Federal Court of Appeal  Cour d'appel fédérale

Date: 20140331

Dockets: A-516-12
A-527-12
A-63-13

Citation: 2014 FCA 84

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

Docket: A-516-12

BETWEEN:

CANADIAN BROADCASTING CORPORATION/
SOCIÉTÉ RADIO-CANADA

Applicant

and

SODRAC 2003 INC.

and

SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND PUBLISHERS IN CANADA (SODRAC) INC.

Respondents

Docket: A-527-12

AND BETWEEN:

ASTRAL MEDIA INC.

Applicant

and

SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND PUBLISHERS IN CANADA (SODRAC) INC.

Respondent

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Respondents

Heard at Montréal, Quebec, on October 1, 2013.

Judgment delivered at Ottawa, Ontario, on March 31, 2014.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] In a decision dated November 2, 2012 (the Decision), the Copyright Board (the Board) exercised its mandate under section 70.2 of the Copyright Act, R.S.C. 1985 c. C-42 (the Act) to settle the terms of a licence to be granted to two broadcasters by a collective society which administers reproduction rights. The terms of the licence reflect the Board's view that royalties were payable with respect to ephemeral copies of works made by the broadcasters in the normal course of their production or broadcasting activities. Ephemeral copies, as will be seen, are copies or reproductions that exist only to facilitate a technological operation by which audiovisual work is created or broadcast.

[2] This aspect of the Board's decision rests on the Supreme Court of Canada's decision in *Bishop v. Stevens*, [1990] 2 S.C.R. 46, in which the Court held that ephemeral recordings of a performance of a work, made solely for the purpose of facilitating the broadcast of that performance, were, if unauthorized, an infringement of the copyright holder's rights. In this application for judicial review of the Board's Decision, the broadcasters argue that *Bishop v. Stevens* must be read in the light of *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, (*ESA*), a decision in which the Supreme Court affirmed the principle of technological neutrality in copyright matters. The result, in the applicants' view, is that, today, ephemeral copies should no longer attract royalties.

[3] The Board's decision raised other issues which will be discussed below but the question that dominated the hearing of this appeal was the treatment of ephemeral recordings in light of *ESA*.

[4] For the reasons that follow, I am of the view that *Bishop v. Stevens* continues to be good law.

THE DECISION UNDER REVIEW

[5] These reasons apply to three applications for judicial review. In file no. A-516-12, the Canadian Broadcasting Corporation/Société Radio Canada (CBC) seeks to set aside several terms of the 2008-2012 licence issued to it pursuant to the Decision. In file no. A-527-12, Astral Media Inc. (Astral) also seeks to set aside a number of the terms of the 2008-2012 licence issued to it pursuant to the Decision. Lastly, file no. A-63-13 involves another application for judicial review by CBC, this time with respect to the Board's January 16, 2013 decision extending the 2008-2012 licence to the 2012-2016 period on an interim basis pending a final determination of SODRAC's section 70.2 with respect to that period. Both licences issued pursuant to the November 2, 2012 and the January 16, 2013 decisions are subject to a stay of execution pursuant to an order of this Court made February 28, 2013, pending the final determination of these applications for judicial review.

[6] These reasons deal with all three applications; a copy of them will be placed on each file. Judgment will issue separately in each file, on the terms provided in these reasons.

[7] The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (Sodrac) Inc., and SODRAC 2003 Inc. (collectively SODRAC) are collective societies responsible for the administration of the reproduction rights on behalf of the holders of those rights.

[8] CBC is Canada's public broadcaster. CBC's mandate with respect to Canada's French speaking population is discharged by the Société Radio-Canada (Radio-Canada) which, for many years, has produced and broadcast programs incorporating music by Québec artists. Since SODRAC represents the majority of Québec reproduction rights holders, Radio-Canada and SODRAC are well known to each other.

[9] Astral is a broadcaster specializing in specialty channels but unlike the CBC, it does not produce any of its own programming. It purchases audiovisual works for broadcast from producers, apparently on the understanding that these producers have obtained the necessary rights to allow it to broadcast the works without the payment of additional royalties

[10] This dispute arises out of a particular historical context. Following the decision in *Bishop v. Stevens* in 1990, SODRAC licensed broadcasters making use of its repertoire to make ephemeral copies for broadcasting purposes, and to incorporate works in its repertoire into their own productions. These licences also covered producers who were commissioned by these broadcasters to produce works containing SOCRAC material. Around 1998, SODRAC began requiring such producers o obtain their own licence, though these licences did not require the payment of royalties. Around 2006, SODRAC began requiring producers to pay for the right to incorporate works from its repertoire into their productions, even if the broadcaster commissioning the work was licensed by SODRAC.

[11] In 1992, CBC and SODRAC concluded an agreement that set the terms upon which CBC was authorized to use works from SODRAC's repertoire on radio, on television and for certain

ancillary purposes. This agreement was renewed from time to time but as SODRAC's licensing practices changed, they were unable to come to an agreement on renewal. SODRAC invoked section 70.2 of the Act so as to seize the Board with the question. More or less at the same time, SODRAC also invoked section 70.2 of the Act in relation to Astral. The Board consolidated the hearing of these two matters.

[12] Section 70.2 of the Act provides for a form of arbitration in which parties who are unable to agree on the term of a licence can apply to the Board to fix those terms:

70.2 (1) Where a collective society and any person not otherwise authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, in respect of the works, sound recordings or communication signals included in the collective society's repertoire are unable to agree on the royalties to be paid for the right to do the act or on their related terms and conditions, either of them or a representative of either may, after giving notice to the other, apply to the Board to fix the royalties and their related terms and conditions.	70.2 (1) À défaut d'une entente sur les redevances, ou les modalités afférentes, relatives à une licence autorisant l'intéressé à accomplir tel des actes mentionnés aux articles 3, 15, 18 ou 21, selon le cas, la société de gestion ou l'intéressé, ou leurs représentants, peuvent, après en avoir avisé l'autre partie, demander à la Commission de fixer ces redevances ou modalités.
(2) The Board may fix the royalties and their related terms and conditions in respect of a licence during such period of not less than one year as the Board may specify and, as soon as practicable after rendering its decision, the Board shall send a copy thereof, together with the reasons therefor, to the collective society and the person concerned or that person's representative.	(2) La Commission peut, selon les modalités, mais pour une période minimale d'un an, qu'elle arrête, fixer les redevances et les modalités afférentes relatives à la licence. Dès que possible après la fixation, elle en communique un double, accompagné des motifs de sa décision, à la société de gestion et à l'intéressé, ou au représentant de celui-ci.

