Canadian corporations. On June 16, 2005, the Canadian Radio-television and Telecommunications Commission (CRTC) issued broadcasting licences to [XM Canada] and Sirius to offer satellite radio services across Canada. [XM Canada] launched its operation on November 22, 2005 and Sirius on December 1, 2005.

[13] At the end of 2004, XM reported over 3.2 million subscribers, and Sirius U.S. had reached the one million subscriber level. At the time of the hearing, Sirius and [XM Canada] had 200,000 and 120,000 subscribers respectively. By the summer of 2008, those numbers had increased to 750,000 and 440,000. Satellite radio services quickly penetrated the market. It took Sirius U.S. 3.6 years to have 5,000,000 units in the hands of American customers, while DVDs took 2.5 years to reach the same amount, MP3 players 4.8 years, cellular phones 10 years and satellite television 10.6 years.

[11] Le signal multiplex transmis par satellite aux récepteurs mobiles est codé de telle sorte que seuls les récepteurs munis d'une clé de déchiffrement permettant de débrouiller le signal peuvent le recevoir et le jouer.

[12] L'expansion des services américains chez nous a été rendue possible par la formation de coentreprises exclusives avec des sociétés canadiennes. Le 16 juin 2005, le Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC) a délivré à [XM Canada] et Sirius des licences de radiodiffusion pour offrir des services de radio par satellite partout au Canada. [XM Canada] a commencé ses opérations le 22 novembre 2005 et Sirius, le 1er décembre 2005.

[13] À la fin de 2004, XM déclarait plus de 3,2 millions d'abonnés, et Sirius U.S. avait atteint le plateau du million d'abonnés. Lors de l'audience, Sirius et [XM Canada] avaient respectivement 200 000 et 120 000 abonnés. À l'été 2008, ces chiffres avaient augmenté à 750 000 et 440 000. Les services de radio satellitaire ont connu une pénétration rapide du marché. Il aura fallu 3,6 années à Sirius U.S. pour placer 5 000 000 d'unités entre les mains de clients américains, alors que le DVD a atteint le même nombre en 2,5 années, le lecteur MP3 en 4,8 années, le téléphone cellulaire en 10 années et la télévision par satellite en 10,6 années.

[14] For our purposes, the infrastructure and operations of the two American services, on which the Canadian services rely, are fairly similar. In order to provide an uninterrupted radio broadcast service, the U.S. satellite services augment their satellite signal through the use of a network of ground transmitters. This technique, which is said to create “space diversity”, prevents signal dropouts. With this combined infrastructure, the satellite services are able to deliver all of their programming to all subscribers, regardless of their location in North America at the time of reception.

[15] In terms of programming content, although each satellite service has developed its own micro-niche programming, both offer a large selection of commercial-free music channels covering a wide range of genres as well as channels of news, children’s programs, sports, comedy, talk and traffic. Additionally, a subscription to the satellite services offers the following innovative features: text display providing artists’ name, songs’ title, scores, stock quotations, a tagging mechanism alerting listeners when a song or an artist is playing on another channel, temporary and permanent recording options, pause and replay of live radio content, Internet service delivery of some audio channels over the Web as a streaming service as well as allowing the receiver to be used as a MP3 player.

[14] Pour les besoins de l’espèce, l’infrastructure et l’exploitation des deux services américains, sur lesquels les services canadiens reposent, sont assez semblables. De façon à fournir un service radio ininterrompu, les services américains augmentent leur signal satellitaire en utilisant un réseau d’émetteurs terrestres. La technique qui, dit-on, crée de la « diversité d’espace » évite les interruptions de signal. Avec cette infrastructure mixte, les services sont en mesure de livrer toute leur programmation à tous leurs abonnés, peu importe où ils se trouvent en Amérique du Nord lors de la réception.

[15] Sur le plan du contenu de la programmation, même si chaque service a conçu ses propres micro-créneaux de programmation, les deux offrent un vaste choix de canaux de musique sans message publicitaire dans un large éventail de genres, de même que des canaux d’actualités, d’émissions pour enfants, de sports, de comédie, d’infovariété et de circulation. De plus, l’abonnement aux services par satellite offre les innovations suivantes : affichage texte du nom des artistes, du titre des chansons, des résultats sportifs et des cotes de la bourse, une fonction de repérage avertissant l’auditeur qu’une chanson ou un artiste tourne sur un autre canal, la possibilité de faire un enregistrement temporaire ou permanent, l’arrêt-reprise de contenu audio en direct, le service Internet de transmission sur demande de certains canaux audio par le Web

ainsi que l'utilisation du récepteur comme lecteur MP3.

[16] Programming of the U.S. services is created and delivered using a content management system (CMS) located at their main broadcast studio. The objective of this system is to store once and deliver many times.

[16] La programmation des services américains est créée et livrée au moyen d'un système de gestion de contenu (SGC) situé à leur studio principal de radiodiffusion. L'objectif de ce système est de mettre en mémoire une fois et de livrer plusieurs fois.

[17] [XM Canada] uses a CMS provided by Delat Digital Media System. [XM Canada] produces and delivers 12 channels originating in Canada at studios located in Toronto and Montreal. Music directors at these two sites select the music to be used which is then injected in the system using functions of the Delat workstations located in these two cities. These workstations are directly connected to the main Delat CMS located in Washington, D.C. by a fibre optic line (OC3 line).

