



Canadian  
Association of  
Broadcasters

L'Association  
canadienne des  
radiodiffuseurs

December 20, 2007

Mr. Claude Majeau  
Secretary General  
Copyright Board of Canada  
56 Sparks Street, Suite 800  
Ottawa, ON, K1A 0C9

Dear Mr. Majeau:

**Re: AVLA/SOPROQ Commercial Radio Tariff (2008-2011)  
Request for Interim Tariff**

The Canadian Association of Broadcasters (CAB) is the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private radio and television stations, networks, specialty, pay and pay-per-view services. The goal of the CAB is to represent and advance the interests of Canada's private broadcasters in the social, cultural and economic fabric of the country.

This letter is in response to the request to the Copyright Board made by AVLA/SOPROQ on December 18 for an interim tariff for the reproduction of sound recordings by commercial radio stations. The CAB is strongly of the view that both the substance of this request and the basis for its filing are questionable. The CAB has four specific points in this regard.

First, the CAB believes, contrary to the assertions of AVLA/SOPROQ, that the merit of the proposed tariff is at best uncertain. As indicated in its July 25, 2007 statement of objections, the CAB strongly objects not simply to the royalties proposed, but also to the very premise of the tariff proposal itself. The CAB intends to put forward evidence and arguments to support the objection, to address the very nature and extent of the reproduction right in the context of current and evolving radio station operations. To set an inaugural tariff without this factual and legal framework would be premature and seriously prejudicial to full and fair process. The CAB is unaware of any contested interim tariff being imposed prior to an inaugural tariff being certified. In fact, the Board denied a request by CBRA for an interim inaugural Commercial Media Monitoring tariff for this reason and otherwise applied the approach described above, stating that

***[a]s this matter deals with a currently uncertified tariff, issuing an interim tariff could be interpreted as setting a policy precedent on a substantive matter not yet properly heard by the Board. The legal issues raised in these proceedings are not sufficiently complex to justify their being examined separately from the substantive issues. Furthermore, a reasonable dispute exists on legal issues such as the existence of rights and retroactivity. In the Board's view, it would be best if those issues, including those regarding quantum and terms and conditions of the tariff, be fully addressed at a hearing.*** [May 3 2001 ruling, CBRA Commercial Media Monitoring – Application for Interim Tariff, emphasis added]

Second, the collectives cite an inability to pay for prolonged tariff proceedings as being fundamental to their request for an interim tariff. This plea seems disingenuous, given that the collectives are directly or indirectly backed by some of the largest entertainment organizations in the world. And whatever the financial situation of AVLA and SOPROQ, it would be an abuse of the tariff certification process established under the *Copyright Act* for collectives to use an interim tariff to fund their case opposing prospective licensees, in a proceeding before the Board intended specifically to allow each side to present evidence and argument as to the appropriate valuation of the right. Royalties collected through a copyright tariff are collected for the benefit of the rightsholder; to seek them expressly for the purpose of litigation is entirely misplaced and unjust.

Third, the CAB's request for consolidation of the 2008 commercial radio proceedings was not, as AVLA and SOPROQ appear to suggest, expected or intended to create delay, but instead, expressly filed in the interests of enhancing time and cost efficiencies, among other benefits. While the CAB had indicated that it was prepared to begin the process to consider the four 2008 commercial radio tariffs on an expedited basis, it respects the Board's ruling that it will make its determination on this process after the SOCAN-NRCC Tariff 1.A Radio Rehearing decision is issued. The collectives' attempt to fault the CAB for applying for consolidation, and to put this forward as a rationale for an interim tariff should be completely dismissed.

Fourth, because this is an inaugural tariff, and in the context of AVLA/SOPROQ's stated concerns about access to funds, the CAB has concerns about the ability of the collectives to properly reimburse any overpayments made under an interim tariff, should the final rate be lower.

The CAB is surprised and disappointed by the actions of AVLA and SOPROQ with regard to this request for an interim tariff, and considers the filing of this request without any prior notice illustrative of bad faith on the part of the collectives. In addition, the CAB believes that the timing of this request, made after regular business hours just three days prior to the Christmas break while requesting that the interim tariff be granted by January 1, 2008, is highly inappropriate.

We submit that AVLA and SOPROQ have not satisfied the requirements for an interim tariff and that, under the circumstances, granting an interim tariff would be inappropriate and inconsistent with the object and purpose of the *Copyright Act*. Should the Board require any further information, we would be pleased to supplement this objection as requested.

