

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Citation File: Reproduction of Musical Works

Regime Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21
Copyright Act, section 66.51

Members Mr. Justice William J. Vancise
Mr. Stephen J. Callary
Mrs. Sylvie Charron

Statement of Royalties to be collected by CMRRA/SODRAC inc. for the reproduction of musical works, in Canada, by online music services in 2008

Reasons for decision

[1] On March 30, 2007, CMRRA/SODRAC Inc. (CSI) filed a statement of proposed royalties for the reproduction of musical works by online music services in 2008 (the “proposed tariff”). The statement was published in the *Canada Gazette*. The Canadian Association of Broadcasters, the Canadian Recording Industry Association, Apple Canada Inc. and Apple Inc., Puretracks, Bell, Rogers Communications and TELUS objected to the proposed tariff.

[2] The following day (March 31, 2007), the Board certified the *CSI Online Music Services Tariff, 2005-2007*. By virtue of section 70.18 of the *Copyright Act* (the “Act”), the 2005-2007 tariff continues to apply on an interim basis until a new tariff is certified.

[3] CSI’s 2005-2007 tariff targets the same users (for different rights) as SOCAN Tariff 22.A (Internet – Online Music Services), which the Board certified for the years 1996 to 2006 on November 24, 2007. The SOCAN tariff is the subject of applications for judicial review; SOCAN has not asked the Board to start the examination of its proposed tariffs for 2007 and beyond.

[4] The Board tends to examine tariffs that target the same users all at once. Still, on January 10, 2008, given that the examination of SOCAN Tariff 22.A would not occur until at least 2009, CSI asked that its proposed tariff be heard on an expedited basis and separately from future versions of SOCAN’s Tariff. On February 21, 2008, the Board denied the application.

[5] On March 6, 2008, CSI applied, pursuant to section 66.51 of the *Act*, for an interim tariff that would be different from the 2005-2007 tariff in three ways. First, it would eliminate “the 10 % introductory discount”. Second, it would require services to provide to CSI information which currently must be supplied only if it is available to the service. Third, it would clarify “certain minor matters that arise out of the wording of the 2005-2007 Tariff”. The objectors have opposed the application.

I. ELIMINATING THE DISCOUNT

[6] In the 2005-2007 tariff, the Board applied a 10 per cent discount to account for the fact that this was a new tariff. The tariff provides for no mechanism by which the discount may be lifted at the end of its intended life.

[7] CSI offers three reasons which, in its view, justify lifting the discount immediately. First, the Board’s decision to examine CSI’s proposed tariff in tandem with SOCAN Tariff 22.A inevitably results in a delay in certifying a CSI tariff for 2008; that delay will deprive songwriters and music publishers of royalties to which the Board has already determined they were entitled. Second, the elimination of the discount would allow CSI to offset expenses it incurred in pursuing the certification of the 2005-2007 tariff and building its online music licensing system. Third, some online music services are fledgling operations, and this may make the collection of retroactive payments difficult.

[8] The objectors rely on several arguments to oppose a change in the rate. First, CSI has failed to establish that the continued application of the certified rate would have deleterious effects. More specifically, the bulk of online operations are controlled by established leaders and therefore, the risks associated with the eventual imposition of retroactive payments are minimal. Second, a change in the rate would prejudge the outcome of the joint examination the Board has ordered; for example, there is no evidence that the online music industry is no longer a nascent industry or that the certified tariff for 2005-2007 should be increased at all. Third, established Board practice is to simply extend existing tariffs on an interim basis. Fourth, cost recovery is not a supporting argument for an interim tariff, at least for a collective society with significant income.¹ Fifth, it will be administratively simpler for CSI to claim eventual retroactive increases in the rates from the services than it will be for CSI to process retroactive refunds to the services.

[9] We agree with the objector’s first, third and fourth arguments. The issue of whether the industry as a whole should benefit from the discount should be examined as part of all the other issues with input from all parties involved. Finally, we would add the following comments. The 2005-2007

¹ [Board’s decision of February 29, 2008](#) pertaining to the Statement of Royalties to be Collected by AVLA/SOPROQ for the Reproduction of Sound Recordings, in Canada, by Commercial Radio Stations for the Years 2008-2011.

rates *are* the tariff. The Board did state that these rates were less than what it then thought would be fair in the longer run. That opinion is binding on no one. The objectors will ask for lower rates for 2008 and beyond. Consequently, those rates could be lower, higher or the same as in 2005-2007. By contrast, when the Board certified an interim tariff for commercial radio after the Federal Court of Appeal ordered it to revisit an earlier decision,² there was no doubt whatsoever that the rate would eventually increase from the previously certified rate. Given the above, there is no need for us to comment on the fifth argument.

II. ADDITIONAL REPORTING OBLIGATIONS

[10] Currently, online music services must provide to CSI the name of the author of the musical work, the International Standard Recording Code assigned to the sound recording, and the name, identifier, product catalogue number and Universal Product Code assigned to any album in which the sound recording was released in physical format, only if the information is available to the service. That information is “owned” by the record companies; services do not always have it. CSI claims that the information is essential to the effective administration of the tariff and that allowing the services to provide it only “if available” until the 2008 tariff is certified will delay collection and distribution and increase administrative costs. The objectors oppose the application on two grounds. First, complying with the additional reporting requirements would require considerable time and resources. Second, CSI has not produced any evidence demonstrating its need for the additional information to administer the rights of its members.

[11] We are not convinced that the current “if available” reporting system prevents CSI from effectively administering the tariff. We also believe it is too early to alter the current system in the absence of concrete evidence as to its efficacy. Before making any such change, we would need to better understand why the requested information is needed and to know the extent to which online music services already provide the information. We also agree that imposing these changes at this time would impose unnecessary costs on the services.

[12] This being said, online music services should prepare themselves for such an eventuality and insist that record labels provide them with the information. For the reasons explained in 2007, difficulties in obtaining information that is essential for the proper administration of the tariff and distribution of royalties will not weigh heavily when the final tariff is certified.

III. WORDING CLARIFICATIONS

[13] CSI also requests some changes in the wording of the interim tariff to avoid unnecessary confusion. These changes should make it clear that the tariff is only available to services that comply with their obligations and that the amounts to be reported and paid are in Canadian dollars.

² [Board's decision of November 24, 2006](#) certifying the *NRCC-SOCAN Interim Commercial Radio Tariff, 2003-2007*.

Our preliminary view is that current legislation (be it the *Act* or Canadian legislation governing the use of foreign currency in paying for Canadian goods and services) is sufficiently clear to make it unnecessary to grant this request.

IV. ORDER

[14] The application of CSI for an interim tariff is denied.

A handwritten signature in black ink that reads "Claude Majeau". The signature is written in a cursive, flowing style.

Claude Majeau
Secretary General