[17] [XM Canada] utilise un SGC fourni par Delat Digital Media System. [XM Canada] produit et livre 12 canaux en provenance du Canada de studios situés à Toronto et à Montréal. Les directeurs musicaux à ces deux sites sélectionnent les pièces qui sont par la suite injectées dans le système par des fonctions des postes de travail Delat situés dans ces deux villes. Ces postes sont reliés directement au SGC principal situé à Washington, D.C. par un lien de fibre optique (lien OC3).

[18] Sirius uses a CMS called Nex Gen but does not produce any programming in Canada. All Sirius' content in Canada is produced by Canadian third-party content providers. These providers generate and deliver the content to the Sirius master control centre located in New York City.

[18] Sirius utilise un SGC connu sous le nom de Nex Gen mais ne produit aucune programmation au Canada. Tout son contenu canadien est produit par des tiers canadiens fournisseurs de contenu. Ces derniers génèrent et livrent le contenu au centre de contrôle principal de Sirius, situé à New York.

[19] XM has a complex of 82 studios in Washington as well as studios in New York, Nashville and Chicago. Sirius U.S. is based out of New York

[19] XM dispose d'un ensemble de 82 studios à Washington ainsi que des studios à New York, Nashville et Chicago. La principale place

and has other studios in Los Angeles and Memphis. Programming is not typically delivered live, with the obvious exception of live sporting events. Essentially, before programming can be uplinked to the satellites for delivery, programming directors must store a copy of all music and audio files required onto the main server. These files are compressed, encoded and combined to complete the process commonly referred to as “multiplexing”. Selection and scheduling of programming content are done using specialized software that instructs the main server when and in what order it must play the various music or audio files. The server also serves the alternative delivery channels, including Internet and cellular phone streaming services.

[20] Although the Canadian satellite services rely heavily on their U.S. partner’s programming, the terms of their CRTC licence require them to include in their subscription package a minimum of content produced in Canada. Accordingly, out of the 130 channels [XM Canada] offers, 13 are produced in Canada while out of the 110 channels Sirius offers, 11 are produced in Canada. The Satellite Radio Services differ slightly in the way they create and deliver their Canadian content. It is useful, in light of the legal issues raised, to highlight

d’affaires de Sirius U.S. est à New York et elle a d’autres studios à Los Angeles et Memphis. La programmation n’est habituellement pas livrée en direct, sauf bien sûr les événements sportifs en direct. Essentiellement, avant que la programmation ne soit transmise au satellite en vue de sa livraison, les directeurs de programmation doivent mettre en mémoire dans le serveur principal une copie de tous les fichiers de musique et audio. Les fichiers sont comprimés, encodés et compilés afin de réaliser le processus communément appelé « multiplexage ». Le choix et la programmation du contenu se font au moyen de logiciels spécialisés qui commandent au serveur principal le moment et l’ordre dans lesquels celui-ci doit faire entendre les divers fichiers de musique ou audio. Le serveur dessert également les canaux alternatifs de livraison, dont les services de transmission sur demande sur Internet et aux cellulaires.

[20] Bien que les services par satellite canadiens utilisent abondamment la programmation de leurs partenaires américains, les conditions de leur licence du CRTC les obligent à inclure dans leur bouquet d’abonnement un minimum de contenu produit au Canada. En conséquence, des 130 canaux offerts par [XM Canada], 13 sont produits au Canada, alors que des 110 offerts par Sirius, 11 le sont. Les services de radio par satellite créent et livrent leur contenu canadien de façon quelque peu différente. Compte tenu

the distinctive features of each Service.

[21] [XM Canada] creates its own programming. A digital communication link from the Canadian offices to the U.S. infrastructure allows the work stations in Canada to send instructions directly to the servers and the scheduling software sitting in U.S. headquarters in Washington. Thus, [XM Canada] programming is conceived and controlled in Canada but produced from Washington.

[22] [XM Canada] receives audio content in the form of CDs or through DMDS-Musicrypt service provided by the sound recording industry. When dealing with a new CD, the production team makes a copy directly on the server in the U.S. using the digital connection, without making any back up or archival copies. New music obtained through DMDS-Musicrypt is received as digital audio files from a server that sits in Canada. In this case, an intermediary copy of the file is stored on a work station located in Canada. If the Canadian production team selects the song, then that file is “transferred” onto the main server in Washington via the digital communication link.

des questions de droit soulevées, il est utile de souligner les caractéristiques qui différencient chaque service.

[21] [XM Canada] crée sa propre programmation. Un lien de communication numérique reliant les bureaux canadiens à l’infrastructure américaine permet aux stations de travail de transmettre des instructions directement du Canada aux serveurs et au logiciel d’ordonnancement situés dans les quartiers généraux de Washington. La programmation de [XM Canada] est donc conçue et contrôlée au Canada, mais produite de Washington.

[22] [XM Canada] reçoit le contenu audio sous forme de CD ou par l’intermédiaire d’un service SDMN-Musicrypt fourni par l’industrie de l’enregistrement sonore. À la réception d’un nouveau CD, l’équipe de production en fait une copie directement sur le serveur aux Etats-Unis au moyen du lien numérique, sans en faire de copies de sauvegarde ou d’archivage. La nouvelle musique obtenue grâce au SDMN-Musicrypt est reçue sous forme de fichiers audionumériques d’un serveur situé au Canada. Dans ce cas, une copie intermédiaire du fichier est mémorisée dans une station de travail située au Canada. Si l’équipe de production canadienne choisit la chanson, ce fichier est alors « transféré » dans le serveur principal à Washington par le lien de communication numérique.