Yours truly,

A handwritten signature in black ink, appearing to read 'Margot Patterson', with a stylized, flowing script.

Margot Patterson  
General Counsel and Vice-President, Legal Affairs

c.c. Glen Bloom  
David Kent

Ottawa

December 18, 2007

Toronto

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Claude Majeau  
Secretary General  
Copyright Board of Canada  
50 Sparks Street, Suite 800  
Ottawa, Ontario K1A 0C9

Dear Mr. Majeau:

**AVLA/SOPROQ Commercial Radio Tariff, 2008-2011**

We act on behalf of the Audio-Visual Licensing Agency (AVLA) and the Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec (SOPROQ) in connection with the above proposed tariff.

We are writing to you to request that the Board exercise its discretion under section 66.51 of the *Copyright Act* and establish an interim tariff for the reproduction of sound recordings by commercial radio stations. We are making this request at this time to enable the Board to consider the request and render a decision as close as possible to January 1, 2008, and assuming that an interim tariff is ordered, to enable commercial radio stations to implement whatever procedures may be required to fully comply with the interim tariff.

**AVLA and SOPROQ**

AVLA and SOPROQ are collective societies that represent the reproduction rights of their member record companies. The member record companies own or control copyright in their sound recordings. They have authorized AVLA and SOPROQ to grant licences to reproduce their sound recording in whole or in part for the purpose set out in the tariff. The repertoire of AVLA and SOPROQ consists of well in excess of 80% of the sound recordings used on commercial radio.

AVLA and SOPROQ jointly filed the AVLA/SOPROQ Commercial Radio Tariff, 2008-2011 to license the reproduction of sound recordings by commercial radio stations. A copy of the proposed tariff is enclosed. The licensed users are specified in clause 3 of the proposed tariff. The Canadian Association of Broadcasters has opposed the proposed tariff.

### Test for an interim tariff

The Supreme Court of Canada established the test for establishing an interim rate order such as an interim tariff in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*.<sup>1</sup> In that case the Court stated at page 1754:

Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.

The Copyright Board has cited this passage with approval on two occasions.<sup>2</sup> In the Retransmission Decision, the Board rephrased the Supreme Court's test for establishing an interim tariff as follows:

When seeking interim relief, it is not necessary for a party to demonstrate prima facie that the main application is likely to succeed; indeed, an interim order can be issued in the absence of any evidence or argument, so long as the main application is not plainly without merits. The Board, in its discretion, may ask the applicant to make such a demonstration or to supply it with evidence or argument; it probably would do so before issuing an interim order that modified the existing situation.

Most recently, in the NRCC/SOCAN Decision, the Board cited both the Retransmission Decision and *Bell Canada* with approval.

Accordingly, there is a two-part test to be met in order to secure an interim tariff. The two parts are: (1) the main application cannot be plainly without merit, and (2) the interim tariff must provide temporary relief against the deleterious effects of the length of the proceedings.

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<sup>1</sup> [1989] 1 S.C.R. 722 (SCC).

<sup>2</sup> *Application to Vary the Television Retransmission Tariff, 1992-1994*, at p. 242 (the "Retransmission Decision"); and *Interim Statement of Royalties to be collected by SOCAN and NRCC in respect of Commercial Radio for the years 2003 to 2007* (the "NRCC/SOCAN Decision").

## **The AVLA/SOPROQ Commercial Radio Tariff is not plainly without merit**

The first branch of the two-part test is whether the above proposed tariff is plainly without merit.

We submit that not only does the proposed tariff have merit, but AVLA and SOPROQ are entitled to have a tariff certified. The only issue to be determined in the main hearing is the rate at which that tariff will be certified.

AVLA and SOPROQ administer the reproduction right for sound recordings. The Board has already certified a tariff with respect to the reproduction of musical works by commercial radio stations for CMRRA/SODRAC Inc. (CSI).<sup>3</sup> The certified tariff provides for the payment of royalties for the reproduction of musical works by commercial radio stations as follows:

5. A low-use station shall pay, on its gross income for the reference month, 0.12 per cent of the station's first \$625,000 gross income in a year, 0.23 per cent of the station's next \$625,000 gross income in a year and 0.35 per cent on the rest.

6. Any other station shall pay, on its gross income for the reference month, 0.27 per cent of the station's first \$625,000 gross income for a year, 0.53 per cent of the station's next \$625,000 gross income in a year and 0.8 per cent on the rest.

