

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date	2012-06-29
Citation	Files: Public Performance of Musical Works
Regime	Collective Administration of Performing Rights and of Communication Rights <i>Copyright Act</i> , section 68(3)
Members	Mr. Justice William J. Vancise Mr. Claude Majeau Mr. J. Nelson Landry
Proposed Tariffs Considered	Tariffs 2.B, 2.C, 2.D, 3, 5.A, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 23, 24

Statement of Royalties to be collected by SOCAN for the public performance or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works

Reasons for decision

I. INTRODUCTION

[1] Pursuant to subsection 67.1(1) of the *Copyright Act*¹ (the “Act”), the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed proposed statements of royalties to be collected for the performance in public or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works for the years 2006 through 2013.

[2] These proposals were published in the *Canada Gazette* accompanied by a notice indicating that prospective users or their representatives could object to the tariffs within the prescribed deadlines. Many of the tariffs addressed in these reasons were not objected to and are certified as filed. Some reflect agreements reached between SOCAN and users. Two matters will be left in abeyance.

¹ R.S.C. 1985, c. C-42.

II. UNOPPOSED, UNCHANGED TARIFFS

[3] The following proposed tariffs are unchanged from the last time they were certified. No one objected to them. They are:

For the years 2009-2010

Tariff 13.A (Public Conveyances – Aircraft)

For the years 2009-2012

Tariff 2.D (Television – Canadian Broadcasting Corporation)

Tariff 5.A (Exhibitions and Fairs)

Tariff 12 (Theme Parks, Ontario Place Corporation and Similar Operations; Paramount Canada's Wonderland and Similar Operations)

Tariff 13.B (Public Conveyances – Passenger Ships)

Tariff 13.C (Public Conveyances – Railroad Trains, Buses and Other Public Conveyances, Excluding Aircraft and Passenger Ships)

For the years 2009-2013

Tariff 2.B (Television – Ontario Educational Communications Authority)

For the years 2011-2012

Tariff 3 (Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns and Similar Establishments)

Tariff 7 (Skating Rinks)

Tariff 8 (Receptions, Conventions, Assemblies and Fashion Shows)

Tariff 10 (Parks, Parades, Streets and Other Public Areas)

Tariff 11 (Circuses, Ice Shows, Fireworks Displays, Sound and Light Shows and Similar Events; Comedy Shows and Magic Shows)

Tariff 14 (Performance of an Individual Work)

Tariff 18 (Recorded Music for Dancing)

Tariff 19 (Fitness Activities and Dance Instruction)

Tariff 20 (Karaoke Bars and Similar Establishments)

Tariff 21 (Recreational Facilities Operated By a Municipality, School, College, University, Agricultural Society or Similar Community Organizations).

[4] The Board received several comments relating to these tariffs. Three deserve a mention.

[5] One user argued that Tariff 8 would be less onerous, administratively and financially, if users were allowed to make a single annual payment. We see no need to amend Tariff 8 accordingly for two reasons. First, this is one of the most undemanding tariffs: users simply file a payment each quarter, with a statement of the number of events, with or without dancing, that occurred during the quarter. Second, Tariff 21 already allows a variety of not for profit community

organizations to be dispensed from complying with six tariffs, including Tariff 8, by making a single, yearly payment.

[6] Tariff 18 sets lower rates for establishments that operate pursuant to the tariff less than four days per week. So does Tariff 20. The rates in Tariff 18 also increase with the maximum capacity of the premises. One comment suggested that this was unfair on two counts. First, both tariffs should vary according to the actual number of days (or hours) in which music is being played for dancing or karaoke. Second, Tariff 18 should take into account actual attendance rather than maximum capacity. The proposed changes, while attractive at first glance, are impractical. The royalties these tariffs set are relatively low, especially given the importance of music to the targeted uses. The royalties are also an average; users who only operate with music for one day per week probably pay a little more than they would if paying a daily rate, whereas users who operate three days per week probably pay a little less. Switching to a per-day rate would require a complete recalibration of the rate grid. It would also increase the administrative burden on all users and on SOCAN. Finally, while it is true that not every establishment attains its maximum capacity on every day it plays recorded music, the administrative burden associated with measuring attendance in these establishments would again far outweigh the potential savings for the vast majority of users of these tariffs.