[23] When it comes time to scheduling program content, the programming director instructs the U.S. scheduling software to play specific songs and recorded voice elements in a certain order and at the appropriate time; the Washington server plays them off its local hard drives, combining the Canadian channels with the American ones into the common multiplex signal that is sent up to the satellite.

[24] Unlike [XM Canada], Sirius does not produce any programming itself; it acquires all of its Canadian content from Canadian third-party content providers. Standard Radio Inc. provides Sirius with a Canadian rock music channel called Iceberg 95 created in studios located in Toronto. The content is available in CD and DMDS-Musicrypt. The music is scheduled from Toronto, loaded onto the Sirius master server where it is encoded and digitized for delivery to the server's master control centre in New York City. Astral Media provides Sirius with two Canadian rock music channels, Rock Velours and Énergie, pursuant to a subcontract with Standard Radio. The programming is created in Montreal using the same technology used by Standard Radio. The music is scheduled from Montreal on a six-hour loop for broadcast each day by a program called Music Master. Content providers store the music files and create the programming on a server located in their respective broadcast studio. Again, if musical works are

[23] Le moment venu de programmer le signal, le directeur de la programmation donne des instructions aux logiciels de répartition américains de jouer des chansons et des enregistrements vocaux donnés, dans un certain ordre et au moment opportun; le serveur situé à Washington les fait alors jouer à même ses propres disques durs en mixant les canaux canadiens et américains en un signal multiplex commun qui est transmis au satellite.

[24] Contrairement à [XM Canada], Sirius ne produit pas elle-même de programmation; elle acquiert la totalité de son contenu canadien de tiers canadiens fournisseurs de contenu. Standard Radio Inc. fournit à Sirius un canal de musique rock canadienne connu sous le nom de Iceberg 95, produit dans des studios situés à Toronto. Le contenu est disponible sur CD et SDMN-Musicrypt. La musique est répartie de Toronto, stockée dans le serveur principal de Sirius où elle est encodée et numérisée pour sa livraison au serveur du centre de contrôle principal à New York. Astral Media fournit à Sirius deux canaux de musique rock canadienne, Rock Velours et Énergie, en vertu d'un contrat de sous-traitance avec Standard Radio. La programmation est créée à Montréal avec la même technologie que celle utilisée par Standard Radio. La musique est répartie de Montréal en boucle de six heures pour radiodiffusion quotidienne au moyen d'un logiciel appelé Music Master. Les

provided on a CD, a digital copy is made on the content provider's server. If musical works are provided through DMDS-Musicrypt, a digital link to that service is used to copy that file onto the Canadian server. Sirius' Canadian content providers do not make archival copies of musical works.

[25] Sirius' content providers use a specialized scheduling software that is part of their server complex to determine which songs and other recorded voice elements will be played and when. When it is time for a show to air, the scheduling system automatically plays it off the copies on the Canadian servers. That output is linked by communication lines to the U.S. facility, combined with the other American channels and uplinked to the satellites. The content used on the Canadian originated signals is never actually stored on the Sirius U.S. server.

[26] In both cases, once the programming has been multiplexed and uplinked to the satellites, programming is delivered to the subscribers' respective receivers in

fournisseurs de contenu compilent les fichiers de musique et créent la programmation sur un serveur situé dans leur studio de radiodiffusion respectif. Encore une fois, si des oeuvres musicales sont fournies sur CD, une copie numérisée en est faite sur le serveur du fournisseur de contenu. Si des oeuvres musicales sont fournies par SDMN-Musicrypt, un lien numérique auquel ce service est branché est utilisé pour reproduire ce fichier dans le serveur canadien. Les fournisseurs canadiens de contenu de Sirius ne font pas de copie d'archives des oeuvres musicales.

[25] Les fournisseurs de contenu de Sirius utilisent un logiciel de répartition spécialisé intégré à leur ensemble de serveurs pour déterminer les chansons et autres enregistrements vocaux qui seront joués ainsi que le moment où ils le seront. Lorsque vient le temps de diffuser une émission, le système de répartition la transmet à partir des copies dans les serveurs canadiens. Ces sorties de données sont intégrées aux installations américaines par des lignes de communication, mixées aux autres canaux américains et transmises aux satellites par liaison ascendante. Le contenu utilisé dans les signaux provenant du Canada n'est jamais vraiment stocké dans le serveur de Sirius U.S.

[26] Dans les deux cas, une fois que la programmation a été multiplexée et transmise aux satellites par liaison ascendante, elle est livrée aux récepteurs respectifs des abonnés au

Canada and the U.S. The Satellite Services' management system tells the Canadian receivers which channels a subscriber is entitled to receive and the U.S. satellite services' management system does the same for its American subscribers. Although the signal that Canadian subscribers receive holds all the channels offered by both the U.S. and Canadian Satellite Services, because the signal is encrypted, they will only have access to a subset of channels.

Canada et aux États-Unis. Les systèmes de gestion des services par satellite indiquent aux récepteurs canadiens les canaux qu'un abonné est en droit de capter; ceux des systèmes américains font de même pour les abonnés américains. Bien que le signal reçu par les abonnés canadiens contienne tous les canaux offerts par les services américain et canadien, parce que le signal est chiffré, les abonnés n'auront accès qu'à un sous-ensemble de canaux.

[5] The tariffs set by the Board are stated as a percentage of the total revenues of Sirius and XM Canada. They are summarized in a table appended to its reasons. The main part of the table is reproduced below with an additional column added on the right to give an identifying designation to each tariff component.

