

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date	2018-09-28
Citation	CB-CDA 2018-196
Regime	Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21 <i>Copyright Act</i> , section 70.15
Members	The Honourable Robert A. Blair Mr. Claude Majeau Mr. J. Nelson Landry
Proposed Tariffs	SODRAC Tariff 5 Redetermination (2009-2012)
Considered	Examination (2013-2016)

Statement of Royalties to be collected by SODRAC for the reproduction, in Canada, of musical works embedded into cinematographic works for the purpose of distributing copies of these cinematographic works for private use or for theatrical exhibition

Reasons for decision

I. INTRODUCTION

[1] The present decision mainly pertains to the certification of a tariff for the reproduction of musical works onto physical copies of an audiovisual work, such as DVDs, destined to consumers.

[2] Pursuant to subsection 70.13(1) of the *Copyright Act*¹ (the “*Act*”), the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) filed its proposed Tariff 5 for the reproduction, in Canada, of musical works embedded into cinematographic works for the purpose of distributing copies of these cinematographic works for private use or for theatrical exhibition for the years 2009 to 2012 (filed on March 28, 2008), 2013 (filed on March 20, 2012), 2014 (filed on March 28, 2013), 2015 (filed on March 31,

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

2014), and 2016 (filed on March 31, 2015). The proposed tariffs were published in the *Canada Gazette*.

[3] For the years 2009-2012, the Canadian Association of Film Distributors and Exporters (CAFDE), the Motion Picture Theatre Associations of Canada (MPTAC) and the Canadian Motion Picture Distributors Association (now Motion Picture Association – Canada) (MPA-C) filed timely objections to the proposal. MPTAC later withdrew its objection. MPA-C also withdrew its objection but filed extensive comments, as allowed by the Board’s Directive on Procedure.

[4] CAFDE also filed timely objections for the years 2013 and 2014, MPA-C for 2013 to 2016, Québecor Media Inc. (QMI) for 2016 and the Canadian Association of Broadcasters (CAB) for 2015 and 2016. CAB and QMI withdrew their objection respectively in October 2015 and in March 2016. Upon request, MPA-C was granted intervenor status with limited rights for the years 2013-2016.

[5] On November 2, 2012, the Board certified SODRAC Tariff 5 for 2009-2012. On December 20, 2012, on request from CAFDE to reopen the decision for the purpose of correcting the Board’s error in implementing the CAFDE DVD royalty proposal, the Board issued an interim decision by which the application of SODRAC Tariff 5 for 2009-2012 was suspended. The Board proceeded to a redetermination of the tariff and on July 5, 2013, certified SODRAC Tariff 5 for 2009-2012 for the second time.

[6] On October 20, 2014, the Federal Court of Appeal set aside the Board’s decisions of November 2, 2012, and July 5, 2013, and referred the matter back to the Board for redetermination.

[7] On October 13, 2015, the Board ordered that the redetermination of SODRAC Tariff 5 for 2009-2012 be consolidated with the examination for the years 2013-2014.

[8] Following consultations with the parties, the Board ordered on November 10, 2015, the consolidation of the examination of SODRAC Tariff 5 for 2009-2014 with the examination for 2015-2016. It also set a hearing to begin on June 21, 2016.

[9] In May 2016, SODRAC and CAFDE filed with the Board a request for certification of a settlement tariff (the “Settlement Tariff”) for the years 2009 to 2016 as well as a request to postpone the hearing *sine die*. The latter request was granted by the Board. In May 2017, the Board provided MPA-C with an opportunity to provide comments on the Settlement Tariff. In response, MPA-C indicated that it would not be submitting any such comments.

[10] Royalties under the Settlement Tariff are the greater of 1.2 per cent of revenues or 8¢ per copy for the selling or renting of DVDs of audiovisual works for private use. Royalties under the

Settlement Tariff are different from SODRAC's proposed rates for 2009-2016 as published in the *Canada Gazette* for those years. In particular, rates under the Settlement Tariff exceed the proposed rates in 2014-2016, in some circumstances. For example, a distributor that uses no more than 10 minutes of music may pay 6.58¢ per copy according to the 2016 proposed rates, but has to pay at least 8¢ per copy for the selling or renting of DVDs of audiovisual works according to the Settlement Tariff. The existence of these circumstances raised issues that required further examination by the Board.

