

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2020-09-11

Citation *Re:Sound Tariff 6.B (2018-2022)*, 2020 CB 014

Members René Côté
Nathalie Théberge
Adriane Porcin

**Proposed
Tariff
Considered** Re:Sound Tariff No. 6.B – Use of Recorded Music to Accompany Fitness
Activities (2018-2022)

Approval of Proposed Tariff(s)

As

Re:Sound Tariff 6.B – Use of Recorded Music to Accompany Fitness Activities (2018-2022)

REASONS FOR DECISION

I. INTRODUCTION

[1] On March 31, 2017, Re:Sound Music Licensing Company (Re:Sound) filed proposed *Tariff No. 6.B – Use of Recorded Music to Accompany Fitness Activities (2018-2022)* (the “Proposed Tariff”).

[2] The following Parties objected to the Proposed Tariff: GoodLife Fitness Centres Inc. (GoodLife), the Fitness Industry Council of Canada (FIC), the Hotel Association of Canada (HAC), Restaurants Canada (RC), and the Retail Council of Canada (RCC). However, on December 6, 2018, Re:Sound, FIC, and GoodLife (collectively, the “Settling Parties”), jointly filed a Settlement Tariff, on the consent of the other objectors (HAC, RC, and RCC).

[3] For the following reasons, we conclude that a tariff based on the Settlement Tariff, with minor changes to the terms and conditions to ensure the symmetric treatment of overpayments and underpayments, and to prevent unnecessary disclosure of confidential information, meets the requirement of being fair and equitable and as such, we approve it.

II. OVERVIEW

[4] On March 31, 2017, Re:Sound filed a statement of proposed royalties for the performance in public or the communication to the public by telecommunication, in Canada, for the years 2018 to 2022, of published sound recordings embodying musical works and performers' performances of such works to accompany fitness activities. The following parties filed timely objections to the Proposed Tariff: FIC, GoodLife, the HAC, RC, and the RCC (collectively, the "Objectors").

[5] On December 6, 2018, Re:Sound, FIC, and GoodLife jointly filed a Settlement Tariff, on the consent of the other Objectors (HAC, RC, and RCC).

[6] On March 24, 2020, the Board asked Re:Sound, the FIC, and GoodLife, to jointly provide the Board with information to support the proposition that the FIC and GoodLife, together, are representative of affected users for the 2018–2022 period.¹ On June 25, 2020, the Settling Parties filed their response.²

III. ISSUE

[7] Whether a tariff based on the Settlement Tariff jointly filed by Re:Sound, FIC and GoodLife, on the consent of the other Objectors in this proceeding (HAC, RC, and RCC), is fair and equitable, and whether the proposed tariff should therefore be approved on that basis?

IV. ANALYSIS

[8] Under the *Copyright Act*, the Board is required to "fix royalty and levy rates and any related terms and conditions under this Act that are fair and equitable."³

[9] When a Settlement Tariff is filed by one or more parties, it represents one piece of evidence adduced as part of the Board's tariff approval process; it does not replace the Proposed Tariff originally filed by a collective society. For this reason, in determining whether or not the Settlement Tariff is fair and equitable, the Board must consider it in the context of the overall process initiated on the basis of the original Proposed Tariff, including any of the objections originally filed by the Parties prior to the filing of the Settlement Tariff.

[10] In evaluating whether a tariff is *fair and equitable*, in the context of a Settlement Tariff, the Board typically considers, amongst others:

- a. Whether parties to the settlement agreement are representative: if parties are representative of the industry affected by the tariff, then it is possible to interpret this that persons that are not party to the agreement would also agree—or at least a significant percentage of them. Such an agreement may then be indicative of some

¹ Order CB-CDA 2020-025 (March 24, 2020).

² Letter from Re:Sound Re: Re:Sound Tariff 6.B – Fitness Activities, 2018-2022 (25 June 2020).

³ Copyright Act, RSC 1985, c C-42, s. 66.501.

- form of “market agreement”, which may suggest that the market believes the rate is fair and equitable;
- b. Whether the settlement addresses all objections, including objections made to the Proposed Tariff, and is indicative of whether non-parties would agree to the settlement; and
 - c. Whether there are significant deviations between the Settlement Tariff and a previously approved tariff (where one exists): in circumstances where a tariff has previously been approved, and where there are no changes in the Settlement Tariff, or where those changes have been explained (either by the Parties or the Board), then the Board may use that as evidence of the substantive fairness of the settlement.