	Full rates	Designation
SOCAN	4.26%	S
NRCC	1.18%	N
CSI		
Programming (with play copies)	0.10%	C1
Extended buffer and replay	1.87%	C2
Storing individual songs and block programming	2.90%	C3
TOTAL		
Receiver with no copying functionality (with play copies)	5.54%	S + N + C1 = T1
Receiver with extended buffer and replay	7.41%	T1 + C2 = T2
MP3-like receiver	10.31%	T2 + C3 = T3
TOTAL (Average)	6.19%	

[6] The notes accompanying the full table in the Board’s decision explain that (a) the C1 rate (0.10%) is subject to a 95% discount when no play copies are being made, (b) the C3 rate (2.90%) assumes that the receiver is also enabled for extended buffer and replay, and (c) the computed average rate (6.19%) is based on the assumption that 30% of subscribers have receivers with buffer and replay functions and 3% have MP-3 like receivers.

Copyright Act

[7] These applications require consideration of the territorial scope of the *Copyright Act*, and consideration of what constitutes the “authorization” of a reproduction of a work. The relevant provisions of the *Copyright Act* read as follows:

2. In this Act, ...

“copyright” [« *droit d’auteur* »] means the rights described in

(a) section 3, in the case of a work ...

“infringing” [« *contrefaçon* »] means

(a) in relation to a work in which copyright subsists, any copy, including any colourable imitation, made or dealt with in contravention of this Act ...

...

“musical work” [« *oeuvre musicale* »] means any work of music or musical composition, with or without words, and includes any compilation thereof ...

2. Les définitions qui suivent s’appliquent à la présente loi. ...

« contrefaçon » [“*infringing*”]

a) À l’égard d’une oeuvre sur laquelle existe un droit d’auteur, toute reproduction, y compris l’imitation déguisée, qui a été faite contrairement à la présente loi ou qui a fait l’objet d’un acte contraire à la présente loi; ...

[...]

« droit d’auteur » [“*copyright*”]

S’entend du droit visé :

a) dans le cas d’une oeuvre, à l’article 3...

« oeuvre musicale » [“*musical work*”]
Toute oeuvre ou toute composition musicale — avec ou sans paroles — et toute compilation de celles-ci.

...	[...]
<p>3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right</p> <p>...</p> <p>and to authorize any such acts.</p>	<p>3. (1) Le droit d’auteur sur l’oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l’oeuvre, sous une forme matérielle quelconque, d’en exécuter ou d’en représenter la totalité ou une partie importante en public et, si l’oeuvre n’est pas publiée, d’en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :</p> <p>[...]</p> <p>Est inclus dans la présente définition le droit exclusif d’autoriser ces actes.</p>
...	[...]
<p>27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.</p>	<p>27. (1) Constitue une violation du droit d’auteur l’accomplissement, sans le consentement du titulaire de ce droit, d’un acte qu’en vertu de la présente loi seul ce titulaire a la faculté d’accomplir.</p>

Standard of review

[8] The core of the Board’s statutory mandate is the determination of an appropriate royalty tariff. Such determinations, when challenged on judicial review, are generally entitled to deference. However, such determinations sometimes require the Board to determine legal issues of general significance, including questions of the interpretation of the *Copyright Act*. A challenge to the Board’s determination of such legal issues are reviewed on the standard of correctness: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45, at paragraphs 49 and 50 (“the Tariff 22 case”).

[9] Most of the issues in this case are similar in nature to the issues raised in the Tariff 22 case, in that the applicants are alleging that the Board has incorrectly determined general questions of copyright law. I have reviewed those issues on the standard of correctness. Other issues have been reviewed on the standard of reasonableness.

[10] I propose to deal first with the Sirius application (A-209-09) and then with the CSI application (A-210-09).

Sirius application (A-209-09)

[11] Two tariff components are in issue in the Sirius application. One is the 1.87% component designated C2 in the table above. It is imposed in respect of satellite radio receivers with an “extended buffer” that automatically stores 44 to 60 minutes of programming that is broadcast on the channel to which the subscriber chooses to listen. The models with this feature are the Starmate Replay, the Starmate 4, the Sportster Replay, and the Stiletto (SL10 and SL100). A subscriber who has a satellite radio receiver with an extended buffer may press a button that causes live content to be paused and replaced with a replay of the stored content. Because the storage space in an extended buffer is limited, the oldest stored content is automatically replaced with new content once the buffer is full. The stored content is lost if the subscriber turns off the receiver, removes it from its docking station, or changes the channel.

[12] The other tariff component in issue in the Sirius application is the 2.90% component designated C3 in the table above. It is imposed in respect of the block recording feature included in

the “Stiletto” models of satellite radio receiver (SL 10 and SL100). When a subscriber engages the block recording feature, the receiver stores several hours of broadcast content for later replay (the SL 10 stores up to ten hours of programming in six hour blocks, the SL 100 stores up to 100 hours of programming in six hour blocks). If the subscriber presses the “love” button during a broadcast, the content then being played (plus whatever is accessible from the replay buffer) is stored in a “library”. The saved content may be played back by accessing the library. The stored content is automatically replaced by content newly stored from a broadcast and any MP3 files downloaded by the subscriber.

[13] It appears that some Sirius receivers may also be used as MP3 players. The MP3 feature does not enable a satellite radio subscriber to record satellite radio broadcast content. However, the Board noted that Sirius markets itself as an alternative to iPods or MP3 players, apparently on the basis that the MP3 feature employs the buffer capacity of Sirius radio receiver as described above. In my view, the fact that some satellite radio receivers may function as MP3 players is not relevant to the issues considered in the Sirius application.