[7] Two users mentioned that it is unfair for non-profit organizations to have to pay Tariffs 19 and 21. The issue of non-profit organizations having to pay tariffs is one that has arisen from time to time. As we explained before:

The argument that non-profit community activities should not attract any royalties must also be rejected. SOCAN has chosen to waive its fees for some such events under relatively strict conditions. This does not mean that community activities should be entitled to use [SOCAN's] repertoire for free.²

[8] SOCAN proposed amending Tariff 18 to specify that it does not target the use of music expressly covered in other tariffs, including performances covered under Tariff 8. The proposed change in wording does not change the ambit of the tariff.

[9] We certify the above tariffs as filed, with two exceptions.

[10] Contrary to proposed Tariff 13.A for 2009 and 2010, the proposed tariff for 2011 and 2012 includes substantive changes from the version we last certified in 2008. First, it adds a new category dealing with “audiovisual presentations”. Second, proposed rates are nearly double the existing ones. Third, proposed fees for in-flight music and audiovisual presentations are further

² NRCC - *Tariff 3 (Use and Supply of Background Music) for the Years 2003- 2009* (20 October 2006) Copyright Board [Decision](#) at para. 169.

doubled if the offerings are interactive. We need more time to study the impact of these changes before certifying the tariff. Consequently, we will certify Tariff 13.A only for 2009 and 2010, and hold this matter in abeyance for 2011 and 2012.

[11] Tariff 5.B deals with concerts offered during exhibitions and fairs. It is intended to mirror Tariff 4 (Concerts). That tariff is currently under examination. The Board will deal with both tariffs at the same time.

III. NO LONGER OPPOSED, UNCHANGED TARIFFS

A. THE BACKGROUND MUSIC TARIFFS (TARIFFS 15.A FOR 2008-2011, 15.B FOR 2009-2011 AND 16 FOR 2010-2011)

[12] The Hotel Association of Canada (HAC), the Retail Council of Canada (RCC) and Bell Canada (Bell) objected to proposed Tariff 15.A. HAC also objected to proposed Tariff 15.B. Rogers Communications, Shaw Communications, Videotron Ltd., Cogeco Cable Inc, Bell, the Canadian Broadcasting Corporation, DMX Music Canada (DMX), HAC, RCC and Stingray Digital Group (Stingray) objected to proposed Tariff 16.

[13] On January 31, 2011, SOCAN asked that the Board set in motion the process leading to a hearing to determine Tariff 15. On February 1, RCC asked that more time be provided, in particular to allow parties to consider whether SOCAN Tariff 16 and Re:Sound Tariff 3 (Use and Supply of Background Music) should be examined jointly with SOCAN Tariff 15.

[14] On May 17, 2011, the Board ruled that the examination of SOCAN Tariffs 15 and 16 would proceed to a hearing on June 12, 2012. All objectors subsequently withdrew from the process.

[15] Bell's objection to Tariff 15.A concerned a small change in wording. SOCAN proposed the following wording for 2011 (new words in bold):

For a licence to perform recorded music forming part of SOCAN's repertoire, by any means, **including a television set**, and at any time and as often as desired in 2011, in an establishment not covered by Tariff 16, the annual fee is \$1.23 per square metre or 11.46¢ per square foot, payable no later than January 31 of the year covered by the licence.

[16] Background music played via television sets is not a new use. The wording of the clause without the bolded words was broad enough to include music played via a television set. We adopt the new wording for clarification purposes.

[17] Tariffs 15.A and 16 already specify that they do not target uses expressly covered in other tariffs. SOCAN proposed that the relevant clauses now mention Tariff 8 expressly. These changes do not alter the ambit of the tariff. We adopt the new wording, again for clarification purposes.

[18] DMX and Stingray withdrew from the process on the understanding that SOCAN no longer sought a rate increase for Tariff 16 in 2010. SOCAN so confirmed in an email to the Board on March 26, 2012. Proposed Tariff 16 for 2011 is identical to what the Board certified for 2009.

[19] We certify Tariff 15.A (2008-2011) and 15.B (2009-2011) as proposed by SOCAN for 2011. We certify Tariff 16 (2010-2011) as certified for 2009, except for the addition of an express reference to Tariff 8, as just discussed.

B. TARIFF 23 (HOTEL AND MOTEL IN-ROOM SERVICES) 2009-2012

[20] HAC objected to Tariff 23 for 2009. Its chief concern was that Tariff 23 should be paid by the service provider, not the hotel or motel.

[21] The last certified tariff was deliberately established as target neutral. The obligations under the tariff are thus joint and several, in terms of the user who authorizes the performance (the service) and the user who performs the music (the hotel).