A copy of CSI's certified tariff for 2007 is enclosed. In certifying the CSI tariff, the Board found that commercial radio stations were liable for the reproduction of musical works in conducting their broadcast operations. Many of these musical works are embodied in the sound recordings that are within the repertoire of AVLA and SOPROQ. Commercial radio stations are therefore liable for the reproduction of sound recordings in conducting their broadcast operations.

In speaking to the Canadian Association of Broadcasters (CAB) on November 5, 2006, the Chairman clearly stated that there were four separate tariffs that could cover commercial radio activities, one of which is for the reproduction of sound recordings:<sup>4</sup>

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<sup>3</sup> *Statement of Royalties to Be Collected by CMRRA/SODRAC Inc. for the Reproduction of Musical Works, in Canada, by Commercial Radio Stations in 2007.*

<sup>4</sup> Speaking Notes for the Honourable Justice William J. Vancise, Chairman of the Copyright Board of Canada, Annual Convention of the Canadian Association of Broadcasters (Business Session – Breakfast with the Copyright Board), Vancouver, Sunday, November 5, 2006

Now, just for radio, there could be tariffs for the communication and the reproduction of the music and of the sound recordings: that's four potential tariffs.

In view of the Board's decision to certify the CSI tariff and the public acknowledgement of the Board's Chairman, the AVLA/SOPROQ Commercial Radio Tariff is not plainly without merit. This application for an interim tariff meets the first branch of the test.

**AVLA and SOPROQ would suffer deleterious effects of the length of the proceedings**

The second branch of the two-part test is whether AVLA/SOPROQ would suffer deleterious effects based on the length of the proceedings.

The proposed AVLA and SOPROQ tariff commences January 1, 2008. The above proposed tariff is the inaugural tariff for each of AVLA and SOPROQ. Neither of the collective societies have tariff income to fund a lengthy and costly Copyright Board hearing.

Proceedings before the Copyright Board to address objections to tariffs are time consuming and costly for participants. A proceeding involves making interrogatories, responding to interrogatories, retaining expert witnesses, preparing expert reports and attending an oral hearing before the Board. Typically, the Board reserves its decision and there is a delay between the date of the hearing and the issuance of the decision certifying a tariff. It is common for objectors to an inaugural tariff to seek judicial review of the Federal Court of Appeal of the Board's decision to certify the tariff, delaying implementation of the tariff still further. While AVLA and SOPROQ do, however, acknowledge and appreciate the steps currently being taken by the Board to reduce the certification time of inaugural tariffs, it will without question be over a year, and it could well be years, between the date that AVLA and SOPROQ proposed the tariff in March 2007, and its eventual certification.

CAB has, on its own initiative, contributed to a significant delay in the commencement of the Board proceedings and potentially significantly increased the complexity, length and cost of the proceedings. CAB has sought to consolidate the hearing of this tariff with the proposed tariffs of the Society of Composers, Authors and Music Publishers of Canada (SOCAN), Neighbouring Rights Collective of Canada (NRCC) and CSI relating to the activities of commercial radio stations. On October 30, 2007, the Board ruled that CAB's application to consolidate the proceedings was premature, as the Board still had yet to

render its decision in the rehearing of the SOCAN/NRCC commercial radio tariff for the period ending December 31, 2007.<sup>5</sup>

We submit that the facts that AVLA and SOPROQ do not have ongoing tariff revenue to fund these proceedings, that inaugural tariffs may take years to be certified, and that CAB has contributed to a significant delay in these proceedings and potentially significantly increased the complexity and cost of these proceedings, show that AVLA and SOPROQ will suffer a deleterious effect if the Board does not grant this request for an interim tariff.

In the NRCC/SOCAN Decision, the Board concluded that deleterious effects would be suffered by SOCAN and NRCC if an interim tariff was not certified, calling the deleterious effects “obvious”.<sup>6</sup> SOCAN and NRCC are established collectives that each administers multiple tariffs certified under the *Copyright Act*.<sup>7</sup> AVLA and SOPROQ are filing an inaugural tariff in the present proceeding. Considering that the deleterious effects of not certifying an interim tariff for SOCAN and NRCC were obvious to the Board, we submit that it is even more obvious that AVLA and SOPROQ would suffer a deleterious effect in this case. We submit that AVLA and SOPROQ meet the second branch of the test for an interim tariff, and that the interim tariff should be certified to provide temporary relief from the deleterious effect that AVLA and SOPROQ would suffer as a result of the potential length of these proceedings.