[14] It is convenient at the outset to deal with a relatively minor preliminary point. The Board said that it relied in part on the agreement of the parties that what is stored in the extended buffer of a radio receiver is a copy of the content that is made by the subscriber (see the Board’s reasons, at paragraph 110). Sirius denies that it made any such concession, but it has not argued that the stored content is not a copy. Rather, Sirius has argued in one of its alternative arguments that the Board breached its duty to provide adequate reasons on the question of whether the content in the extended

buffer – which Sirius characterizes as “ephemeral storage” – is a reproduction of a substantial part of a work. In my view, it was open to the Board to determine, based on the record, that stored broadcast content in the extended buffer is a copy made by the subscriber. Further, given that the extended buffer stores 44 to 60 minutes of broadcast content that can be replayed by the subscriber, the Board could not reasonably have concluded that what is stored in the extended buffer at any point in time is not a substantial part of a copied work.

[15] The heart of the Sirius application is its challenge to the Board’s conclusion that a satellite radio service provider, by supplying a subscriber with a receiver having an extended buffer or a block recording feature, necessarily authorizes the subscriber to copy works that are subject to copyright. The issue for this Court is whether the Board erred in law in reaching that conclusion.

[16] The Board’s analysis of this point is encapsulated in paragraph 113 of its reasons, which reads as follows:

In our opinion, [Sirius and XM Canada] have authorized a reproduction in the present circumstances. All the recording options contained in the "Stiletto" and similar receivers sold by [XM Canada] are dependent on the subscriber's decision to use those features. The [contention of Sirius and XM Canada] that they authorize the mere use of equipment that may or may not be used to infringe copyright which entitles them to presume that subscribers use the device in

À notre avis, [Sirius et XM Canada] ont autorisé une reproduction dans les présentes circonstances. Toutes les fonctions d’enregistrement dont sont dotés le « Stiletto » et les récepteurs semblables vendus par [XM Canada] sont tributaires de la décision de l’abonné de les utiliser. L’argument des [Sirius et XM Canada] selon lequel ceux-ci ne font que permettre l’utilisation d’équipement, laquelle peut s’avérer illicite ou non, et s’autorisant de ce fait pour supposer que les abonnés se servent des

accordance with the law is not in accord with the evidence in this case. Here [Sirius and XM Canada] are not passive. They control the programming sent to the subscribers by encrypting the signal, and by decrypting it they grant to their subscriber the right to access the full programming including the right to use all of those services. [Sirius and XM Canada] can program their receivers to permit or prevent copying. With respect to block copying, pause and replay and other features, access to the content copied in the extended buffers is controlled by [Sirius and XM Canada]. Subscribers who stop paying for the service no longer have access to the content stored in their receivers. In addition, some end-user licence agreements contemplate the possibility that subscribers will use the receiver software to copy content programming or even individual songs based on which a subscriber could presume that [Sirius and XM Canada] purport to have the authority to allow private copying.

appareils dans le respect de la loi, n'est pas conforme à la preuve versée au présent dossier. [Sirius et XM Canada] ne sont pas passifs. Ils contrôlent la programmation transmise aux abonnés en chiffrant le signal; en le décryptant, ils leur accordent le droit d'accéder à toute la programmation, y compris le droit d'utiliser tous ces services. [Sirius et XM Canada] peuvent programmer leurs récepteurs pour autoriser ou empêcher la copie. En ce qui concerne la copie de bloc, la pause, l'écoute différée et autres fonctions, l'accès au contenu reproduit dans le tampon prolongé est contrôlé par [Sirius et XM Canada]. L'abonné qui cesse de payer pour le service n'a alors plus accès au contenu stocké dans son récepteur. De plus, certains contrats de licence d'utilisation prévoient la possibilité pour les abonnés d'utiliser le logiciel du récepteur pour copier du contenu de programmation ou même des chansons ce qui autoriserait un abonné à supposer que [Sirius et XM Canada] sont censés disposer du pouvoir d'autoriser les copies privées.

[17] The resolution of the main issue raised in the Sirius application turns on the meaning to be given to the closing words of section 3 of the *Copyright Act*, which refer to the authorization of any of the acts set out in the opening words of subsection 3(1) or in paragraphs 3(1)(a) to (i). The relevant portions of subsection 3(1) read as follows (emphasis added):

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or *reproduce the work or any substantial part thereof* in any material form whatever ...

...

and to authorize any such acts.

3. (1) Le droit d’auteur sur l’oeuvre comporte le droit exclusif de produire ou *reproduire la totalité ou une partie importante de l’oeuvre*, sous une forme matérielle quelconque ...

[...]

Est inclus dans la présente définition le droit exclusif d’autoriser ces actes.

[18] There is a long and consistent line of jurisprudence that gives a relatively narrow meaning to the closing words of subsection 3(1) of the *Copyright Act*. That jurisprudence is reflected in what is the leading Canadian authority on that point, *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 (“the CCH case”).

[19] One of the issues in the CCH case was whether the Law Society of Upper Canada, by providing self-service photocopiers for the use of its patrons in the Great Library and not monitoring their use, had authorized the patrons to copy the works in the Great Library collection, thereby breaching the copyright of the owners and publishers of the works. The Law Society had posted the following notice above each photocopier: “The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Certain copying may be an infringement of the copyright law. This library is not responsible for infringing copies made by the users of these machines.”