[13] The heart of the dispute between CBC and Astral (collectively, the Broadcasters) on the one hand, and SODRAC, on the other, is SODRAC's business model which the Broadcasters say is inconsistent with the prevailing industry model. The Broadcasters say that the normal practice in the industry is for the producer of an audiovisual work (television program, movie or other cinematographic work) to obtain a through-to-the-viewer licence from the rights holder.

[14] In its Decision, the Board described a through-to-the viewer licence as follows:

> Producers sometimes secure a *through-to-the-viewer licence*. Such a licence authorizes all copies of a musical work made by the producer or others in the course of delivering the audiovisual work to the ultimate consumer in the intended market, be it television, cinema, DVD, Internet or other. A *buy-out licence* is a through-to-the-viewer licence in which royalties are set at a lump sum paid up front. Other through-to-the-viewer licences give the producer the option to extend the licence beyond a certain point in time, a certain territory or a certain market at pre-determined prices. When a producer exercises an option pursuant to a through-to-the-viewer licence, the related rights are cleared for downstream users as well as for the producer.
>
> Decision at paragraph 15

[15] The Broadcasters emphasize that this type of licence is consistent with the producer's intention in obtaining a licence, which is to create a product that can be marketed to broadcasters or exhibitors who can then exploit it commercially. The fact that the rights acquired under a through-to-the-viewer licence may be limited in time or place does not detract from the essential feature of such a licence, which is that the producer obtains or "clears" all necessary rights for downstream users, within the temporal or geographical limits of the licence.

[16] As against this model, SODRAC has adopted a layered approach to licensing in which each link in the distribution chain must acquire (and pay for) the right to make the copies required for its

commercial purposes. It is reasonable to assume that SOCRAC'S position is designed to maximize revenue for the artists it represents.

[17] SODRAC's change in strategy corresponds with the adoption of new technology that generally requires producers to make multiple copies of a musical work in order to incorporate it into an audiovisual work, a process known as synchronisation. At the same time, computerized digital content management systems and digital projection systems require broadcasters or exhibitors of an audiovisual work to make multiple copies of the work in order to broadcast or exhibit it. These copies, described earlier in these reasons as ephemeral copies, are known as incidental copies and were described as follows by the Board:

> …*Synchronization* refers to the process of incorporating a musical work into an audiovisual work. Thus, a *synchronization copy* is any copy made in order to include the work into the final (*master*) copy of an audiovisual work. A post-synchronization copy of the music is made each time the audiovisual work itself is copied, for example to broadcast, deliver or distribute the audiovisual work.
>
> An *incidental copy* is necessary or helpful to achieve an intended outcome but is not part of the outcome itself. A *production-incidental copy* is made in the process of producing and distributing an audiovisual work, either before or after the master copy is made: it is a form of synchronization copy. A *broadcast-incidental copy* is made to facilitate the broadcast of an audiovisual work or to preserve the work in the broadcaster's archives, while a *distribution-incidental copy* is made for the purpose of readying or preserving the motion picture for distribution to the public: both are forms of post-synchronization copies.
>
> Decision at paragraphs 11-12 (emphasis in the original)

[18] To round out this discussion of incidental copies, it is of interest to note that the evidence before the Board was that a producer will reproduce a musical work between 12 and 20 times in the course of the synchronization process leading to a finished master copy. Television broadcasters, using digital content management systems (which are now the industry standard), make multiple

copies of an audiovisual work in the course of editing (for example, adjusting sound and colour balance), broadcasting and archiving the work. While the making of incidental copies is not a new phenomenon (see *Bishop v. Stevens*), it appears that technological advances may have increased the number of incidental copies made in the course of commercial operations. The Board says it did; the Broadcasters dispute this.

[19] With that background, I turn to the Board's decision. After having laid out the historical and technological background summarized above, the Decision then set out a few general legal principles, the most relevant of which is the following:

> Fourth, the Board cannot impose liability where the Act does not or remove liability where it exists. Consequently, the Board cannot decide who should pay, only what should be paid for which uses, and only to the extent that the envisaged use requires a licence.
>
> Decision at *paragraph* 62

[20] This principle is a partial answer to the Broadcaster's argument with respect to whether incidental copies should attract royalties. In the Board's view, liability to pay royalties is imposed by the Act and is based upon use of the protected material. As a result, the Board cannot relieve a user of protected material from the financial consequences of that use.

[21] The Board then went on to consider what it called "contextual legal principles". Under this heading, the Board engaged in an examination of the history and current state of SODRAC's licensing practices. It acknowledged that the use of through-to-the viewer licenses in some markets by some rights holders was relevant but not determinative. The focus of the inquiry was on

SODRAC's practices which, to the extent that they were both consistent and significant in the relevant market, could not be ignored.

[22] The Board's review of the evidence, including SODRAC's licensing practices, led it to conclude that SODRAC had issued few, if any, through-to-the-viewer licences. To the extent that SODRAC had issued licences granting the licencee the right to authorize others to reproduce protected works, that right generally resided with the broadcaster not with the producer. So it was that CBC's licence from SODRAC covered synchronization in audiovisual works commissioned by CBC from independent producers. Under such licences, producers did not acquire the right to authorize anyone "downstream" in the distribution chain to reproduce a protected work.

[23] As a result of its review of the evidence, the Board concluded that the record before it was unambiguous. "In the most relevant market, the province of Québec, through-to-the-viewer licensing exists but is not the norm": see Decision at paragraph 78. This finding is significant because, to the extent that the Board sets royalties and licence fees on the basis of the economic value of the rights involved, the definition of the market for those rights is a relevant consideration.

[24] The Board next embarked on an analysis of the economic value of reproduction rights in the hands of broadcasters and producers, an analysis that proceeded on the basis of two fundamental propositions:

> a) The copy-dependent technologies adopted by producers and broadcasters add value to their businesses, by allowing them to remain competitive, even if they do not generate direct profits. Since part of this value arises from the use of additional copies, some of the benefits flowing from those copies should be reflected in the remuneration paid for the additional copies.