A. REPRESENTATIVENESS OF THE SETTLING PARTIES

[11] In their June 25, 2020, response to the Board, the Settling Parties noted that GoodLife has over 1.5 million members and over 405 clubs across Canada, and that FIC represents over 5,000 facilities and over 4 million members nationwide. However, the response did not state clearly that GoodLife and FIC are representative of the fitness industry at the time the Settlement Tariff was submitted, but rather referred the Board back to its own conclusions in *Re: Sound Tariff No. 6.B – Use of Recorded Music to Accompany Fitness Activities, 2013-2017*.⁴

[12] Based on the evidence submitted in this proceeding, including the June 25, 2020, response from the Settling Parties, we are unable to conclude with absolute certainty that GoodLife, FIC and the other Objectors – which themselves are well-established trade associations with broad membership – are representative of all affected users.

B. STATUS OF OBJECTIONS

[13] This Settlement Tariff was filed with the consent of the Objectors.

[14] In this proceeding, only GoodLife filed substantive objections, raising concrete issues of dispute. First, it noted that the proposed tariff increased fees both for fitness classes and background music at a time when there was substantial pressure to reduce membership fees. Second, it objected to the structure of payments: it wanted a single payment for all uses of recorded music in all areas in a fitness venue.

[15] The settlement clearly addresses the first issue: for background music, it uses the same rates as the previously approved tariff; for fitness classes, it uses the same rates as the previously approved tariff, increased only on account of inflation.

⁴ In *Re: Sound Tariff No. 6.B - . Use of Recorded Music to Accompany Fitness Activities, 2013-2017*, Decision of the Board dated January 12, 2018 (“2013-2017 Decision”), par. 22, the Board found that “FIC and GoodLife collectively represent a wide range of Canadian fitness venues, from small 10 member clubs to very large chains such as GoodLife.”

[16] The settlement does not address the second issue, since the structure of the Settlement Tariff is almost identical to that of the Proposed Tariff. However, without evidence on the problems associated with the payment structure, we are unable to determine how or whether this affects the fairness of the Settlement Tariff.

C. COMPARISON OF SETTLEMENT TARIFF AND PREVIOUSLY APPROVED TARIFF

i. Royalty Rates

[17] As with the previously approved *Re:Sound 6.B (2013-2017)* and the proposed *Re:Sound 6.B (2018–2022)*, the Settlement Tariff provides that where a background music supplier to a fitness venue pays its respective tariff, the fitness venue is not required to pay under *Re:Sound 6.B*.

[18] If a fitness venue subscribes to background music, but the supplier does not pay its respective tariff, the venue must pay instead. The Settlement Tariff fixes that rate as 3.2 per cent of the amount paid to the supplier, subject to a minimum of \$2.15 per venue per quarter. These rates are the same as the approved rates in *Re:Sound 6.B (2013-2017)*.

[19] In the case where background music is not provided by a supplier, the Settlement Tariff requires that the fitness venue pay a flat royalty which depends on the number of members. This royalty ranges between \$50 and \$500 per year. The amount of this royalty is the same as it was in *Re:Sound 6.B (2013-2017)*.

[20] For fitness classes, the Settlement Tariff provides for a rate payable per class offered. These rates now range between 41.6¢ and 46.7¢ per class. These rates are increased, relative to *Re:Sound 6.B (2013-2017)*, by a percentage less than inflation measured for the same period.

[21] There is no new element in this matter that would lead us to question the fair and equitable character of the previously approved rates. The rates in the Settlement Tariff are either identical to those in the previously approved tariff or increased by less than inflation. We therefore conclude that the rates in the Settlement Tariff are fair and equitable.

ii. Terms and Conditions

[22] Most terms and conditions in the Settlement Tariff do not differ significantly from those in *Re:Sound 6.B (2013-2017)* and we find them to be appropriate. However, there are a few that do differ significantly from the previous tariff and do require alterations; these are in relation to the treatment of overpayments and underpayments, and of confidential information.

[23] Unlike its predecessor, the Settlement Tariff provides that overpayments (payments in excess of what is due, already collected by Re:Sound) do not require interest payments. However, if there are underpayments, that is, payments now owing to Re:Sound, the Settlement Tariff would charge interest. In its submission, Re:Sound argued that this change from the previously certified tariff is

a “minor wording [change which has] been made for the purposes of clarity and consistency with other Re:Sound tariffs.”⁵ We do not agree that this justifies this asymmetric treatment of overpayments and underpayments.