[11] As such, the Board asked the parties to provide additional information with a view to assessing the potential effect of the Settlement Tariff on other players in this specific market. The parties were asked to provide information on the market's structure, the players, the royalties generated, the governance and membership of the trade association, the nature and extent of consultations that took place in relation to the Settlement Tariff, as well as all agreements between SODRAC and distributors covering the subject matter of SODRAC Tariff 5 for the period of 2009-2016. CAFDE and SODRAC were also asked to provide their position on fairness issues in regards of distributors not represented by CAFDE, who may prefer SODRAC's proposed rates over the Settlement Tariff.²

[12] On October 5, 2017, SODRAC provided its response on a highly confidential basis. Upon further request by the Board, SODRAC also provided a public version of its submissions.

[13] SODRAC identified distributors which are not CAFDE members. Among those non-members, SODRAC identified 2 subcategories: (i) those who have reached an agreement with SODRAC, and (ii) those with whom SODRAC wishes to reach an agreement.

[14] Regarding subcategory (i), the information provided by SODRAC was not sufficient to establish unequivocally that the agreements in existence covered the entire tariff term (2009-2016).

[15] Regarding subcategory (ii), because the tariff structure adopted in the Settlement Tariff was different from the proposed tariffs published in the *Canada Gazette* and, as such, was not subject to submissions by certain potential users, the Board was of the view that it had to consult more broadly to determine whether the Settlement Tariff took into account the interest of the targeted industry as a whole.

[16] In order to carry out this broader consultation, the Board asked SODRAC to provide the contact information of non-CAFDE distributors who do and who do not have agreements with SODRAC.

² See Notices 2017-095 and 2017-164.

[17] In its letter dated December 22, 2017, SODRAC identified the distributors which are not CAFDE members and which did not have an agreement with SODRAC for the tariff term.

[18] Subsequently, in its Notice 2018-017, the Board asked for comments from these distributors on the Settlement Tariff, and more specifically, on the appropriateness of certifying SODRAC Tariff 5 as per the Settlement Tariff. These distributors were also provided with the file's relevant Board Notices, the Settlement Tariff and the parties' public responses to the Board's prior requests for additional information.

[19] None of these distributors filed submissions in response to the Board's request for comments.

[20] On June 29, 2018, SODRAC filed a motion to amend the Settlement Tariff's transitional provision so that defaulting payors would incur late payment interests from January 1, 2009, instead of the agreed upon date of June 30, 2016. SODRAC explained that this was aimed at a particular user who had stopped making payments under the applicable tariff since 2009. CAFDE opposed this request on July 20, 2018, and SODRAC replied on July 24, 2018.

II. ANALYSIS

[21] Any tariff proposal, whether agreed to by the parties of record or not, must also take into consideration the interest of non-signatories or non-parties.

[22] In this respect, the Board's *Re:Sound Tariff 5* decision provides a useful framework when carrying out such an assessment for the purpose of 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.³

[23] As far as this particular file is concerned, the Board's motives for consulting with non-members of CAFDE were consistent with this *Re:Sound Tariff 5* framework, as it appears from its Notice 2017-164, which provided that:

³ *Re:Sound Tariff 5 – Use of Music to Accompany Live Events (Parts A to G), 2008-2012* (May 25, 2012) Copyright Board Decision at para 10 [*Re:Sound Tariff 5*]. See also *Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2015 FCA 289 at paras 45 and following. [*Netflix*]

Given that the SODRAC-CAFDE agreement is according to SODRAC [TRANSLATION] “initially specifically for the benefit of CAFDE members” and that non-CAFDE distributors have reached agreements that include “per-minute rates” for a term different from the tariff term, the Board is of the view that procedural fairness requires that non-CAFDE distributors be consulted on the SODRAC-CAFDE agreement, which – if certified as a tariff – would otherwise bind them without affording them the opportunity to being heard.

