

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date	2017-05-19
Citation	CB-CDA 2017-050
Regime	Collective Administration of Performing and of Communication Rights <i>Copyright Act</i> , subsection 68(3)
Members	The Honourable Robert A. Blair Mr. Claude Majeau Mr. J. Nelson Landry
Proposed Tariffs Considered	SOCAN Tariffs 13.A – Public Conveyances – Aircraft (2011-2014 and 2015-2017)

Statement of Royalties to be collected 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 AND HISTORY OF THE TARIFF

[1] The present reasons concern tariffs proposed by the Society of Composers, Authors and Music Publishers of Canada (SOCAN). On March 31, 2010, March 31, 2011, March 30, 2012, April 2, 2013, and March 31, 2014, SOCAN filed pursuant to section 67.1 of the *Copyright Act*,¹ statements of proposed royalties to be collected for the public performance or the communication to the public by telecommunication of musical works in an aircraft for the years 2011 to 2017. The proposed tariffs were published in the *Canada Gazette*. On each occasion, prospective users and their representatives were given notice of their right to file objections to the proposed tariffs.

[2] The last tariff certified by the Board, for 2009-2010, provided a licence to publicly perform recorded music in an aircraft, while on the ground or in-flight. It included music played through personal headsets offered to customers.

¹ *Copyright Act*, R.S.C., 1985, c. C-42.

[3] The 2011-2014 tariff proposals included substantive changes from the previously certified tariffs. First, a new category dealing with “audiovisual presentations” was added. Second, proposed rates were nearly double the existing ones. Third, proposed fees for in-flight music and audiovisual presentations were further doubled for interactive offerings.

[4] The 2015-2017 tariff proposals also included substantive changes from the previously certified tariffs. While users then paid a quarterly fee based on ranges of number of seats, users would now pay an annual fee per seat. In addition, the previously certified “in-flight music” category was replaced by “music as part of in-flight programming.”

[5] The National Airlines Council of Canada (NACC) filed timely objections to the tariff for 2013 and 2014. While its objection for 2015–2017 was filed late, NACC was granted intervenor status with full participatory rights for those years. There were no other objectors or intervenors in respect of these tariffs.

[6] NACC described itself as a trade association representing Canada’s largest passenger air carriers, being Air Transat A.T. Inc., Jazz Aviation LP, Air Canada and WestJet Airlines Ltd.

[7] After attempts by the parties to resolve the matter, on September 29, 2015, SOCAN requested that the Board set a schedule for a hearing. The Board established a joint proposed schedule of proceedings on October 27, 2015, leading to a hearing scheduled to begin on September 27, 2016.

[8] After exchanging interrogatories and initial answers thereto according to the schedule, on April 29, 2016, SOCAN wrote to the Board, indicating that a settlement was soon forthcoming; as a result, there would be no filing of motions regarding deficiencies of interrogatory answers. Two months later, the parties jointly filed the Settlement Tariffs for the years 2011 to 2020, requesting that the Board cancel the scheduled hearing and certify the Settlement Tariffs for the years 2011-2014 and 2015-2017, since the tariffs proposed for the years 2018-2020 had not been yet filed.

[9] In their June 29, 2016 joint request for certification, the parties indicated the following:

With respect to these requests for certification:

1. The tariff rates that SOCAN and NACC are requesting for 2011-2014 are lower than those in the tariff that SOCAN originally proposed for the years 2011–2014; as such, SOCAN and NACC submit that there is no prejudice in the Board continuing the currently certified tariff for the years 2011-2014 in place of the form of tariff that SOCAN had proposed for 2011–2014.
2. The changes that SOCAN and NACC have made to the proposed tariff for 2015–2017 are not substantive and deal mostly [with] the reporting requirements; the rates and structure are

the same as those originally proposed for these years. What has been added is a potential discount for licensees if an airplane is out of service for a period of time for required maintenance.

[10] The history of Tariff 13.A prior to this proceeding consists of two settlement-certifications, and several certifications without objection. In 1992, the Board certified the form of the tariff which it would continue to certify up until 2010, based on an agreement between SOCAN and the Air Transport Association of Canada.² In 2004, the Board certified an agreement between SOCAN, the Air Transport Association of Canada and Air Canada, to revert to the form of the tariff last certified in 1998.³

II. ANALYSIS

[11] The first Settlement Tariff, for the years 2011-2014 is identical to the tariff the Board certified in 2012 for the years 2009 and 2010.⁴ Of note is the fact that the Settlement Tariff rates are the same since 1992.