[24] In previous decisions, the Board held that asymmetric treatment of overpayments and underpayments was not reasonable. For example, in *Re:Sound 6.C (2013-2018)*⁶, the Board modified the terms of a settlement to impose symmetric treatment, drawing on its decisions in, *inter alia*, *Re:Sound 5 (2008-2012)*⁷, *Access K-12 Redetermination (2005-2009)*⁸, and *Commercial Radio (2016)*⁹. In *Re:Sound 5 (2008-2012)*, the Board also noted that a mere agreement among the parties in this regard is not a sufficient justification.¹⁰

[25] In our view, the same reasoning applies also in this case. To address this issue, we modify the terms and conditions of the Settlement Tariff to specify that: “(a)ny overpayment resulting from an error or omission on the part of Re:Sound shall bear interest from the date of the overpayment until the overpayment is refunded.”¹¹

[26] In addition, the Settlement Tariff has differing provisions on the sharing of confidential information that we conclude must be altered. The Settlement Tariff provides that Re:Sound may share aggregated information, as well as confidential information with its “agents and service providers, if they have signed a confidentiality agreement”; “SOCAN, subject to confidentiality being preserved”; and “to the extent required to effect the distribution of royalties, with royalty claimants and their agents.”

[27] In *Re:Sound Tariff 6.C (2013-2018)*, the Board noted that any sharing of confidential information with service providers shall be only “to the extent required by the service providers for the service they are contracted to provide,” with a signed confidentiality agreement as a safeguard.¹² This is similar to decisions for other Re:Sound tariffs, where the Board explained that sharing information among collectives dealing with the same clients is both efficient and

⁵ Request for Certification, Letter of Re:Sound to the Board, December 6, 2018, at p. 2

⁶ *Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment (2013-2018)* (July 21, 2017) Copyright Board Decision, at paras 29-30.

⁷ *Re:Sound Tariff 5 – Use of Music to Accompany Live Events, 2008-2012 (Parts A to G)* (May 25, 2012) Copyright Board Decision, at paras 53, 61. [*Re:Sound 5, 2008-2012*]

⁸ *Access Copyright (Educational Institutions) 2005-2009 — Redetermination* (18 January 2013) Copyright Board Decision, at paras 39-40.

⁹ *Commercial Radio Tariff (SOCAN: 2011-2013; Re:Sound: 2012-2014; CSI: 2012-2013; Connect/SOPROQ: 2012-2017; Artisti: 2012-2014)* (21 April 2016) Copyright Board Decision, at para 409.

¹⁰ *Supra* note 7, at para 55.

¹¹ Similar wording has recently been used in *SODRAC Tariff No. 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition)* (September 28, 2018), Copyright Board Decision.

¹² See *Re:Sound Tariff 6.C (2013-2018)*, at para 27, citing *Commercial Radio Tariff (SOCAN (2011-2013); Re:Sound (2012-2014); CSI (2012-2013); Connect/SOPROQ (2012-2017); Artisti (2012-2014)* (April 21, 2016) Copyright Board Decision, at para 406.

desirable.¹³ Accordingly, we modify these provisions so that sharing of information with service providers shall be only “to the extent required by the service providers for the service they are contracted to provide.” The information authorized to be shared under the approved tariff shall be protected by a confidentiality agreement.

[28] We make one additional, minor adjustment to the text of the tariff. Paragraph 4(1)(a) of the Settlement Tariff makes reference to “subsection 4(2) of the *Re:Sound Background Music Suppliers Tariff, 2010-2013*.” A specific reference to Tariff 3.A for the years 2010 to 2013 risks becoming obsolete at the moment later years of Tariff 3.A are approved by the Board. To mitigate that risk, we remove the reference to “2010-2013.” Consequently, we also remove the reference to “subsection 4(2).”

V. CONCLUSION

[29] As noted above, we are unable to confirm with absolute certainty that the Settling Parties and other Objectors, together, are representative of all users that would be affected by a tariff based on the Settlement Tariff, although we acknowledge that they probably represent a large portion of such users.

[30] However, given our finding that the royalty rates have not increased by more than the rate of inflation from the last-approved tariff, and that we are not aware of any significant changes in the relevant market, we conclude that they are fair.

[31] While the Settlement Tariff does not address GoodLife’s objection regarding royalty structure, we do not have evidence on any potential problems caused by this structure. Thus, we do not alter the royalty structure to address GoodLife’s objection.

[32] Furthermore, we find that the terms and conditions of the Settlement Tariff, with some minor modifications regarding the symmetric treatment of overpayments and underpayments and the safeguard of confidential information, are appropriate.

[33] For these reasons, we find that a tariff based on the Settlement Tariff, with alterations as described above, is fair and equitable and approve it as *Re:Sound Tariff 6.B – Use of Recorded Music to Accompany Fitness Activities (2018-2022)*.

¹³ See for example *Re:Sound Tariff 3.A – Background Music Suppliers (2010-2013)*; *Re:Sound Tariff 3.B – Background Music (2010-2015)* (September 1, 2017) Copyright Board Decision, at paras 80 to 83, citing *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 41.