

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Regime Public Performance of Music
Copyright Act, Section 67.2

Members Mr. Justice Donald Medhurst
Michel Hétu, Q.C.
Dr. Judith Alexander
Mr. Michel Latraverse

Proposed Tariffs Considered 2.B, 2.C, 3, 7, 8, 12, 14, 15.A, 16, 18, 19 and 20

Statement of Royalties to be collected for the performance in Canada of dramatico-musical or musical works in 1992

Reasons for decision

I. INTRODUCTION

Pursuant to section 67 of the *Copyright Act* (hereinafter, the “*Act*”), the Society of Composers, Authors and Publishers of Music of Canada (SOCAN) filed with the Board a statement of proposed royalties for the performance, or the communication by telecommunication in 1992, in Canada, of musical or dramatico-musical works.

The statement was published in the *Canada Gazette* on September 28, 1991. At the same time, the Board gave notice to users of their right to file objections to the proposed tariff no later than October 26, 1991.

The following reasons concern tariff items 2.B, 2.C, 3, 7, 8, 12, 14, 15.A, 16, 18, 19 and 20. Items 2.A, 4, 5.B, 6, 9, 10, 11, 13.B, 13.C, 15.B and 17 will be dealt with in later decisions.

In the case of tariffs 3, 12, 18 and 20, the wording approved by the Board includes minor variations from the text proposed by SOCAN. These variations are merely intended to enhance the understanding of these tariffs.

II. ADJUSTMENTS FOR PRICE FLUCTUATIONS

In establishing the 1990 and 1991 music tariffs, the Board used the Industrial Products Price Index (IPPI) to adjust for inflation tariff elements that are expressed as a fixed amount. It based that decision on the argument that often the public performance of music is used as an input into the production of consumer goods, rather than being itself a consumer good, and that the IPPI better reflects price changes for this type of commodity. At this hearing SOCAN asked the Board to reconsider using the Consumer Price Index (CPI) as the basis for these adjustments. On February 5, 1992, the Board held hearings on this issue.

Many of the music performance tariffs do move more or less in tandem with inflation. A tariff based, for example, on costs or revenues automatically reflects price fluctuations. The same cannot be said of tariffs which are lump-sums (as in the case of TVOntario or Radio-Quebec), which contain flat rate minimums (as can be found in tariff 3), or tariffs based on use (receptions and background music suppliers), attendance or physical capacity. These tariffs must be continually reassessed if changing economic conditions are to be reflected in them. SOCAN suggests that these adjustments should be made through the instrument of the CPI.

The Board is still of the opinion that, over the longer term, granting inflationary adjustments as a matter of course could prevent a tariff from adjusting to structural changes in the market. Very few participants in any market are sheltered from adverse changes in economic conditions by an automatic adjustment to preserve their purchasing power; one only has to recall the experiences of many income earners and consumers over the last couple of years. The Board's role is to set rates that are fair and reasonable in the circumstances, of which inflation forms only one part.

This having been said, an index to adjust fixed sums over the shorter term is both useful and efficient. Approving and certifying tariffs can be time consuming and expensive. Where SOCAN seeks no more than a mechanical adjustment, and where users do not object, the Board can reasonably assume that the underlying conditions to the existing tariffs have not changed. Under such circumstances, the adjustment may be granted without hearings or a lengthy exchange between the Board and SOCAN.

The Board realizes that for some users it is often cheaper, in the short term, to pay an adjustment than to fight it. Adjustments cannot be allowed to congeal into "entitlements" nor to set authoritatively the value of that use of music for the long term. A periodic, in-depth look at tariffs to which any short-term adjustment factor had been applied would still be required. The Board would need to look at developments and changing conditions in the sellers' and users' markets, to ensure that fairness and equity were maintained.

Therefore, the Board finds it appropriate to allow an adjustment to the fixed amounts within the music tariff. This requires the Board to determine which, in its opinion, is the measure of choice for such adjustments.

To justify using the CPI for this purpose, SOCAN asked Mr. Ross, a partner with Peat, Marwick, Stevenson, Kellogg to prepare a study on the "appropriateness of various broad inflation indexes for inflation adjustment for fixed rate tariffs for music performing rights" (Transcript, p. 15). The report concludes that the CPI is the most appropriate measure. This conclusion forms the main

basis of SOCAN's request.

SOCAN makes two arguments in favour of using the CPI. First, it maintains that the CPI is technically better suited than the IPPI. Second, it argues that the CPI is a concept that is better recognized and understood by both copyright owners and music users.