[20] The Chief Justice, writing for the Court, explained the meaning of “authorize” as follows (at paragraph 38 of her reasons):

“Authorize” means to “sanction, approve and countenance”: *Muzak Corp. v. Composers, Authors and Publishers Association of Canada, Ltd.*, [1953] 2 S.C.R. 182, at p. 193; *De Tervagne v. Belœil (Town)*, [1993] 3 F.C. 227 (T.D.). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, “[g]ive approval to; sanction, permit; favour, encourage”: see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference: *CBS Inc. v. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812 (Ch. D.), at pp. 823-24. However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law: *Muzak, supra*. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement: *Muzak, supra*; *De Tervagne, supra*; see also J. S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at p. 21-104, and P. D. Hitchcock, “Home Copying and Authorization” (1983), 67 C.P.R. (2d) 17, at pp. 29-33.

[21] Applying these principles, the Chief Justice concluded that the Law Society had not authorized any copying in breach of the right of any copyright holder. I summarize as follows the analysis leading to that conclusion.

[22] Where a person authorizes the use of equipment that may be used lawfully but may also be used unlawfully to infringe copyright, it must be presumed that the person authorized only the lawful use of the equipment (see paragraph 43). Although patrons of the Great Library could have used the photocopiers to infringe copyright, it is equally plausible that the patrons used the photocopiers without infringing copyright. Therefore, the Law Society was *prima facie* entitled to the benefit of the presumption against the authorization of an infringing act.

[23] That presumption is not rebutted by a notice warning a person who is permitted to use equipment that certain uses could infringe copyright (paragraph 44). Specifically, the “disclaimer notices” posted near the photocopiers in the Great Library did not constitute express acknowledgement by the Law Society that the photocopiers would be used in an unlawful manner.

[24] The presumption may be rebutted if the person authorizing the use of equipment is, by virtue of its relationship with the user of the equipment, in a position to control the use of the equipment such that it can be said to have sanctioned, approved, or countenanced any infringement resulting from the use of the equipment. However, even if some patrons of the Great Library used its photocopiers to infringe copyright, the Law Society lacked the degree of control over the Great Library’s patrons that would rebut the presumption. This point is explained in more detail at paragraph 45 (citation omitted):

The Law Society and Great Library patrons are not in a master-servant or employer-employee relationship such that the Law Society can be said to exercise control over the patrons who might commit infringement [...]. Nor does the Law Society exercise control over which works the patrons choose to copy, the patron’s purposes for copying or the photocopiers themselves.

[25] In this case, satellite radio service providers may be said to authorize their subscribers to use all features of the radio receivers with which they are supplied. It is appropriate that the satellite radio service providers be given, *prima facie*, the benefit of the presumption against the authorization of the use of the receivers to infringe copyright. The issue for this Court is whether the presumption has been rebutted.

[26] In the circumstances of this case, the question of rebuttal turns on the degree to which satellite radio service providers control the use of the satellite radio receivers they supply to their subscribers. In that regard, I do not read the CCH case as authority for the proposition that the degree of control required to rebut the presumption necessarily requires a particular legal relationship between the user of equipment and the person authorizing its use. In my view, while the requisite degree of control may exist if there is, for example, a master-servant relationship or an employer-employee relationship, it may also exist in other circumstances.

[27] Here, the relationship is one of satellite radio service provider and subscriber. The service provider supplies the subscriber with broadcast content (some of which, but not all, is subject to copyright) and a receiver that must be used to receive the broadcast content. The use of a receiver with an extended buffer automatically causes 44 to 60 minutes of broadcast content to be copied, and the use of a receiver with block recording feature that is engaged automatically causes up to 10 or 100 hours of broadcast content to be copied.

[28] It is important, in my view, that the subscriber cannot prevent the copying of broadcast content without turning the receiver off or, if the receiver has a block recording feature, by disengaging it. Because the copying is automatic, the only control that can be exercised over copying initiated by the subscriber rests with the satellite radio service providers. They alone know what is being broadcast and when, and what broadcast content is subject to copyright. They alone have chosen to supply their subscribers with receivers that preclude them from exercising any

choice as to what is copied in the extended buffer once the receiver is turned on, and any choice as to what is copied when the block recording feature, if any, is engaged.

[29] It is true that not all broadcast content is subject to copyright. However, it is equally true that when a particular work is being broadcast on a particular channel, and a satellite radio receiver is turned on and tuned to that channel, some or all of that work will necessarily be copied to the extended buffer or, in the case of a receiver with a block recording feature that is engaged, to the block recording memory. In practical terms, the use of a satellite radio receiver as it is intended to be used will always result in the making of infringing copies because of the technological choices made by satellite radio service providers.

[30] The element of *automatic copying* by a satellite radio receiver is a factor that was not present in the CCH case. Each patron of the Great Library could choose what to copy and what not to copy. By contrast, in this case a subscriber causes the copying of *all* received broadcast content merely by using the satellite radio receiver as it is intended to be used. In my view, in the circumstances of this case, the presumption against the authorization of an infringing act is rebutted in this case by the degree of control exercised by the satellite radio service providers over their broadcast content and the features included in the radio receivers supplied to their subscribers.

