



August 11, 2017

[*CB-CDA 2017-083*]

**Files: SODRAC v. CBC Licences [Redetermination (2008-2012); Determination (2012-2018); Interactive kiosks (2011)]**

## **RULING OF THE BOARD**

### *SODRAC's request*

On August 4, 2017, SODRAC asked the Board to strike certain points raised by CBC in its statement of case and to declare inadmissible some of the evidence filed by CBC.

Essentially, SODRAC alleges that CBC (i) is raising legal arguments that fall outside the scope of the issues brought before the Board; (ii) is raising for the first time arguments challenging the royalties for the sale or licensing of a program; and (iii) has adduced evidence relating to a new category of incidental copies in a procedurally unfair manner.

SODRAC requests that these irregularities be decided prior to the hearing set for Wednesday, September 6, 2017.

### *Background*

By way of background, the Board notes that it consulted the parties on February 4, 2016, about the issues that needed to be addressed (see Notice [*CB-CDA 2016-010*]).

Regarding the consideration of the licence for the years 2012 and following, in light of the parties' submissions, on March 10, 2016, the Board stated that it would consider the following issues (see Notice [*CB-CDA 2016-025*]):

- a. Starting November 7, 2012, the application of new exceptions that came into force on that day;
- b. The royalties for conventional and specialized television broadcast-incidental reproductions, including ARTV as of August 25, 2015, and Explora as of March 28, 2012;
- c. The royalties for Internet video broadcast-incidental reproductions including video-on-demand offers such as *Tou.tv Extra*;
- d. The royalties for radio broadcast-incidental reproductions;
- e. The royalties for Internet audio broadcast-incidental reproductions;
- f. The royalties for the sale or licensing of a program;
- g. The royalties for sales of physical media;
- h. The royalties for online sales of digital files of audiovisual works until December 31, 2014 (date preceding the coming into force of SODRAC Tariff 7 – Reproduction of

Musical Works Embedded in Audiovisual Works for Transmission by a Service, *Canada Gazette*, June 7, 2014); and

- i. The royalties for Interactive Kiosks.

Furthermore, the Board also notified the parties on May 12, 2017, that the deadlines for the filing of CBC's statement of case and expert reports and SODRAC's reply statement of case had been postponed to May 29 and June 27, 2017, respectively (see Notice [CB-CDA 2017-045]).

#### *Decision*

The Board rejects SODRAC's request for the following reasons.

The allegations made by SODRAC are serious and concern the merits of the case. It would therefore be inappropriate to deal with them in advance, so close before the hearing, in a case that has already had more than its fair share of setbacks.

As the Board already indicated in response to a similar request from CBC, instead of striking the items disputed by SODRAC, the Board will address them after having heard the parties at the hearing, including the points relating to the procedural fairness issue (see Ruling [CB-CDA 2017-037]).

#### *Remarks*

At this time, the Board wishes to lay some of the preliminary groundwork.

It does not seem at all clear that the issues identified above are exhaustive. For example, issue (i), *Royalties for Interactive Kiosks*, no longer seems to be on the agenda. Moreover, even if they were exhaustive, they should not be relied on to exclude arguments, including legal and economic arguments, but rather to define the general contours of the specific points that will be up for debate with respect to either the law or the facts. Ignoring the potential application of additional exceptions could amount to a denial of justice. In any event, the Board would in all likelihood have an equitable duty to reopen the debate if, after the hearing, it noted that certain exceptions might apply and that it would have to decide on these in order to reach a decision on the merits.

Secretary General,



Gilles McDougall