The technical suitability of a price index as a tool for short-term adjustments to the music tariffs lies, first and foremost, in whether the commodities (that is both goods and services) whose prices are to establish it are similar to the commodity in question – music used in public performances. Music used in public performances is an input into the production of commodities destined for final consumption or further processing. The Board remains of the opinion that the public performance tariffs are thus closer to prices included in the IPPI than in the CPI.

SOCAN nevertheless maintains that the CPI is better suited to adjusting fixed sums within the tariffs for two reasons, both of which leave the Board unconvinced. SOCAN argues that the IPPI is an output index at the manufacturing level. The evidence presented by SOCAN's witness on this issue was ambiguous. Mr. Ross agreed that the user's input was also the creator's output, and that all intermediate commodities are simultaneously outputs of one process and inputs of another. It is quite clear that the CPI is also an index of the prices of outputs of final goods which are simultaneously used as inputs by consumers. The argument that whether the components of an index are inputs or outputs matters is without merit.

SOCAN also asserts that services are excluded from the calculation of the IPPI, and hence it cannot reflect the use of music, which is a service. This is inaccurate. Mr. Ross agreed that to the extent that the production of a manufactured intermediate good requires the use of services, the price fluctuation of services is reflected in the IPPI. The distinction between goods and services may well be semantic and the problem is avoided by classifying them all as commodities. It was brought out in evidence that the difference between the two is often a nice distinction.

The Board accepts the argument that the CPI is more familiar and better understood by copyright owners and music users. Mr. Ross also stressed that Statistics Canada routinely revises the IPPI figures within the first year of their publication. The published CPI figures are rarely revised. This is of practical importance in the short term. As well, the Board notes that other Boards, such as the CRTC, use the CPI when considering rate adjustments.

The Board must therefore reconcile two conclusions which, at first glance, appear irreconcilable. On the one hand, the uses of music contemplated in the public performance tariffs are, in most instances, more in the nature of production inputs than of final commodities. On the other, the Board recognizes the practical advantages of using the CPI as a basis for adjusting fixed amounts used in the music tariffs.

Consequently, the Board opts for structuring its own adjustment factor. That factor, which is linked to the CPI, also accounts for the historical correlation between the CPI and the IPPI. An examination of the evidence filed by Mr. Ross at the hearing shows that over the last decade, the IPPI has been on average generally two per cent lower than the CPI. Therefore, it would appear reasonable to grant tariff adjustments that do not exceed the percentage increase in the CPI minus two percentage points, unless the tariff is reopened for a full reassessment. It would also

appear that the best time period to use is from June to June: using the index for these months allows SOCAN to make the required calculations in time for filing its proposed statements.

Applied to these proceedings, this approach would yield an adjustment factor of 4.3 per cent, since the year-over-year increase in the CPI between June, 1990 and June, 1991 was 6.3 per cent. This factor shall be used for setting the 1992 tariffs.

Of course, parties remain free to reopen the debate on any aspect of a tariff item when it is filed with the Board for certification. Indeed, since this adjustment factor is meant to be used over relatively short time periods, it will be necessary to reexamine the tariff structures from time to time, to ensure that their basis continues to be fair under changing conditions.

III. TARIFF 2.B (TVONTARIO)

In 1987, the Copyright Appeal Board scrutinized tariff item 2.B, concerning TVOntario and set the royalties to be paid at \$275,000. By agreement, this amount was progressively raised to \$332,327 in 1990. For 1991, SOCAN asked for an increase of five per cent, to \$348,940; TVOntario did not comment on this request. The Board increased the royalty by 2.2 per cent to \$339,638; this corresponded to the increase in the IPPI for that period.

In its proposed statement for 1992, SOCAN asked that the price TVOntario pays for its use of music be increased by six per cent, to \$360,016.30. TVOntario objected and asked that the Board apply to it the same approach as was applied to Radio-Québec for setting its 1990 tariff. It also suggested that the debate be focused on the three issues it said had been identified in that decision: relative use of protected music, the inflation adjustment, and variations in audience ratings. On February 24 and 25, 1992, the Board held hearings on this item.

SOCAN and TVOntario agree on three points. First, there has been no determination of the value of the performing rights in music used by TVOntario since the 1987 decision of the Copyright Appeal Board. Second, the mandate of TVOntario, the manner in which it is fulfilled and the type of programming it broadcasts have remained essentially the same as outlined in that decision. Third, TVOntario's use of protected music has remained constant since 1987.