> b) The Board cannot, under the umbrella of a section 70.2 arbitration between two parties, dictate how either of the parties should conduct their business generally, or how they should deal with third parties such as producers. In other words, it is not for the Board to force SODRAC to issue through-to-the-viewer licenses or to establish through-to-the-viewer licences as a standard arrangement.

[25] After establishing these principles, the Board's decision went on at some length in setting the financial terms of the licences to the CBC and to Astral. After making allowance for the fact that SODRAC did not represent all of the rights holders for music incorporated into the Broadcasters' offerings, the Board then addressed the quantification of the fees to be paid by the latter under various headings. The Board set the licence fees for broadcast-incidental copies in radio and television as well as the fees payable by CBC with respect to synchronization licences. Finally, the Board dealt with licence fees payable for internet TV, sales of programs to consumers for private use (DVDs and downloads), and fees for licensing of CBC programs to third parties.

[26] The Broadcasters' principal argument before us was that the analysis adopted by the Board flew in the face of the principle of technological neutrality established by the Supreme Court in *ESA*. As a result, in order to simplify the analysis, I propose to deal with the issue of technological neutrality at this point, deferring the analysis of the other arguments made by the Broadcasters until later in these reasons.

ANALYSIS

[27] The Board is unusual among specialized administrative tribunals in that its decisions on question of law are reviewable on the standard of correctness: see *Rogers Communications Inc. v. Society of Composers, Author sand Music Publishers of Canada,* 2012 SCC 35, [2012] 2 S.C.R. 283 at paragraphs 10-15. Questions of fact are only reviewable if they are "made in a perverse or

capricious manner or without regard for the material before it [the tribunal]": see section 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (*Khosa*), the Supreme Court of Canada described this provision as providing "legislative precision to the reasonableness standard of review of factual issues falling under the *Federal Courts Act*": *Khosa*, at paragraph 46.

[28] Earlier in these reasons, I set out two fundamental propositions that inform the Board's reasoning: see paragraph 25. The first is that, if technological advances require the making of more copies of a musical work in order to get an audiovisual work that incorporates it to market, those additional copies add value to the enterprise. As a result, they attract additional royalties, not necessarily on a per-copy basis but on the basis of the additional value generated by those copies. Simply put, more copies mean more value and thus, more royalties.

[29] The Broadcasters challenge this proposition on two interrelated but distinct grounds. First, they say that copy-dependent technology does not add value to an enterprise and as a result, there is no additional value to share with artists who, incidentally, bear none of the costs of acquiring and maintaining the new technology. This is essentially an economic argument, on which the Board heard extensive evidence and on which it came to a conclusion for which there is an evidentiary foundation. As a result, this Court is not in a position to interfere with the Board's conclusion on the economic justification for its conclusion.

[30] The Broadcasters' second argument is a legal one: the Board's decision fails to give effect to the principle of technological neutrality articulated by the Supreme Court in *ESA*. The Broadcasters

concede, as they must, that the incorporation of a musical work into an audiovisual work (synchronization) is a reproduction that attracts royalties. However, they go on to argue that copies of the work that are made purely to meet the requirements of the technological systems used by producers and broadcasters ought not to attract royalties. Changes in technology should not automatically result in changes in royalties. Otherwise, intellectual property rights become a drag on technological innovation and efficiency.

[31] The Board's reasoning is grounded in the Supreme Court's decision in *Bishop v. Stevens*, a case in which the Supreme Court held that each of the rights enumerated in subsection 3(1) of the Act was a separate right reserved to the owner of the copyright, whose use by another attracted liability for the payment of royalties. Section 3(1) of the Act is reproduced below for ease of reference:

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	3. (1) Le droit d'auteur sur l'œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'œuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'œuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :
(a) to produce, reproduce, perform or publish any translation of the work,	a) de produire, reproduire, représenter ou publier une traduction de l'œuvre;
…	…
(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,	d) s'il s'agit d'une œuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'œuvre peut être reproduite, représentée ou exécutée mécaniquement;
(e) in the case of any literary, dramatic,	e) s'il s'agit d'une œuvre littéraire,

musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,	dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'œuvre en tant qu'œuvre cinématographique;
(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,	f) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;
…	…
and to authorize any such acts.	Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

[32] More specifically, *Bishop v. Stevens* decided that ephemeral recordings made solely for the purpose of facilitating the broadcast of a work were caught by paragraph 3(1)(*d*) of the Act and were not implied in the right to broadcast a work: see *Bishop v. Stevens* at paragraphs 22-25. To that extent, *Bishop v. Stevens* is directly on point and, unless it has been overturned or disavowed by the Supreme Court, it determines the outcome of this branch of the applications for judicial review.

[33] The Broadcasters say that *Bishop v. Stevens* has been overtaken by *ESA*.

[34] The issue in *ESA* was whether a download of a game containing music is a communication of the musical work to the public by telecommunication, one of the rights reserved exclusively to the copyright holder by the Act: see paragraph 3(1)(*f*). If it is, then the publishers of the game, who had already paid for the right to *reproduce* the music incorporated in the game, were liable to pay royalties with respect to the download (*the communication to the public by telecommunication*). As a result, recourse to a technologically advanced method of delivery would create liability for additional royalties that were not paid or payable when the game was sold on a traditional physical medium, such as a CD-ROM.

[35] In its decision, reported at (2007) 61 C.P.R. (4th) 353, the Board found that the download of a game containing music was a communication of the musical work to the public by telecommunication, a decision that was confirmed by this Court at 2010 FCA 221. The majority of the Supreme Court reversed this Court and, in the course of doing so, affirmed the principle of technological neutrality.

[36] The Supreme Court began by articulating its view of the source and effect of technological neutrality:

> In our view, the Board's conclusion that a separate, "communication" tariff applied to downloads of musical works violates the principle of technological neutrality, *which requires that the Copyright Act apply equally between traditional and more technologically advanced forms of the same media: Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363, at paragraph 49. The principle of technological neutrality is reflected in s. 3(1) of the Act, which describes a right to produce or reproduce a work "in any material form whatever". In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.
>
> *ESA* at paragraph 5 (my emphasis).