[24] With this objective in mind, the Board obtained and analysed additional information to allow a careful examination of the potential impact of the Settlement Tariff on the DVD distribution industry as a whole, if it were to be certified as requested by the parties.

[25] The information so provided by the parties showed that while CAFDE members are the main users in terms of the royalties paid under this tariff, accounting for over 60 per cent of the total royalties paid, they are not representative of the whole industry: CAFDE members account for 48 per cent of all distributors (Group 1), non-CAFDE distributors with an agreement with SODRAC account for 30 per cent of all distributors (Group 2), and non-CAFDE distributors that do not have an agreement with SODRAC account for 22 per cent of all distributors (Group 3).⁴

[26] The information also showed that all members of Group 1 and 2 are SODRAC licensees for a contractual term that includes the entire tariff period.

[27] Furthermore, the information provided confirmed that the DVD distribution industry was not homogenous in terms of its actual SODRAC licensing practices. More specifically, a review of the various SODRAC licences showed that rate structures branch off into 2 main categories: a rate based on the amount of music used in an audiovisual work (“Per minute rate”) and a rate based on the greater of revenues or number of copies distributed (“Per revenue or Per copy rate”), whichever leads to the highest royalties.

[28] Distributors may rationally prefer a given structure depending on the amount of music used in their products. Large uses of music would tend to favor the per-revenue or per-copy rate, while, under a certain threshold of music used, some users may find it more advantageous to adopt a per-minute rate.

[29] Therefore, certifying a given rate structure may result in requiring certain users to pay more than they would under other rate structures.

[30] However, because Group 1 and Group 2 members have licence agreements with SODRAC that pre-empt the effect of any certified tariff, as per s. 70.191 of the *Act*, they are indifferent to

⁴ SODRAC estimates that Group 3 accounts for 8.36 per cent of royalties payable.

the certification of a per minute or per revenue or per copy rate. The main concern is therefore Group 3, which may be adversely affected by one of the rate structures if certified.

[31] None of Group 3 members provided comments in response to the Board's request. As such, it is reasonable to infer that Group 3 members are also indifferent to the Settlement Tariff or did not want to comment.

[32] In *Netflix v. SOCAN*,⁵ the Federal Court of Appeal approved generally of the *Re:Sound 5* framework, but refined it in cases where the subject matter of the settlement agreement differs from the published proposed tariffs, stating that:

where, as here, a settlement agreement deals with subject matter that did not appear in the published proposed royalties and where none of the parties at the negotiating table are adversely affected by the change, as is the case here, it seems to me that procedural fairness requires that a representative number of the affected segment of the industry be given the opportunity, if it so chooses, to make its comments and point of view known and dealt with by the Board.

[33] In the present case, where the rate base and structure of the Settlement Agreement and those of the Proposed Tariffs differ for some periods, the same procedural fairness concerns arise. As mentioned above, the Group 3 members which may be affected by such differences were consulted but did not provide comments. As such, the Board has discharged its duties with respect to procedural fairness as explained by the Federal Court of Appeal in the *Netflix* decision.

III. CONCLUSION AND DISPOSITION

[34] The fact that CAFDE members are not fully representative of the gamut of relevant users could have raised procedural fairness issues since the Settlement Tariff had not been subject to a proper publication process. Without such a process, non-members cannot assess whether the Settlement Tariff – if certified – would be contrary to their best interest.

[35] However, the Board was apprised of the fact that a group of non-members of CAFDE were already licensed by SODRAC for the duration of the Settlement Tariff. This group is subject to their own licensing framework, distinct from any certified tariff, and as such, is not affected by it. As a result, no procedural fairness issue arises as far as these licensees are concerned.

[36] As far as industry players that do not have a SODRAC licence for the duration of the Settlement Tariff are concerned, the Board contacted all such distributors known to SODRAC to afford them the opportunity to comment on the Settlement Tariff and raise their concerns, if any.

