Federal Court of Appeal | Cour d'appel fédérale

Date: 20110225

Docket: A-433-09

Citation: 2011 FCA 70

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

BETWEEN:

RE:SOUND

Applicant

and

MOTION PICTURE THEATRE ASSOCIATIONS OF CANADA,
ROGERS COMMUNICATIONS INC., SHAW COMMUNICATIONS INC.,
BELL EXPRESSVU LLP, COGECO CABLE INC., EASTLINK, QUEBECOR MEDIA,
TELUS COMMUNICATIONS COMPANY, TURNER BROADCASTING SYSTEMS, INC.,
CANADIAN BROADCASTING CORPORATION,
and CANADIAN ASSOCIATION OF BROADCASTER

Respondents

Heard at Montréal, Quebec, on February 22, 2011.

Judgment delivered at Ottawa, Ontario, on February 25, 2011.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

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

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Respondents

REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an application for judicial review of a decision of September 16, 2009, by the Copyright Board wherein it answered the following question in the negative:

> Is anyone entitled to equitable remuneration pursuant to section 19 of the *Copyright Act*, R.C.S. 1985, c. C-42 [the Act] when a published sound recording is part of the soundtrack that accompanies a motion picture that is performed in public or a television program that is communicated to the public by telecommunication?

[2] The question arose after the applicant, Re:Sound, filed two proposed tariffs for the performance in public and communication to the public by telecommunication of published sound recordings. Both tariffs were objected to: (1) tariff 7, which targets the use of sound recordings embodied in a motion picture performed by a motion picture theatre; and (2) tariff 9, which targets the use of sound recordings in programs broadcast by television services.

[3] The definition of “sound recording” in section 2 of the Act was central to the Board’s decision.

“sound recording” means a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work;	« enregistrement sonore » Enregistrement constitué de sons provenant ou non de l’exécution d’une œuvre et fixés sur un support matériel quelconque; est exclue de la présente définition la bande sonore d’une œuvre cinématographique lorsqu’elle accompagne celle-ci.

[Emphasis added.]

[4] The meaning of this exclusion required the Board to construe the defined term "sound recording" and the undefined term "soundtrack" as it relates to pre-existing sound recordings.

[5] The applicant mainly contends that the Board erred in construing the exclusion clause as excluding all the individual components of a soundtrack, including any embedded pre-existing recording (applicant’s memorandum at paragraph 25). According to the applicant, what is excluded

from the definition of sound recording is the soundtrack *as a whole*, not its individual elements. It alleges two reasons in support of its position: (1) in the definition of “sound recording,” “soundtrack” refers to the physical location of the recording, not to the sounds themselves; (2) the portions of a soundtrack are different from the soundtrack as a whole, and they cannot be treated the same (*ibidem* at paragraphs 32 to 35). For these reasons, the applicant believes that although no one can claim equitable remuneration for the whole soundtrack, the makers and performers of separate sound recordings embedded in the soundtrack can.

[6] According to the applicant, the exclusion was intended as a limitation on the rights in cinematographic works and not on the copyright extended to sound recordings (*ibidem* at paragraph 63). In other words, the purpose of the exclusion was to prevent a motion picture, not a sound recording, from being protected twice (*ibidem* at paragraph 68).

[7] The Board was not convinced by the applicant’s attempt to draw a distinction between the soundtrack and its component parts because, in its opinion, such an interpretation would require adding to the words of the definition of the term "sound recording" (Board’s reasons at paragraph 28).

[8] It therefore concluded that tariffs 7 and 9 were based on no valid legal foundation and were incapable of being certified. As a result, the tariffs were struck from the proposed statement of royalties that had been published in the *Canada Gazette* (reasons at paragraph 44).

[9] There was a debate as to the applicable standard of review. There is no need to dwell on this issue as, in my view, the Board came to the correct conclusion essentially for the reasons that it gave. This being said, I wish to briefly comment on three particular issues.

[10] First, the applicant raised before us various preoccupations concerning the impact of the Board's decision on the rights of performers and makers of sound recordings, notably that a sound recording incorporated within a soundtrack a) could be published on the internet or otherwise disseminated or b) could be extracted from a DVD and thereafter published, without any recourse or remedy open to the performer or maker in either case. As noted by the respondents, these preoccupations are ill founded.

[11] Indeed, under subsection 17(1) of the Act, a performer must authorize the embodiment of his or her performance in a cinematographic work. Consequently, an unauthorized embodiment of a performance in a cinematographic work contravenes the Act. Moreover, once a prior sound recording is extracted from the soundtrack that accompanied the cinematographic work, it again attracts the protections offered performers and makers under the Act for stand-alone sound recordings.

[12] The applicant also raised a comparative law argument. It relied on Australian jurisprudence, which I find of no assistance, as it is based on legislation that is fundamentally different in regard to sound recordings and soundtracks. The same can be said of the UK law on which the applicant also relied.

[13] The applicant also raised an argument based on the incompatibility with Article 10 of the *Rome Convention* which provides that the producers of phonograms enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. This argument fails to consider that the *Rome Convention* defines “phonograms” as any exclusively aural fixation of sounds (Article 3, paragraph (b)), and that consequently a “fixation of images (e.g., cinema) or of images and sounds (e.g., television) are therefore excluded” (WIPO Guide to the Rome Convention section 3.7). Therefore, I find no reason to interfere with the Board’s conclusion.

[14] Finally, the applicant argued that regardless of the Board’s construction of the definitions, it is entitled to a tariff for live-to-air broadcasts because these types of broadcasts are not “communications to the public of cinematographic work", as defined in section 2 of the Act. The applicant states that such broadcasts are not expressed by any process analogous to cinematography, hence not subject to the section 19 exclusion (applicant’s memorandum at paragraph 88). The applicant asks that its application for judicial review be allowed on this point and that the matter be sent back to the Board so that it may pronounce itself on the issue.

[15] In my view, the judicial review application cannot be allowed on this limited ground. This argument was not raised in the applicant’s notice of application and was not brought to the attention of the Board. As such, the Board cannot be faulted in any way for not having dealt with this issue. There are therefore no grounds for reviewing the decision of the Board on this basis.

[16] As a result, I would dismiss this application for judicial review with costs.

"Johanne Trudel"

J.A.

"I agree
Marc Noël J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	February 25, 2011

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