[37] A slightly different view of technological neutrality emerges from paragraph 9 of the majority's reasons:

> SOCAN has never been able to charge royalties for copies of video games stored on cartridges or discs, and bought in a store or shipped by mail. Yet it argues that identical copies of the games sold and delivered over the Internet are subject to both a fee for reproducing the work and a fee for communicating the work. *The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the Copyright Act in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user.* To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.
>
> (My emphasis.)

[38] Finally, a third view of technological neutrality is found in paragraph 10 of the majority's reasons:

> The Board's misstep is clear from its definition of "download" as "a file containing data ... the user is meant to keep as his own" (*paragraph* 13). The Board recognized that downloading is a copying exercise that creates an exact, durable copy of the digital file on the user's computer, identical to copies purchased in stores or through the mail. *Nevertheless, it concluded that delivering a copy through the Internet was subject to two fees - one for reproduction and one for communication - while delivering a copy through stores or mail was subject only to reproduction fees. In coming to this conclusion, the Board ignored the principle of technological neutrality.*
>
> (My emphasis.)

[39] A careful reading of these passages shows that the Supreme Court's majority reasons incorporate at least three views of technological neutrality:

> a) Technological neutrality is media neutrality. Media neutrality is a statutory prescription arising from the opening words of section 3 of the Act, which protects the production or reproduction of works "in any material form whatever". Media neutrality was recognized by the Supreme Court in *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363 (*Robertson*), a case involving copyright in content originally published in a newspaper and then republished online.
>
> b) Technological neutrality is a principle of statutory interpretation according to which, absent evidence of a contrary Parliamentary intention, the Act is to be interpreted so as to avoid imposing royalties according to the method of delivery of a protected work.
>
> c) Technological neutrality is determined by functional equivalence so that if two technologically distinct operations produce the same result (delivering a copy of a work to the consumer), the incidence of royalties should be the same in both cases.

[40] In light of these different views of technological neutrality, it is difficult to know how one is to approach technological neutrality post-*ESA*. This is particularly true when one considers that in both *Robertson* and *ESA* the Court's decision was reached following an analysis that did not rely on any of the possible variants of technological neutrality.

[41] In *Robertson*, the issue was whether the Globe and Mail infringed the copyright of freelance contributors when it contributed their work to electronic databases. The case was one of overlapping copyrights as the freelance contributors retained the copyright in their article while the Globe and Mail had the copyright in the newspaper as a whole, whether considered as a compilation or a collection: see *Robertson*, at paragraph 31. The majority in the Supreme Court held that the databases infringed the freelancer's copyright because the databases did not involve a reproduction of the newspaper as such but of discrete elements such as articles, even though these were tagged with the name of the original publication, date of publication and other publication specific identifiers. The basis of the Supreme Court's decision is that the database reproduced the freelance contributor's, not the newspaper's, originality. The result was that the inclusion of the article in the database was an infringement of the freelancer's copyright and was not covered by the newspaper's copyright.

[42] The decision in *Robertson* turned on the originality of the work being reproduced and not on the nature of the medium on which the articles were republished. While the Court's conclusion was technologically neutral, in the sense that the medium on which reproduction occurred was not a relevant consideration, its decision provided no guidance as to how technological neutrality was to be achieved.

[43] Similarly, the majority decision in *ESA* was the result of an analysis of the legislative history of the Act and of the jurisprudence showing that communication to the public by telecommunication was historically an aspect of the performance right, and that this right did not include the delivery of a permanent copy of the work. Since the download did result in the creation

of a permanent copy of the work on the downloader's computer, it was not a performance and thus not a communication of the work to the public by telecommunication.

[44] The majority's analysis did not rely on nor refer to any of the shades of technological neutrality that it discussed in the earlier part of its reasons. As a result, *ESA*, while restating the principle of technological neutrality in copyright law, provides no guidance as to how a court should apply that principle when faced with a copyright problem in which technological change is a material fact.

[45] *Bishop v. Stevens* was just such a case. In it, the broadcaster argued that the right to broadcast a performance necessarily included the right to make ephemeral recordings in support of the broadcasting activity. The broadcaster argued that pre-recording was virtually essential "to ensure the quality of broadcasts and to enable broadcasters to offer the same programming at convenient times across five different time zones": see *Bishop v. Stevens*, at paragraph 23. This argument was rejected on the basis of the statutory distinction between the right to make a recording of a work and the right to perform that work.

[46] The Supreme Court's reasoning in *Bishop v. Stevens* is worth repeating here as it foreshadows the arguments made in this case:

> In sum, I am not convinced that there is any reason to depart from the literal meaning of s. 3(1)(d) and the introductory paragraph to s. 3(1) of the Act, which on their face, draw a distinction between the right to make a recording and the right to perform. Neither the wording of the Act, nor the object and purpose of the Act, nor practical necessity support an interpretation of these sections which would place ephemeral recordings within the introductory paragraph to s. 3(1) rather than in s. 3(1)(d). On the contrary, policy

considerations suggest that if such a change is to be made to the Act, it should be made by the legislature, and not by a forced interpretation. I conclude that the right to broadcast a performance under s. 3(1)(d) of the Act does not include the right to make ephemeral recordings for the purpose of facilitating the broadcast.

Bishop v. Stevens, at paragraph 33

[47] This reasoning is taken up in the following passage from *ESA*:

40 SOCAN submits that the distinction between reproduction and performance rights in *Bishop* actually supports its view that downloading a musical work over the Internet can attract two tariffs. Since reproduction and performance-based rights are two separate, independent rights, copyright owners should be entitled to a separate fee under each right. This is based on the Court's reliance in *Bishop*, at p. 477, on a quote from *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] 2 All E.R. 1496 (C.A.), at p. 1507, per Greene L.J.:

> Under the *Copyright Act*, 1911 [on which the Canadian Act was based], ... the rights of the owner of copyright are set out. A number of acts are specified, the sole right to do which is conferred on the owner of the copyright. The right to do each of these acts is, in my judgment, a separate statutory right, and anyone who without the consent of the owner of the copyright does any of these acts commits a tort; if he does two of them, he commits two torts, and so on. [Emphasis added.]