⁵ *Netflix*, *supra* note 3 at para 49.

[37] Considering that none have come forward or otherwise commented on the Settlement Tariff, the potential cause for breach of procedural fairness is alleviated.

[38] Accordingly, the Board certifies SODRAC Tariff 5 for the years 2009 to 2016 in accordance with the terms and conditions set out in the Settlement Tariff, with two modifications described below. The Board wishes to underscore the fact that the certified rate is warranted under the factual circumstances that are specific to this tariff term. Particular attention to the market's actual or anticipated characteristics under the next tariff term will likely be required when determining the appropriate rate.

[39] Section 18 of the Settlement Tariff provides that SODRAC may, upon a 30-day notice in writing, terminate the licence of a distributor who does not comply with this tariff. We strike out this section as it pertains to language of an individual contractual licence rather than a tariff. This also touches upon copyright liability and provisions in the *Act* governing remedies against tariff users. As such, it is a compliance and enforcement issue rather than a tariff certification issue.

[40] Finally, we need to deal with the following transitional issues. In *CBC Radio 2011*, the Board wrote that “[t]he practice of using interest factors should be generalized.”⁶ In *Access Copyright (Governments), 2015*, the Board further clarified this statement: “[t]he term ‘generalized’ implies that there need to be special circumstances for interest factors not to be applied.”⁷ One example of special circumstances occurs when the Board certifies a tariff pursuant to an agreement among some or all of the users and the proposing collective, as we do here.

[41] We do not include interest factors in this tariff for the following reasons. First, when SODRAC and CAFDE jointly filed their request to certify, there was no mention of interest factors to be applied to retroactive adjustments. Nor was there any table of interest factors in Tariff 5 as certified for the years 2009-2012, either in 2012 or in 2013. In addition, the form of the tariff we certify today is almost identical to the interim tariff that has prevailed, for the vast majority of the period from January 1, 2009 to date. In our view, a typical distributor would have few, if any retroactive adjustments to make to SODRAC and such adjustments would likely be quantitatively small. While the fact that adjustments are likely to be small does not, on its own, dictate that we should not apply interest factors to retroactive payments, it gives us comfort that the decision not to do so will be of little practical consequence.

[42] Regarding the transitional provisions for which SODRAC requested a modification, we change the due date for royalty payments provided in the Settlement Tariff but not as requested.

⁶ *SOCAN-Re:Sound CBC Radio Tariff, 2006-2011* (July 8 2011) Copyright Board Decision at para 131.

⁷ *Access Copyright Provincial and Territorial Governments Tariff, 2005-2014* (May 22, 2015) Copyright Board Decision at para 522.

Since the applicable interim tariff is enforceable,⁸ and provides for interest on late payments, it would be inappropriate to address past defaults in the final tariff. This is in line with the Board's positions on tariff compliance and enforcement issues, which it deemed outside its jurisdiction.⁹ Certifying a June 30, 2016, due date would be tantamount to modifying the operation of or enforcing retroactively the interim tariff. We include transitional provisions with deadline dates (i.e., December 14, 2018) set after the certification date as users could not comply with tariff obligations set for the past. Users may however be subject to different obligations under the Settlement Tariff.



Gilles McDougall
Secretary General

⁸ *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669 at paras 188 ff.

⁹ See: *Re: Sound Tariff 3.A – Background Music Suppliers (2010-2013)* and *Re: Sound Tariff 3.B – Background Music (2010-2015)* (September 1, 2017) Copyright Board Decision at para 85; *Statement of Royalties to Be Collected by SOCAN (2011-2013)*, *Re: Sound (2012-2014)*, *CSI (2012-2013)*, *Connect/ SOPROQ (2012-2017)* and *Artisti (2012-2014) in Respect of Commercial Radio Stations* (April 21, 2016) Copyright Board Decision at para 405. See also *Private Copying Tariff Enforcement, 2001-2003* (January 19, 2004) Copyright Board Decision, to the effect that the Board does not have jurisdiction to order compliance with the tariff.