There is a further factor that warrants the Board exercising its discretion to order an interim tariff. One of the objects and purpose of Canada’s *Copyright Act* is to enable the collective administration of copyright. If the Board were prepared to grant an interim order in inaugural tariff proceedings in cases in which a tariff is clearly warranted, this would enable collective administration of copyright and thereby contribute to the attainment of this object and purpose by providing the collective society an opportunity to recover some of its initial start up costs at an earlier date prior to the final tariff certification.

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<sup>5</sup> *Ruling of the Board on CAB's request to consolidate hearings / Décision de la Commission sur la requête de l'ACR pour joindre l'examen de tarifs*, October 30, 2007.

<sup>6</sup> *Supra* note 2 at para 15:

Third, the deleterious effects of staying with the 2002 rates are obvious. Since October 2005, money has changed hands. Reverting to the 2002 rates would impose a recalculation that we know would not be final because we know that there will be an increase in the tariff. Imposing two recalculations where there could be one (or none) creates deadweight loss. Granting the application minimizes unnecessary exchanges of money. CAB downplayed these difficulties, stating it was confident that the parties’ accountants could easily make these determinations. We agree with SOCAN, for the reasons set out in paragraph 5 of this decision, that the exercise would be complex, costly and useless.

<sup>7</sup> R.S.C. 1985, c. C-42. See [www.socan.ca](http://www.socan.ca) and [www.nrdv.ca](http://www.nrdv.ca) for lists of tariffs that SOCAN and NRCC presently administer.

## **The CSI rate is an appropriate rate for the interim AVLA/SOPROQ tariff**

As mentioned above, the Board has certified a CSI tariff for the reproduction of musical works by commercial radio stations. AVLA and SOPROQ submit that an appropriate rate for an interim tariff is the current royalty rate set in the CSI tariff.

AVLA and SOPROQ have proposed the royalty rate set in the CSI tariff because of the similarity in the use made by commercial radio of the copyright interests represented by CSI and those represented by AVLA and SOPROQ, and because commercial radio stations are accustomed to dealing with the CSI tariff. Furthermore, the repertoire of AVLA and SOPROQ is at least as large as that of CSI.

The ability of commercial radio stations to pay the proposed interim tariff is not an issue. In recent years profit levels of commercial radio stations have reached record levels. In its decision of March 28, 2003, concerning the inaugural CSI tariff for the reproduction of musical works by commercial radio stations, the Board stated:

This case clearly establishes that the radio industry as a whole is very profitable and that setting a tariff even double what the Board is certifying would have a limited impact on the industry's bottom line.<sup>8</sup>

This interim rate is proposed without prejudice to the final tariff rate proposed by AVLA and SOPROQ for 2008-2011. At this preliminary stage, an interim tariff can be certified with evidence that would not be sufficient to support a tariff in the main proceeding. As stated in *Bell Canada*, an interim order does not make *any* decision on the merits of an issue to be settled in a final decision. In the above proposed tariff AVLA and SOPROQ seek a royalty rate that exceeds the royalty rate certified by the Board for CSI for the reproduction of musical works by commercial radio stations.

## **The Terms of an Interim Tariff**

To assist the Board in considering this request, we enclose a draft interim tariff. The draft interim tariff is the same as the tariff proposed by AVLA and SOPROQ with the exception of the title of the tariff, the tariff rates specified in paragraphs 5 and 6 and the inclusion of the interim provision in paragraph 17.

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<sup>8</sup> Reproduction of Musical Works 2001-2004 (Commercial Radio), March 28, 2003, p. 18 [emphasis added]. This rate has been carried through to the end of 2007.

## **Conclusion**

We submit that AVLA and SOPROQ have established that they meet the two-part test for an interim tariff and that, under the circumstances, granting an interim tariff is consistent with the object and purpose of the *Copyright Act*.

We would be pleased to supplement this request with whatever information or documentation the Board requires in order to fully consider this request.

Yours very truly,

A handwritten signature in black ink, appearing to read "Glen A. Bloom". The signature is fluid and cursive, with the first name "Glen" being more prominent than the last name "Bloom".

Glen A. Bloom  
GAB:cms

- c. David Kent (by email)  
Counsel for CAB