[31] This leads me to consider the question of disclaimer notices, which were the subject of considerable discussion in the hearing of these applications. Notices that are somewhat analogous to the disclaimer notices in the CCH case appear in the “user guide” and the “end user licence

agreement” for Stiletto receivers. CSI argues statements from those documents could be interpreted by users as a “signal” that the copying of copyright material on the receiver is permitted. The Board appeared to accept this submission at paragraph 113 of its reasons, the last sentence of which reads as follows:

In addition, some end-user licence agreements contemplate the possibility that subscribers will use the receiver software to copy content programming or even individual songs based on which a subscriber could presume that the Satellite Services purport to have the authority to allow private copying.

De plus, certains contrats de licence d'utilisation prévoient la possibilité pour les abonnés d'utiliser le logiciel du récepteur pour copier du contenu de programmation ou même des chansons ce qui autoriserait un abonné à supposer que les services par satellite sont censés disposer du pouvoir d'autoriser les copies privées.

[32] The notices to which this Court was referred read as follows:

From the Stiletto User Guide:

Several features of the Stiletto 10 [or 100] enable you to record and store broadcast content for playback. Broadcast content is subject to copyright laws, and distribution of copyrighted material is prohibited by law without the express permission of the copyright holder. To prevent unlawful distribution of copyrighted material, the Stiletto 10 [or 100] prevents you from electronically copying stored (recorded) songs or shows to another device.

From the Stiletto 10 End User Licence Agreement:

You may use the Software only for your private, non-commercial use. You may not use the Software in any way to provide, or as part of, any commercial service or application. Copies of content files, including without limitation songs and other audio recordings, which are stored and/or transferred using the Software, and which are protected by the copyright laws or related laws of any jurisdiction, are for your

own personal use only and you may not publicly perform them or distribute them to third parties.

[33] As I read these notices, they are intended primarily to warn subscribers about certain impermissible uses of copies of broadcast content stored in the satellite radio receiver that may be subject to copyright. The notices might have been more thorough if they had expressly informed subscribers that merely receiving broadcast content on a receiver equipped with an extended buffer or a receiver equipped with a block recording feature that is engaged may result in the making of an infringing copy of broadcast content that is subject to copyright. Nevertheless, I am not inclined to conclude, as the Board apparently did, that the absence of that information justifies the conclusion that a subscriber might presume that the satellite radio service providers “purport to have the authority to allow private copying”. I would say, however, that the satellite radio service providers could not realistically have advised their subscribers against making infringing copies, because copying was automatic in the case of a receiver with an extended buffer, and in the case of a receiver with a block recording feature when it was engaged.

[34] For these reasons, I conclude that the Board did not err in law when it concluded that the satellite radio service providers, by supplying a subscriber with a radio receiver having an extended buffer or a block recording feature, thereby authorized the subscriber to copy all broadcast content, including broadcast content that was subject to copyright. It follows that the Sirius application cannot succeed.

CSI application (A-210-09)

[35] CSI asserts a number of challenges to the Board's decision. Its challenges fall into two general categories. The first category relates to the determination of the location of the copying of a work and whether an infringing authorization can occur in relation to a copy made outside Canada. The second category relates to the copies of broadcast content made in the 4, 6 or 10 second buffer memory found in all satellite radio receivers.

(1) The location of the copying of a work, and the authorization of copying outside Canada

[36] A copy of each work available for broadcast by Sirius and XM Canada resides in a main server located in the United States. When Sirius and XM Canada instruct their scheduling software to play a specific work, the instruction is sent to the United States main server, and the track for that work is uplinked from the United States main server to the satellite for transmission to Canada in the course of their Canadian broadcast activities.

[37] Some of the electronic copies of works residing in the United States main server are created by transmission from a party located in the United States based on instructions from Sirius and XM Canada. Others are transmitted from the Canadian studios of XM Canada as a step in the programming of its Canadian channels.

[38] Programming entails the selection of works, some obtained in the form of CDs and some by direct electronic transfer from DMDS-Musicrypt to XM Canada's computer in Canada. Once the XM Canada music director in Canada selects a work to be added to the XM Canada playlist, he or

she engages a technological device that causes the electronic music file to be transferred from Canada to a main server located in the United States, where it remains permanently available for uplink to the satellite and transmission to Canada.

[39] The issues raised by CSI in relation to the copies of works residing in the United States main server are whether the Board erred in law when it concluded that: (a) the Board has no jurisdiction to impose a royalty tariff in respect of a copy of a work made in the United States as a direct result of an act taken by XM Canada in Canada; (b) the Board has no jurisdiction to impose a royalty tariff in respect of XM Canada's authorization in Canada of the making in the United States of a copy of a work; (c) Sirius and XM Canada did not authorize the copying in the United States of any works.

[40] The Board concluded that, when an electronic copy of a work is transmitted to and stored on the United States main server solely as a result of the act of a person in Canada, the copying occurs in the United States and therefore the Board has no jurisdiction to impose a royalty tariff in respect of that copying. In reaching that conclusion, the Board reasoned that the act of reproduction occurs in the place where the creation of the copy is completed, so that an electronic copy of a work comes into existence in the United States when it is received by the server located in the United States. Therefore, that copy is made in the United States even if the mechanism by which the copy was created was activated in Canada.

[41] CSI argues that where the copying is initiated in Canada, the act of copying occurs in Canada because there is no person outside Canada who can be held responsible for it. This

argument assumes that the making of the copy in these circumstances cannot be subject to the copyright laws of the United States, and that the owner of the United States server who permits it to be used as the repository for copies of musical works cannot be held liable under the copyright laws of the United States. This Court was referred to nothing in the record and no jurisprudence that could support this assumption, and I see no basis for accepting it.