Consequently, only two issues remain to be determined. First, can the approach suggested by SOCAN be used with regard to TVOntario? Second, can the approach used for Radio-Québec in 1990 serve to establish TVOntario's tariff for 1992, and if so, should any adjustment be made to it?

A. ANALYSIS OF SOCAN'S PROPOSED APPROACH

In its opening statement and its closing argument, SOCAN stated that the amount to be paid by TVOntario in 1992 ought to be the same as in 1991, increased by any adjustment factor which the Board may select in setting other fixed-sum tariffs. As its only justification for this amount, SOCAN put forward a formula which, it suggested, reflects the approach taken by the Board in setting the rate to be paid in 1991 by the Canadian Broadcasting Corporation television. At that time, the Board established a correlation, based on respective viewing shares, between the royalties paid by all Canadian commercial broadcasters under tariff 2.A.1 and the price to be

paid by the Canadian Broadcasting Corporation. This approach, in SOCAN's opinion, allows the Board to focus on issues of relative use of music and popularity of programming, and to avoid the pitfalls associated with distinctions based on the public or commercial character of music users. With regard to TVOntario, SOCAN offered a comparison between the viewing shares of TVOntario and of the 24 commercial television stations located in Ontario, and the royalties paid by those stations in 1991. The formula yields the following result:

$$\frac{1.8}{47.3} \times \$10,244,827 = \$389,867$$

SOCAN did not request that the Board use this to determine the tariff, as had been done in the 1991 Canadian Broadcasting Corporation television tariff. Rather, it used the amount resulting from the formula to maintain that its request was perfectly reasonable, being for an amount less than what the formula yields.

SOCAN's approach cannot be used in the instant case. As counsel for TVOntario pointed out in his argument, the data offered is too uncertain.

The figure of \$10,244,827 cannot be used for this calculation. Upon verification, that number shrank to \$9,937,559. Even the verified figure cannot be used. First, SOCAN could not confirm whether the amount included payments received from the Canadian Broadcasting Corporation affiliates; those amounts ought not to be used in the calculation unless these affiliates' viewing share is added to the denominator. Second, it was not made clear whether any part of the amount may be on account of out-of-province viewing: since only viewing in Ontario had been included in the calculation, no account should be taken of revenues resulting from out-of-province viewing. Finally, the method used by SOCAN to obtain the viewing data was extremely indirect at best. No one could comment confidently on certain apparent anomalies in the data, including a share of 0.9 per cent attributed to a category called "others."

B. SHOULD THE BOARD APPLY TO TVONTARIO THE SAME FORMULA (WITH OR WITHOUT MODIFICATIONS) AS WAS APPLIED TO RADIO-QUÉBEC?

In the absence of any other readily applicable formula, the Board agrees with the general approach put forward by TVOntario. Its role, mandate, operations and financial structure are very similar to those of Radio-Québec. All things being equal, it is only reasonable to treat it in a similar way. Given the fact that music use patterns appear to be the same as they were in 1987, only two adjustments are required to the amount set at that time.

The first adjustment accounts for inflation. For the reasons given earlier in this decision, the Board, rather than using the IPPI, opts for an adjustment factor equal to the CPI minus two per cent applied yearly. From June, 1986, to June, 1991, the CPI increased 27.2 per cent, from 99.6 to 126.7. Subtracting 10 per cent (two per cent for five years) from this number leaves an inflationary adjustment of 17.2 per cent. This would increase by \$47,300 the amount set in 1987.

The second adjustment accounts for the change in viewing share. Mr. Rob Young, partner and Senior Vice-President, Media Research and Planning, of Harrison, Young, Pesonen and Newell, a firm specializing in media planning and buying operations, testified on an analysis he

conducted, using BBM data, of the variations in the viewing share of TVOntario since 1987. His analysis showed that between the fall of 1986 and the fall of 1991, TVOntario's share of all television viewing in Ontario declined by 18 per cent, going from 2.2 per cent to 1.8 per cent. Similar analyses of TVOntario's viewing at the national level yielded similar results.

The Board finds the figures put forward by TVOntario to be supported by the evidence and reliable for the specific purpose of this calculation. A decrease of 18 per cent in viewing share during the relevant period, leads to a reduction of \$49,500 (18 per cent of \$275,000). The net result of the operation is \$272,800. The cost of TVOntario's licence for 1992 is set at that amount.