41 In our view, the Court in *Bishop* merely used this quote to emphasize that the rights enumerated in s. 3(1) are distinct. *Bishop* does not stand for the proposition that a single activity (i.e., a download) can violate two separate rights at the same time. This is clear from the quote in *Ash v. Hutchinson*, which refers to "two acts". In *Bishop*, for example, there were two activities: 1) the making of an ephemeral copy of the musical work in order to affect a broadcast, and 2) the actual broadcast of the work itself. In this case, however, there is only one activity at issue: downloading a copy of a video game containing musical works.

ESA at paragraphs 40-41

[48] In my view, this passage reaffirms the fundamental distinction between reproduction and performance (communication to the public by telecommunication) that the Court articulated in *Bishop v. Stevens*. Nothing in this passage, or elsewhere in *ESA*, would authorize the Board to create

a category of reproductions or copies which, by their association with broadcasting, would cease to be protected by the Act. ESA did not explicitly, or by necessary implication, overrule *Bishop v. Stevens*.

[49] As a result, I am unable to accept the Broadcasters' argument that the comments about technological neutrality in *ESA* have changed the legal landscape to the point where the Board erred in finding that incidental copies are protected by copyright. The Broadcasters' argument with respect to technological neutrality fails.

ADDITIONAL GROUNDS OF REVIEW

[50] The Broadcasters raise a number of other issues in their attack on the Board's Decision. They can be summarized as follows:

> 1- The Board failed to carry out or to properly carry out its role as economic regulator by wrongly deciding a number of questions that arose before it in the course of its decision.
>
> 2- The Board exceeded its jurisdiction when it imposed a general licence on the Broadcasters notwithstanding the latter's expressed preference for transaction-based licences if the Board ordered the payment of royalties for ephemeral reproductions.
>
> 3- The Board failed to consider a relevant factor when it refused to take into account the CBC's ability to pay when fixing licence fees that were substantially more than those which CBC has paid historically.

I will now address each of these in turn.

1- The Board failed to carry out or to properly carry out its role as economic regulator by wrongly deciding a number of questions that arose before it in the course of its decision.

[51] This heading covers a number of distinct findings by the Board whose common denominator is their economic impact. Most of these findings relate to the exercise of the Board's judgment in assessing the evidence put before it by the parties and in putting a value on reproduction rights in different contexts, such as radio, television, internet, and film and DVD distribution.

[52] Such questions are reviewable on the standard of reasonableness since they inevitably involve the weight to be given to the evidence heard by the Board and the conclusions to be drawn from that evidence. Reasonableness, in this context, means "within the range of acceptable outcomes that are defensible in terms of the facts and the law": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 74.

[53] Many of the points raised by the Broadcasters are an attempt to re-argue before us the evidence that was before the Board. In essence, the questions raised by the Broadcasters turn on whether ephemeral copies have economic value and, if so, the proper quantification of that value in the setting of royalties.

[54] The Broadcasters' first approach to the question of the value of ephemeral copies was to argue that any value attached to ephemeral copies was compensated in the through-to-the-viewer licence issued to the producers who paid for a synchronization licence with respect to an audiovisual work. A good deal of evidence was led to show that the through-to-the-viewer licence was the industry standard in Canada and that the terms of such a licence made the issue of broadcast-incidental copies redundant since all downstream reproductions are covered by the terms of the

licence. The Broadcasters say that the Board cannot or should not make an order contrary to established commercial practice in the broadcasting industry.

[55] Notwithstanding the Broadcasters' attempt to make this a question of law, it is one of fact. Did the producers from whom they obtained programs (with respect to which SODRAC administered the reproduction rights) obtain a through to the viewer licence from SODRAC? If the answer to the question is no, it is of no assistance to the Broadcasters to say that they thought the producers had obtained such licences or that they ought to have.

[56] The Board examined the evidence submitted by the parties on this question, including a number of synchronization licences issued by SODRAC and came to the conclusion that "in the relevant market, the province of Québec, through-to-the-viewer licensing exists but is not the norm": Decision, at paragraph 78. It is not this Court's role to review the evidence and to decide if it would come to the same conclusion. The Board's conclusion is based on the evidence, it is intelligible and it is within the range of acceptable outcomes, having regard to the facts and the law.

[57] The Broadcasters also challenge the Board's conclusion that Québec is the relevant market but in light of the fact that SODRAC represents the majority of reproduction rights holders in Québec (see Decision, at paragraph 18), it is not unreasonable to consider the market where SODRAC is the most active as the relevant market.

[58] The Broadcasters go on to say that the formula devised by the Board to credit them in cases where programs which they broadcast have cleared to the viewer is wrong and produces an absurd

result because even if all programs broadcast in a given period were cleared to the viewer, the formula would still require them to pay royalties with respect to those programs. For reasons that will become apparent, I believe that this issue is best dealt with under the heading dealing with the Board's power to issue a blanket licence over CBC's objections.

[59] The remaining "economic" issues involve questions such as the fixing of SODRAC's royalties as a percentage of royalties payable to SOCAN, and the fact that some royalties imposed by the Board (e.g. Internet TV) are inconsistent with those ratios. These decisions are based upon the evidence that the Board had before it and to which it makes reference in its Decision. The Board has expertise in the setting of appropriate royalties as a result of its long experience in doing so. It has the advantage of having heard all the evidence as well as having an in-depth understanding of the context in which these questions arise. These factors suggest that we should defer to the Board's expertise, unless it can be shown that the Board has come to an unreasonable conclusion. That has not been shown with respect to these issues.

2- The Board exceeded its jurisdiction when it imposed a general licence on the Broadcasters notwithstanding the latter's expressed preference for transaction-based licences in the event that the Board ordered the payment of royalties for ephemeral reproductions.

[60] CBC argues that the Board exceeded its jurisdiction when it imposed a blanket synchronization licence. CBC says that it indicated to the Board that, at the royalty rates proposed by SODRAC, it would proceed by way of transactional licences as the need arose. This argument does not arise for Astral as it is not a producer of audiovisual works and therefore does not require a synchronization licence.