[12] With respect to the 2015-2017 Settlement Tariff, further analysis is required because – as mentioned above – it is different from the previously certified, to the point that the two tariffs are not easily comparable.

[13] In 2012, the Board set out a two-part framework for certifying tariffs pursuant to agreements:

Before certifying a tariff based on agreements, it is generally advisable to consider (a) the extent to which the parties to the agreements can represent the interests of all prospective users and (b) whether relevant comments or arguments made by former parties and non-parties have been addressed. These are not hard and fast rules: prospective users who did not file a timely objection no longer have a right to air their views before the Board. Yet because tariffs are both prospective and of general application, some account must be taken of the interests of those who are not before us and who will be affected by our decision, especially with tariffs of first impression.⁵

[14] This “Re:Sound 5 framework” was referenced in a recent Board decision⁶ relating to SOCAN Tariff 22.D.1 for online audiovisual content. This decision was reviewed by the Federal Court of Appeal. While the Court considered that the Re:Sound 5 framework had not been

² *SOCAN – Multiple Tariffs, 1992* (June 30, 1992) Copyright Board Decision at 10.

³ *SOCAN – Multiple Tariffs, 1998-2007* (June 18, 2004) Copyright Board Decision at 45.

⁴ *SOCAN – Multiple Tariffs, 2006-2013* (June 29, 2012) Copyright Board Decision at para 10.

⁵ *Re:Sound Tariff 5 – Use of Music to Accompany Live Events, 2008-2012 (Parts A to G)* (25 May 2012) Copyright Board Decision at para 10.

⁶ *SOCAN Tariff 22.D.1 – Audiovisual Webcasts 2007-2013* (18 July 2014) Copyright Board Decision.

applied correctly and returned the matter to the Board, it did not question the framework itself.⁷ Accordingly, we now proceed to a Re:Sound 5 analysis.

[15] According to its website, “[t]he NACC is an association intended for all air carriers facing similar regulatory and policy issues. All large passenger air carriers are eligible for NACC membership, provided that they hold certificates authorizing passenger seating capacity of *70 passengers or more* and other licenses required in our by-laws.”⁸ [emphasis added]

[16] In order to assess the impact of the Settlement Tariffs on all carriers, we need to consider planes smaller than the 70 passenger threshold. We will use the example of a 50-passenger plane. Under the previously certified tariff, royalties for this plane are \$162 per year for music while on ground and \$648 per year for in-flight music. Under the Settlement Tariffs, the royalties to be paid for this plane would be the same amounts for the years 2011 to 2014. For 2015-2017, these royalties would be \$116 per year for music while on the ground and \$274.50 per year for in-flight programming, both to be prorated to the number of days in which the aircraft is in service during the year. The Settlement Tariffs thus imply the same or lower royalties as those previously certified for this 50-passenger plane. In addition, the proposed tariffs were either higher or the same as the Settlement Tariffs, which implies no procedural fairness issues.

[17] The second part of Re:Sound 5 framework refers to the comments or arguments made by former parties and non-parties. In this instance however, there were none.

[18] Based on our analysis, we conclude that the interests of those not represented by NACC are not adversely affected by the Settlement Tariffs. We therefore certify this Tariff as per the Settlement Tariffs, of which the rates are reproduced in the Annex.



Gilles McDougall
Secretary General

ANNEX

RATES CERTIFIED

2011-2014	2015-2017

⁷ *Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2015 FCA 289 at paras 45-53.

⁸ National Airlines Council of Canada, “About Us”, online: <http://airlinecouncil.ca/about-us/#membership>.

1. Music while on ground		1. Music while on ground
<u>Passengers</u>	<u>Fee per Calendar Quarter</u>	\$2.32 per seat, for each aircraft in service during the year, prorated to the number of days in which the aircraft is in service during the year.
0 to 100	\$40.50	
101 to 160	\$51.30	
161 to 250	\$60.00	
251 or more	\$82.50	
2. In-flight Music		2. Music as part of in-flight programming
<u>Passengers</u>	<u>Fee per Calendar Quarter</u>	\$5.49 per seat for each aircraft in service during the year, prorated to the number of days in which the aircraft is in service during the year.
0 to 100	\$162.00	
101 to 160	\$205.20	
161 to 250	\$240.00	
251 or more	\$330.00	