IV. TARIFF 2.C (RADIO-QUÉBEC)

The price of \$237,895.80 proposed by SOCAN would impose on Radio-Québec an increase of six per cent on the amount set for 1991, or \$224,430. Radio-Québec did not object to the tariff, and no hearings were held on the issue. For the reasons given earlier of this decision, the Board considers that the adjustment should be 4.3 per cent, yielding a price of \$234,080 for Radio-Québec's 1992 licence.

V. TARIFF 3 (CABARETS, BARS AND OTHER SIMILAR ESTABLISHMENTS); TARIFF 18 (RECORDED MUSIC FOR DANCING)

The Hotel Association of Canada and the Canadian Restaurant and Foodservices Association (CRFA) had opposed SOCAN's proposed tariffs 3 and 18 for 1992.

On December 17, 1992, the Board received a copy of agreements, dated November 16, 1992, between SOCAN and the two objectors. Under these agreements, the rate set in tariff item 3.A for live performances would be 2.5 per cent of the compensation for entertainment for 1992, with a minimum fee of \$80. The rate set in tariff item 3.B for recorded music would be set at 1.66 per cent, with a minimum of \$60 for the same year.

As for tariff item 18, the agreements would allow for an increase of 8.3 per cent to the amounts set in 1991. In all other respects, the tariff would remain identical.

The Board certifies tariff items 3 and 18 for 1992 as suggested by SOCAN and the objectors.

VI. TARIFF 7 (SKATING RINKS); TARIFF 14 (PERFORMANCE OF AN INDIVIDUAL WORK)

In its proposed statement, SOCAN requested that the share of admission fees paid by skating rinks for the use of music be raised from 1.2 per cent to 2 per cent. SOCAN's proposed statement also requested increases of between 460 per cent and 2,300 per cent for the performance of an individual work. No one objected to these items, but the Board reserved its decision on the matter. On December 23, 1992, SOCAN advised the Board that in order to help expedite the Board's disposition of the 1992 tariffs, it would consent to tariff items 7 and 14 being set for 1992 at the same level as in 1991. The Board certifies those tariff items accordingly.

VII. TARIFF 8 (RECEPTIONS); TARIFF 16 (MUSIC SUPPLIERS)

SOCAN's statement of proposed tariffs for these items is identical to the tariff approved in 1991. No one objected to these items, but the Board reserved its decision on the matter. The Board certifies tariff items 8 and 16 as filed.

VIII. TARIFF 12 (CANADA'S WONDERLAND, ONTARIO PLACE AND OTHER SIMILAR OPERATIONS)

Objections were filed to this tariff by Canada's Wonderland, Ontario Place Corporation and the Canadian Alliance of Music Presenters (CAMP). Since then, two separate agreements have been signed between the objectors and SOCAN. The first, signed by Canada's Wonderland, dealt with this particular user. The second purports to deal only with Ontario Place, but has also been signed by CAMP as well as by Ontario Place.

Given these agreements, SOCAN now requests that tariff 12 be split into two items identical in all respects but one: for that part of the price which is linked to attendance, Canada's Wonderland would pay a rate of \$3.50 per thousand persons, while Ontario Place and all other theme parks would pay a rate of \$2 per thousand persons.

The Board certifies tariff item 12 as suggested by SOCAN and the objectors.

IX. TARIFF 15.A (BACKGROUND MUSIC)

In its proposed statement, SOCAN requested that the rate applicable under this tariff item be increased from \$1.13 to \$1.20 per square metre, and that the minimum price be raised from \$86.65 to \$91.85. For the reasons given earlier, the Board adjusts these amounts by 4.3 per cent. The rate is set at \$1.18, and the minimum price at \$90.38.

X. TARIFF 19 (FITNESS ACTIVITIES)

In its proposed statement, SOCAN requested that the rate applicable under this tariff item be increased from \$2.05 to \$2.17 per average number of participants per week, and that the minimum price be raised from \$122.65 to \$130. For the reasons given earlier, the Board adjusts these amounts by 4.3 per cent. The rate is set at \$2.14, and the minimum price at \$128.

XI. TARIFF 20 (KARAOKE BARS)

CRFA opposed this proposed tariff item. The agreement between SOCAN and CRFA, already referred to earlier, also relates to this tariff item. According to its terms, karaoke bars and similar premises would be required to pay an annual licence fee of \$137.78 if the bar operates no more than three days a week, and of \$198.53 if the bar operates four or more days a week.

The Board certifies tariff item 20 as suggested by SOCAN and CRFA.

A handwritten signature in black ink, appearing to read 'Philippe Rabot'. The signature is fluid and cursive, with a large initial 'P' and a stylized 'R'.

Philippe Rabot
Secretary to the Board