[61] CBC's argument is based on the wording of section 70.2 of the Act, the provision that permits the Board to set the terms of a licence between two parties as opposed to fixing a tariff:

70.2 (1) Where a collective society and any person not otherwise authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, in respect of the works, sound recordings or communication signals included in the collective society's repertoire are unable to agree on the royalties to be paid for the right to do the act or on their related terms and conditions, either of them or a representative of either may, after giving notice to the other, apply to the Board *to fix the royalties and their related terms and conditions.*.	70.2 (1) À défaut d'une entente sur les redevances, ou les modalités afférentes, relatives à une licence autorisant l'intéressé à accomplir tel des actes mentionnés aux articles 3, 15, 18 ou 21, selon le cas, la société de gestion ou l'intéressé, ou leurs représentants, peuvent, après en avoir avisé l'autre partie, demander à la Commission *de fixer ces redevances ou modalités.*
(2) The Board may *fix the royalties and their related terms and conditions* in respect of a licence during such period of not less than one year as the Board may specify and, as soon as practicable after rendering its decision, the Board shall send a copy thereof, together with the reasons therefore, to the collective society and the person concerned or that person's representative.	(2) La Commission peut, selon les modalités, mais pour une période minimale d'un an, qu'elle arrête, *fixer les redevances et les modalités afférentes* relatives à la licence. Dès que possible après la fixation, elle en communique un double, accompagné des motifs de sa décision, à la société de gestion et à l'intéressé, ou au représentant de celui-ci.
(My emphasis.)	(Je souligne.)

[62] CBC's argument is that the power to "fix the royalties and their related terms and conditions" does not include the power to decide if the parties will enter into a licensing agreement at all. If the parties do not agree that they wish to enter into a licence agreement, there is no agreement with respect to which the Board may fix the royalties and the terms and conditions. Thus, if "CBC does not want a blanket synchronization licence, the Board has no jurisdiction to impose it": Broadcasters' Memorandum of Fact and Law, at paragraph 18.

[63] SODRAC points out that CBC has the right to refrain from using music in the SODRAC repertoire, in which case the question of the form of licence simply does not arise. However, where CBC chooses to use the SODRAC repertoire in its productions, it requires a licence. If it is not able to agree on the terms of that licence with SODRAC, then the latter is entitled to apply pursuant to section 70.2 of the Act to have the Board set the royalties and the terms and conditions which apply to them, including the basis upon which those royalties are calculated.

[64] In its submissions before the Board, CBC seems to have conceded that the Board could impose a blanket licence. At paragraph 119 of its Decision, the Board summarizes one of the options put forward by CBC's experts with respect to a blanket through-to-the-viewer licence for CBC. Later on, at paragraph 132, the same experts propose a discount to the royalty payable pursuant to the proposal for a blanket licence favoured by the Board.

[65] Finally, CBC's own submissions to the Board appear to have accepted that the Board could impose a blanket licence:

> 12.1 The Board should issue a blanket license covering all television production and broadcasting activities of SRC/CBC.
>
> Joint Application Record, Vol. 1 Tab 1

[66] CBC's response to these facts is to say that the Board could impose a blanket licence with its consent but not without it.

[67] If that is so, then the Board's remedial jurisdiction under section 70.2 is dependent upon the consent of one of the parties to the statutory arbitration. On its face, such a proposition is at odds

with the objective of section 70.2, which is to resolve disputes that the parties have been unable to resolve themselves. In this case, CBC, having failed to agree with SODRAC on the terms of a licence, claims the right to decide that in the future, it will proceed by agreement with SODRAC.

[68] CBC claims that its position is supported by a decision of this Court, *CTV Television Network v. Canada (Copyright Board)*, [1990] 3 F.C. 489. In that case, the issue was whether CTV, as a network, was liable to pay royalties with respect to communication of a work to the public by telecommunication. That issue had been determined against the Copyright Board and the collective societies involved in *CAPAC v. CTV Television Network Ltd.*, [1968] S.C.R. 676 (*Capac*) but, following amendments to the Act, the Board proposed, once again, to consider a tariff payable by the network. The Federal Court agreed with CTV that the amendments had not had the effect proposed by the Board. In the course of its reasoning, the Court said that the Board's only function was to fix the royalties that the collective societies could charge. On appeal, the Federal Court's decision was upheld though this Court took a broader view of the Board's jurisdiction. It quoted the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at page 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

[69] In my view, this statement remains good law. As a result, *CAPAC* is of no assistance to CBC. Its argument on this issue fails.

[70] That said, the issue of the discount formula may go some way to meeting some of CBC's objections to a blanket license. The discount formula is a formula designed to give the Broadcasters credit when they broadcast a program in which the producer has in fact obtained a through to the viewer licence from SODRAC.

[71] Before dealing with the specifics of the operation of the discount formula, it may be useful to review the context. At paragraph 62 of its Decision, quoted at paragraph 19 of these reasons, the Board held that liability for royalties exists only to the extent that the "envisaged use" requires a licence. The corollary of this proposition is that, to the extent that a licence has been obtained by others for the benefit of a broadcaster, no royalties are payable.

[72] A second factor to be taken into account is that the formula for royalties payable in a given month reflects the fact that music from the SODRAC repertoire is only a fraction of the total music used by a broadcaster in any given month. As a result, in calculating the royalty rate for SODRAC, the Board allowed a "repertoire adjustment". Thus at paragraph 93 of its decision, the Board identified the portion of a broadcasting service's offerings which were drawn from the SODRAC repertoire. By way of example only, it found that music from the SODRAC repertoire was 46.33% of the music used on CBC television. To obtain the net royalty rate, the Board multiplied the base royalty rate by the repertoire adjustment. For CBC television, the base royalty rate of 31.25% was reduced by 46.33% to yield a net royalty rate of 14.78% : see paragraph 110 of the Decision.

[73] As for the formula itself, SODRAC points out in its Memorandum of Fact and Law that the Board proposed the discount formula to the parties in pre-hearing mediation. When it introduced the discount formula the Board explained it as follows:

> Nouvelle disposition dont je suis maintenant autorisé à vous faire part. L'intention est de permettre à la SRC [Société Radio Canada] (et à Astral) de ne payer aucune redevance pour les reproductions incidentes de diffusion (broadcast incidental copies) si le producteur de l'émission a effectivement obtenu une licence « through to the viewer ».
>
> New provision which I am now authorized to share with you. The intention is to allow SRC [Société Radio Canada] (and Astral) to not pay any royalties for broadcast incidental copies if he producer of the program has in fact obtained a "through to the viewer" licence.
>
> Application Record, Vol. 23 Tab 14 Article 6.03, Footnote 10

[74] It bears repeating that the royalties payable to SODRAC are only payable for the use of music in the SODRAC repertoire. Taking the Board at its word, if all the programs using music from the SODRAC repertoire in a given month were cleared through to the viewer, then the formula should result in a discount equal to the total royalties otherwise payable for that month.