[42] CSI also relies on the decision of *eBay Canada v. M.N.R.*, [2010] 1 F.C.R. 145, 2008 FCA 348, at paragraph 52, for the proposition that information stored on a computer in the United States is in law capable of being located in Canada for the purpose of section 231.6 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). CSI argues that, based on the reasoning in that case, the electronic copy of a musical work stored on the United States server may be treated as being located in Canada for the purposes of the *Copyright Act*.

[43] Nothing in *eBay* compels the conclusion that, for the purposes of the *Copyright Act*, an electronic copy of a musical work stored in a server in a particular country is also located in another country merely because there is a person in that other country who can access the copy. I would reject any such interpretation because it would necessarily mean that a specific copy of a work may, at the same moment, be within the territorial scope of the *Copyright Act* and the territorial scope of any number of the copyright laws of any number of other countries. That would not be consistent with the well established and well understood territorial limitation of the *Copyright Act* (see the *Tariff 22* case, paragraph 56).

[44] Nor can I accept the argument of CSI that the copying occurred in both Canada and the United States, so that the location of the copying for purposes of the *Copyright Act* should be determined on the basis of the “real and substantial connection” test as applied in the *Tariff 22* case. The *Tariff 22* case required a determination, for the purposes of the *Copyright Act*, of the location of a communication initiated in one country and received in another. Given that a communication cannot be complete without both a sender and receiver, it was necessary to adopt a principled basis for choosing whether the communication would be situated at the location of the sender or the location of the receiver. The principle applied in that case – the real and substantial connection test – is not required to determine the location of the act of copying where, as in this case, the completed copy exists only in one location.

[45] I agree with the Board that the making of a copy is not complete until it exists in some material form (see subsection 3(1) of the *Copyright Act*). I also agree that the electronic copies of works stored in the United States main server are outside the Board’s jurisdiction, even if the copying was initiated in Canada. I am compelled to conclude that CSI’s challenge to that aspect of the Board’s decision cannot succeed.

[46] CSI argues in the alternative that a person who initiates, in Canada, the making of an electronic copy of a work in the United States has authorized the copying, and has thereby infringed in Canada the copyright attached to the work by virtue of the closing words of subsection 3(1) of the *Copyright Act*. The Board, based on its interpretation of subsection 3(1), concluded that the act of

authorizing in Canada is not actionable under the *Copyright Act* where the primary infringement occurs outside Canada. I agree.

[47] As I interpret the closing words of subsection 3(1), the authorization of a particular act infringes copyright only if the authorized act is itself an act of infringement. Therefore, when the Board concluded correctly that it has no jurisdiction to impose a royalty tariff in relation to the copying of a work located in the United States, it was compelled to conclude that it has no jurisdiction to impose a royalty tariff in relation to the authorization of that copying, even if the authorization took place in Canada.

[48] CSI also argues that the Board should have concluded that Sirius and XM Canada authorize the copying of all musical works on the United States servers, including copies created by the act of a person in the United States. That argument too must fail, based on the interpretation of paragraph 3(1) of the *Copyright Act* set out in the previous paragraph.

(2) Copies in the 4 to 10 second buffer

[49] The remaining challenges by CSI to the Board's decision relate to the 4 to 10 second buffer memory found in all satellite radio receivers supplied by Sirius and XM Canada to its subscribers. The buffer memory automatically records 4 to 10 seconds of broadcast content. The recorded content is continuously replaced as new content is received so that at any point in time, only the last 4 to 10 seconds of broadcast content is in the buffer. The content is played to the listener in a

“rolling” fashion to provide for smooth listening, with none of the interruptions that might be caused by momentary interruptions in transmission.

[50] The specific questions are whether the Board erred in concluding that (a) a work is not copied when 4 to 10 second segments of the work are copied in the buffer memory of a satellite radio receiver or a personal computer; and (b) a 4 to 10 second segment of a work is not a substantial part of the work.

[51] CSI argues that the Board erred in law in determining that the rolling 4 to 10 seconds of broadcast content stored momentarily in the temporary memory of a satellite radio receiver is not a copy of the work, or a copy of a substantial part of a work. The Board’s conclusion on this point is primarily a finding of mixed law and fact but CSI argues, in essence, that the Board misdirected itself by reasoning that a copy of a work or a substantial part of a work would exist only if a complete reproduction of the work exists at one point in time.

[52] While the Board clearly considered it relevant that the 4 to 10 second buffer does not cause a copy of the entire work to exist at any point in time, I do not read its reasons as indicating that this was determinative. As I understand the Board’s reasons, its conclusion was influenced, not only by the fact that a copy of no more than 4 to 10 seconds of content could exist in the buffer at any one time, but also by the fact that there would at no time be a choice as to what goes into the buffer and when it comes out. In my view, the Board’s conclusion that the buffered content was not a copy of

an entire work or a copy of a substantial part of a work was reasonably open to it on the record and was not based on an error of law. CSI's application cannot succeed on this ground.

Conclusion

[53] I would dismiss both applications for judicial review with costs.

“K. Sharlow”

J.A.

“I agree

Eleanor R. Dawson J.A.”

“I agree

David Stratas J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-209-09

STYLE OF CAUSE: SIRIUS CANADA INC. v.
CMRRA/SODRAC INC., SOCAN,
CANADIAN SATELLITE RADIO
INC. and NRCC

PLACE OF HEARING: Ottawa

DATE OF HEARING: September 7 and 8, 2010

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: DAWSON J.A.
STRATAS J.A.

DATED: December 16, 2010

APPEARANCES:

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