[...] SOCAN can collect royalties from any party liable either for the communication to the public by telecommunication, or the authorization of the communication in providing the services. As part of the agreement with SOCAN, the three major Services will pay the royalties they agreed upon. However, the target neutrality of the tariff the Board certifies will allow SOCAN to collect from other parties should new entrants to this industry refuse to pay.³

[22] Correspondence SOCAN sent to HAC on March 26, 2009 clarified the situation further:

As of this writing, SOCAN has no reason to believe that the current situation will change, but SOCAN reserves its right to collect the royalties from the establishments in the event that they are not paid by the service providers in the future.

[23] On May 28, 2009, HAC withdrew its objection. We certify Tariff 23 for the years 2009-2012 as filed.

IV. TARIFFS BASED ON AGREEMENTS

[24] Before certifying a tariff based on agreements, it is generally advisable to consider the extent to which the parties to the agreements can represent the interests of all prospective users, as well as whether the terms of the agreement are fair.

³ SOCAN - Tariff 23 (Hotel and Motel In- Room Services) for the Years 2001 to 2006 (30 June 2006) Copyright Board [Decision](#) at para. 48.

A. TARIFF 2.C (TELEVISION – SOCIÉTÉ DE TÉLÉDIFFUSION DU QUÉBEC) 2009-2012

[25] This is a single-user tariff, last certified as an annual lump sum amount of \$180,000 for 2008. SOCAN proposed rates of \$180,000 for 2009 and \$216,000 for the years 2010-2012.

[26] On January 18, 2012, SOCAN filed with the Board an agreement for annual payments of \$216,000 for the period 2011 to 2013. In an email dated March 26, 2012, SOCAN confirmed that Télé-Québec had paid \$180,000 for 2009 and \$216,000 for 2010. Since this is a single-user tariff, there is no need for heightened scrutiny of the agreement. We certify Tariff 2.C as filed for the years 2009 to 2012. We do not certify the tariff for 2013 because the objection period for 2013 tariffs has not expired.

B. TARIFF 6 (MOTION PICTURE THEATRES) 2009-2013

[27] The Board last certified Tariff 6 for 2008 at a rate of \$1.23 per seat, with a minimum fee of \$123 per screen. SOCAN proposed the following rates for the years 2009-2013:

Year / Année	Per Seat / Par siège	Minimum / Redevance minimale
2009	\$1.69	\$169
2010	\$1.69	\$169
2011	\$1.40	\$140
2012	\$1.45	\$145
2013	\$1.50	\$150

[28] On July 6, 2011, SOCAN filed an agreement it had reached with the Motion Picture Theatre Associations of Canada (MPTAC). The agreement provided for the following rates.

Year / Année	Per Seat / Par siège	Minimum / Redevance minimale
2009	\$1.30	\$130
2010	\$1.35	\$135
2011	\$1.40	\$140
2012	\$1.45	\$145
2013	\$1.50	\$150

[29] The agreement also provided adding to the tariff a mention that the rate per seat and the minimum fee are to apply on an annual basis and on a per screen basis.

[30] MPTAC has represented, and continues to represent the vast majority of motion picture theatre owners and operators in Canada, including independent theatres.⁴ Absent any other opposition, we can take for granted that the agreement is in the interest of all users subject to the

⁴ SOCAN - Tariff 6 (Motion Picture Theatres) for the Years 1992 to 1998 (1 December 1995) Copyright Board Decision at 3.

tariff. The proposed royalty increases, while greater than inflation, remain modest. We certify Tariff 6 according to the agreement.

C. TARIFF 9 (SPORTS EVENTS) 2010-2012

[31] The last certified Tariff 9, for the years 2002-2009, reflected an agreement between SOCAN and over a dozen objectors that covered the period from 2002 to 2011.⁵

[32] Pursuant to the agreement, SOCAN proposed rates of 0.095 per cent of gross receipts for 2010 and 0.1 per cent for 2011. SOCAN also proposed the rate of 0.1 per cent for 2012. No one objected. The parties to the 2002-2011 agreement represent a wide variety of users. They also pay the bulk of the royalties pursuant to this tariff. The proposed increases are fair: in effect, they respond to comments of the Board going back as far as 2000.⁶

[33] Finally, a reporting obligation clause that is part of the agreement and of the proposed tariffs did not find its way in the last certified tariff. It has been added to the tariff we certify: users will now be required to report licensed events and to pay royalties on a quarterly basis.

[34] We certify Tariff 9 for the years 2010-2012 as filed.

D. TARIFF 24 (RINGTONES AND RINGBACKS) 2006-2013

[35] A ringtone is a digital audio file that is played to indicate an incoming telephone call. A ringback is a digital audio file that is heard by the calling party after dialling and before the call being answered. A certified tariff is in place for the first but not the second.