[75] The Board expressed the formula in terms of a discount per program. The formula itself is as follows:

> Discount per program = A x B / C

Where

> A = the monthly rate applicable to the service that broadcasts the relevant program,
>
> B = the program's production cost, in the case of a CBC program, and the program's acquisition cost, in the case of another program, and
>
> C = the total production and acquisition costs for the programs broadcast by the service during the month.

[76] While the formula is calculated on a program basis and the royalties are calculated on a monthly basis, the monthly discount is necessarily the sum of all the individual program discounts for a given month. So, if the relevant costs for all SODRAC material "cleared to the viewer" broadcast in a month are aggregated under item B, the formula will yield the monthly discount.

[77] In a given month, the royalty payable by a broadcaster is the net royalty rate less the total of the discounts for programs containing music from the SODRAC repertoire that have been cleared to the viewer. If the formula is properly constructed, in a month where all the music used from the SODRAC repertoire was cleared to the viewer, the discount should equal the net royalty rate so that, in that month, no royalties would be due. In order for the discount to equal the net royalty rate (item A in the formula), the fraction B/C must equal 1.

[78] However, we know from the repertoire adjustment that music from the SODRAC repertoire is only 46.33% of all music broadcast by CBC television. As a result, item C in the formula, the total production and acquisition costs for the programs broadcast by the service during the month, will always be larger than item B since item the latter (music from the SODRAC repertoire) represents only 46.33% of the music broadcast in a month and presumably roughly the same proportion of the total production and acquisition costs of all programs in a month. So, in a case where all music from the SODRAC repertoire broadcast in a month had been cleared to the viewer, the total discount for that month would be in the order of 46%, such that a royalty of 54% would be payable in a month in which all rights had already been cleared to the viewer.

[79] Such a result is contrary to law, in the sense that royalties are not payable where the rights to use the music have already been cleared. The Board recognized this when it proposed the formula as a means of allowing the broadcaster an exemption for cleared to the viewer programs. In my view, the Broadcasters are correct when they say that the formula is flawed and needs to be corrected.

[80] In order for the discount formula to work as intended, C must represent the production or acquisition cost of all music from the SODRAC repertoire that has been broadcast in the reference month. Where all of that music has been cleared to the viewer, then B/C will equal 1. In a case where some of the music has been cleared to the viewer and some has not, this amendment to the formula will reduce the royalties payable in proportion to the extent to which music has been cleared to the viewer.

[81] This discussion is no doubt difficult to follow in the abstract. As a result, I have included an example demonstrating both the flaw in the formula as drafted by the Board, and the effect of the amendment to the formula that I propose, in an appendix to these reasons.

[82] In the end result, I would allow the applications in part to allow for the amendment of the discount formula.

3- The Board failed to consider a relevant factor when it refused to take into account the CBC's ability to pay when fixing licence fees that were substantially more than those which CBC has paid historically.

[83] CBC bases this argument on a heading at p. 50 of the Board's decision: Summary of the Rates to be Certified, Estimated Royalties and *Ability to Pay* (my emphasis). CBC points out, correctly, that nowhere in the two paragraphs that make up this portion of the Board's decision is the subject of ability to pay discussed. Furthermore, CBC says that the Board committed a reviewable error in ordering a four-fold increase in royalties payable at a time when, according to the evidence, CBC's revenues have diminished drastically.

[84] This argument can be disposed of summarily. CBC is a publicly funded broadcaster whose basic allocation is voted by Parliament. If the CBC is not properly funded, as its submissions suggest, it is not the role of the artists whose works it uses in its broadcasts and productions to make up the shortfall by accepting less than the economic value of their rights under the Act. The Board's role as economic regulator does not extend to protecting CBC from the cost consequences of the programming choices it makes. This argument fails as well.

[85] This disposes of the matters raised by the Broadcasters in files no. A-516-12 and A-527-12. The terms of the judgment to be issued pursuant to these reasons will be dealt with below. I now turn to the subject matter of file no A-63-12.

The application for judicial review of the interim licence issued on January 16, 2013

[86] The licences issued by the Board following its November 2, 2012 Decision expired on March 31, 2012 (CBC) and August 31, 2012 (Astral). However, in 2009, the Board made an interim order continuing the then existing licences in place until it rendered its decision with respect to the 2008-2012 period. Those interim orders were of no further effect as of November 2, 2012 when the

Board issued its Decision and the concomitant licences. This left a legal vacuum as the 2009 interim licences were at an end and the new licences had already expired.

[87] In order to fill this legal vacuum, on January 16, 2013, the Board ordered that the licences for the 2008-2012 periods would continue in effect from the date of their expiry until the Board rendered a final decision with respect to the section 70.2 application made by SODRAC for the 2012-2016 periods. The Board's interim decision and the licences issued as a result are the subject of the third application for judicial review by CBC.

[88] In its January 16, 2013 reasons (available online at http://www.cb-cda.gc.ca/decisions/2013/sodrac-16012013.pdf), the Board canvassed the factors that were relevant to the making of an interim order. It noted that an interim decision was intended to avoid the negative consequences resulting from lengthy proceedings and avoided the creation of a legal vacuum. It disagreed with CBC's argument that the 2008-2012 licence did not represent the *status quo* given its significant differences from the parties' prior pattern of dealings. The Board found that the *status quo* represented the state of the relationship between the parties at a given time, regardless of how long that state of affairs had been in place. Once the Board made the order with respect to the 2008-2012 period, the terms of that order became the new *status quo*.

[89] CBC also argued that legislative changes and the Supreme Court's recent jurisprudence had or would significantly change the landscape between it and SODRAC. The Board held that the positions put forward by CBC on these issues (the effect of the Supreme Court's decision in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2

S.C.R. 326 and the effect of the amendment to the Act, particularly section 30.9) were hardly non-contentious. The Board was of the view that these matters were more appropriately dealt with in the course of a full hearing rather than on an interim basis.