[36] Timely objections to proposed Tariff 24 were filed by Apple Canada and Apple Inc. (Apple), Bell Mobility/Bell Canada (Bell), Canadian Satellite Radio Inc. (CSR), the Canadian Recording Industry Association and some of its members (CRIA), the Canadian Wireless Telecommunications Association (CWTA), *Groupe de radiodiffusion Astral inc.*, Teletoon Canada Inc. and MusiquePlus Inc. (Astral), Please Hold Canada Inc. (PHC), Rogers Communications (Rogers), Sirius Canada Inc. (Sirius), Telus Communications Company (Telus) and Videotron.

[37] Astral, CSR, and Sirius subsequently withdrew their objections. On June 7, 2010, SOCAN wrote to the Board, informing it that Bell Mobility, CRIA, Rogers, Telus, and Videotron had signed an agreement with SOCAN and requesting that the Board certify a tariff consistent with

⁵ *SOCAN - Tariff 9 (Sports Events) for the Years 2002 to 2009* (23 January 2009) Copyright Board [Decision](#). The list of objectors is at para. 7.

⁶ *Ibid.* at para. 6; *SOCAN - Tariff 9 (Sports Events) for the Years 1998 to 2001* (15 September 2000) Copyright Board [Decision](#) at 8, 10.

that agreement. Parties to the agreement also withdrew their objections. MTS Allstream and Sasktel also signed the agreement, although they had not objected to the proposed tariff.

[38] On January 25, 2012, the Board asked the remaining objectors, Apple, CWTA and PHC, to state whether they wished to maintain their objections. All withdrew. Tariff 24 is now unopposed.

[39] Ringtones and ringbacks are inherently linked to the market for wireless services. Information from the CRTC indicates that, as of the end of 2010, Bell, Rogers and Telus had a combined share exceeding 90 per cent of the wireless market. Thus, fewer than 10 per cent of wireless customers subscribe through a provider that is not party to the agreement. The figure is likely substantially less, since the parties to the agreement include several other carriers with smaller market shares. CWTA, while not a party to the agreement, had the opportunity to maintain its objection on behalf of its members who had not signed the agreement, such as Wind, Public Mobile, and Mobilicity. We are satisfied the parties to the agreement were capable of representing the interests of all relevant users.

[40] The preamble to the agreement indicates the basis for determining its equity. To determine the tariff to be paid to communicate ringtones, the Board used as a proxy the royalties paid pursuant to agreements allowing the same users to copy such ringtones. These royalties have recently declined; the agreement proposes a proportional decline in the rate of the tariff. Given that this reflects the Board's methodology in 2006,⁷ the result is *prima facie* fair.

[41] The tariff will now extend to ringbacks. The existing tariff, which applied only to ringtones, raised \$1.8 million in 2009, according to data routinely filed by SOCAN with the Board. Changes both to the rate base and to the rate make it impossible to predict the amounts that will be collected under the tariff we certify here.

[42] There may need to be retroactive adjustments, since this tariff is being certified in 2012 but beginning in 2006. Licensees selling ringtones from July 1, 2009 onwards may need to adjust their payments due to the change in the rate. Licensees selling ringbacks will need to make retroactive payments dating back to 2006. We do not have evidence on the size of these adjustments and there is no provision for them in the agreement. Since no party has requested that we deal with the issue, we leave this matter for SOCAN to administer with its licensees.

[43] In a recent decision, the Board wrote that "the practice of using interest factors should be generalized" where retroactive payments obtain.⁸ We agree. That being said, we are reluctant to

⁷ SOCAN - Tariff 24 (Ringtones) for the Years 2003 to 2005 (18 August 2006) Copyright Board [Decision](#) at para. 100.

⁸ SOCAN-Re:Sound CBC RadioTariff, 2006- 2011 (8 July 2011) Copyright Board [Decision](#) at para. 131.

disturb the agreement negotiated between SOCAN and the users of its tariff. As such, we decline to add an interest factor clause to the tariff where none has been proposed.

[44] We certify the tariff filed as Appendix B of the agreement between SOCAN and the objectors. This tariff sets royalty payments of 6 per cent of the price paid by the subscribers with a minimum of 6 cents per ringtone or ringback for the period January 1, 2006 through June 30, 2009. The tariff also sets royalty payments of 5 per cent with a minimum of 5 cents per ringtone or ringback for the period July 1, 2009 through December 31, 2013.

A handwritten signature in black ink, appearing to read 'Gilles McDougall', written in a cursive style.

Gilles McDougall
Secretary General