[90] However, the Board was conscious of the fact that the parties might well choose to organize their affairs differently following the issuance of the 2008-2012 licence. It was of the view that any interim licence should facilitate that process without pre-empting it. As a result, it held that the blanket synchronization licence which it imposed, over CBC's objections, for the 2008-2012 period should be discounted by 20% during the interim period so as to facilitate the migration to a new way of doing business, if the parties were motivated to do so.

[91] Before us, CBC made the same arguments as it had before the Board. It stressed that the *status quo*, in fact, was the state of affairs that was in place prior to the issuance of the 2008-2012 licence, particularly since the execution of that licence was stayed pending the outcome of these proceedings. It also pointed to the effect that it says the newly added section 30.9 of the Act will have on the question of incidental licences. That section provides an exemption in favour of broadcast undertakings reproducing a protected work solely for the purpose of their broadcasting, subject to certain conditions.

[92] Finally, CBC questions whether SODRAC would be in a position to repay any amounts paid to it pursuant to the interim licence if it is successful in its challenge to the latter.

[93] I agree with the Board that once it settled the terms of the 2008-2012 licence, it became the *status quo* between the parties, notwithstanding the stay of execution of that licence. Given that I propose to uphold the 2008-2012 licence with one small change, I can see no reason not to treat that order as the *status quo*. As for the changes in the way the parties do business in the future, in light of the 2008-2012 licence, legislative amendments and developments in the jurisprudence, this is a matter best considered by the Board in the hearings on the merits for the 2012-2016 licence which, as I understand it, were to begin within days of the hearing of this appeal.

[94] As a result, I would dismiss the application for judicial review in file no. A-63-13.

CONCLUSION

[95] For the reasons set out above, I would allow the applications for judicial review in part in files no. A-517-12, A-527-12 and A-63-12, but only for the purpose of amending the discount formula. I would amend the formula by defining element C of the formula where it appears at subsection 5.03 (2) of the CBC licence and subsection 6.03(2) of the Astral licence so that it reads as follows:

> (C) represents the total production and acquisition costs for all programs containing music from the SODRAC repertoire Broadcast by the service during the month.

[96] The stays of execution of the licences issued by the Board on November 2, 2012 and January 16, 2013 are hereby dissolved.

[97] SODRAC is entitled to one set of costs for all applications. However, in light of the Broadcasters' partial success, the amount of the costs, otherwise determined, will be reduced by 10 per cent.

"J.D. Denis Pelletier"
J.A.

"I agree
Marc Noël J.A."

"I agree
Johanne Trudel J.A."

APPENDIX

For the purposes of this example, I assume the following facts:

CBC television's repertoire adjusted royalty rate is 14.78 per cent of the royalty base (the amount of which royalties are calculated): paragraph 110 of the Decision.

The average amount of music from the SODRAC repertoire broadcast by CBC in a month is 46 per cent: paragraph 93 of the Decision.

The total production costs and acquisition costs of programs containing music from the SODRAC repertoire in the reference month is $100,000.

The total production costs and acquisition costs of all programs broadcast in the reference month is $210,000

The acquisition/ production costs of all programs containing music from the SODRAC repertoire in the reference month is as follows:

Program 1 - $15,000
Program 2 - $25,000
Program 3 - $14,000
Program 4 - $16,000
Program 5 - $30,000
$100,000

Assuming that rights to Program 1 have been cleared to the viewer, the royalties payable by the broadcaster for that month would be calculated on the basis of the discount formula A x B/C, where

A = the royalty rate otherwise payable,
B = the acquisition/production cost of the cleared program, and
C = the total acquisition/production cost of programs broadcast in the reference month.

Therefore

A = 14.78% B = $15,000 C = $210,000

Discount Program 1 = 14.78% x $15,000/$210,000 =14.78% x .071= 1.03%

Therefore, the royalties payable by the broadcaster in the reference month would be

14.78% - 1.03% = 13.75% x the royalty base

The discount for each of the other programs, in the event that the producer has cleared the rights to the viewer, applying the same formula, would be:

Program 2 = 1.77%
Program 3 = 0.88%
Program 4 = 1.12%
Program 5 = 2.11%

If all five programs had been cleared to the viewer, the total discount, as per the formula would be:

1.03% + 1.76% + .98% + 1.12% + 2.11% = 7%

The result would be the same if the acquisition/production costs were aggregated for the month, as shown below:

14.78 x $100 000/$210 000 = 14.78 x .476 = 7%

As a result, in a case where all programs containing music from the SODRAC repertoire had been cleared to the viewer, the discount formula established by the Board would result in the broadcaster paying royalties of:

14.78% - 7% = 7.78% of the royalty base

in a month in which there was no liability to pay royalties. This is contrary to law and to the Board's own stated objectives.

This can be remedied by defining C in the formula as the total acquisition/production cost of all programs containing music from the SODRAC repertoire broadcast in the reference month.

Using this formula, if the rights for the music from the SODRAC repertoire had been cleared to the viewer, the discount for Program 1 would be

A=14.78% B=$15,000 C=$100,00\

Discount Program 1 = 14.78% x $15,000/$100,000 = 14.78 x .15 = 2.22%
Royalties payable in reference month = 14.78% - 2.22% = 12.56%

If all programs broadcast in the month had been cleared to the viewer, the discount would be

A=14.78% B=$100,000 C=$100,000

Discount = 14.78% x $100,000/$100,000 = 14.78% x 1 = 14.78%

Royalties payable: 14.78% - 14.78% = 0 x royalty base = $0

This is the result intended by the Board.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-516-12, A-527-12 AND A-63-13
DOCKET:	A-516-12
STYLE OF CAUSE:	CANADIAN BROADCASTIN CORPORATION/SOCIÉTÉ RADIO-CANADA v. SODRAC 2003 INC. AND, SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND PUBLISHERS IN CANADA (SODRAC) INC.
AND DOCKET:	A-527-12
STYLE OF CAUSE:	ASTRAL MEDIA INC. v. SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND PUBLISHERS IN CANADA (SODRAC) INC.
AND DOCKET:	A-63-13
STYLE OF CAUSE:	CANADIAN BROADCASTING CORPORATION/SOCIÉTÉ RADIO-CANADA v. SODRAC 2003 INC. AND, SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND PUBLISHERS IN CANADA (SODRAC) INC.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	OCTOBER 1, 2013
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	NOËL J.A.

TRUDEL J.A.

DATED: MARCH 31, 2014

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