

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Citation *Re:Sound Tariff 3.A (2014-2018)*, 2020 CB 015

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Proposed Tariffs Re:Sound Tariff No. 3 – Use and Supply of Background Music (2013-2016)
Re:Sound Tariff No. 3.A – Background Music Suppliers (2017)

Considered Re:Sound Tariff No. 3.A – Background Music Suppliers (2018)

Approval of Proposed Tariffs

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Re:Sound Tariff 3.A – Background Music Suppliers (2014-2018)

REASONS FOR DECISION

I. INTRODUCTION

[1] Re:Sound is the collective society that administers the rights for the performance in public and the communication to the public by telecommunication of published sound recordings for performers and sound recording makers. Re:Sound filed proposed tariffs with the Copyright Board for the use and supply of background music by background music suppliers, Tariff 3.A, for the years 2013 to 2016 and 2017 and 2018.

[2] On January 31, 2020, Re:Sound and several background music suppliers filed a joint request for approval of a settlement tariff agreed between them regarding the use and supply of background music for the years 2014 to 2018 (the “Settlement Tariff”). The suppliers in question objected to the proposed Tariff 3.A for the years 2013 to 2018. They consist of five broadcasting distribution undertakings (BDUs), namely Bell Canada, Cogeco Communications Inc., *Québecor Média inc.*, Rogers Communications Canada Inc. and Shaw Communications Inc., as well as Stingray Digital Group Inc. (Stingray), Sirius XM Canada Inc. (Sirius), Mood Media Corporation (Mood) and Zoom Media Inc.

[3] We conclude that the Settlement Tariff may form the basis for approving a fair and equitable tariff subject to minor adjustments to its wording.

II. BACKGROUND

[4] The Board approved *Re:Sound Tariff 3.A – Background Music Suppliers (2010-2013)* on September 1, 2017¹. The tariff sets out the royalties that background music suppliers must pay to Re:Sound for the communication to the public by telecommunication of recorded music to their subscribers, and the royalties they must pay when the same background music suppliers pay, on behalf of their subscribers, for the performance in public of music in these subscribers' establishments.

Rates Set by the Board for the Years 2010 to 2013

Supplier that communicates music to its subscribers	0.97% of revenues received during the quarter, subject to a minimum fee of \$0.64 per subscriber, per establishment, per quarter
Supplier that pays for its subscribers for the performance of music by its subscribers	3.2% of revenues received from those subscribers during the quarter, subject to a minimum fee of \$2.15 per subscriber, per establishment, per quarter

[5] On March 30, 2012, March 30, 2016, and March 31, 2017, Re:Sound filed proposed tariffs for the performance in public or the communication to the public by telecommunication of published sound recordings containing musical works and performers' performances of such works in relation to the use of background music by background music suppliers for the years 2013 to 2016, 2017 and 2018. Note that since the last approved tariff already covers the year 2013, this year is not the subject of the present decision.

[6] The proposed tariffs were published in the *Canada Gazette* on June 9, 2012, June 18, 2016, and May 13, 2017, respectively, accompanied by notices informing potential users and their representatives that they could object to these proposed tariffs with the Board within 60 days of the publication of the proposed tariffs.

[7] The following parties filed objections to the proposed tariffs for at least one of the relevant periods: the BDUs, as well as Stingray, Sirius, *Totem Médias inc.* (Totem), DMX Music Canada Inc. (DMX), the Hotel Association of Canada (HAC), Restaurants Canada, GoodLife Fitness Inc. (GoodLife), and the Fitness Industry Council of Canada.

[8] On April 26, 2018, the Board asked the objectors to confirm their participation in the examination of the proposed tariffs. Only the five BDUs, Sirius, Stingray and Mood (which

¹ *Re:Sound Tariff 3.A – Background Music Suppliers (2010-2013)*, CB-CDA 2017-091 (1 September 2017) Copyright Board. [*Re:Sound 3.A (2010-2013)*]

purchased DMX in 2012) confirmed their participation. The HAC, Restaurants Canada, the Fitness Industry Council of Canada and Totem stated that they did not want to participate, whereas GoodLife did not respond and is deemed to have withdrawn its objection.

[9] The proposed tariff for 2013-2016 provides for an overall royalty rate for music provided by a background music supplier. As for the proposed tariffs for 2017 and 2018, they follow the same structure as that of the last approved tariff. Thus, they set out the royalties that background music suppliers must pay for the communication to the public by telecommunication of music to their subscribers and the royalties they must pay if they pay the royalties for the performance in public of music on behalf of their subscribers.

Proposed Rates for the Years 2013 to 2016

Royalties payable when the music is provided by a music supplier	16.36% of the gross revenues the supplier earns from supplying recorded music, subject to a minimum fee of \$20.61 per establishment, per quarter
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Proposed Rates for the Years 2017 and 2018

Supplier that communicates music to its subscribers	2.25% of revenues received during the quarter, subject to a minimum fee of \$1.50 per subscriber, per establishment, per quarter
Supplier that pays on behalf of its subscribers for the performance in public of music by its subscribers	7.5% of revenues received during the quarter, subject to a minimum fee of \$5.00 per subscriber, per establishment, per quarter

[10] On January 31, 2020, Re:Sound informed the Board that it had reached an agreement with the background music suppliers that remained objectors to Tariff 3.A, and asked that the Settlement Tariff for the period of 2014 to 2018 be approved. The Settlement Tariff has the same structure as that of the last approved tariff and proposed tariffs for 2017 and 2018. The rates are identical to the last approved rates.

Proposed Rates in the Settlement Tariff

Supplier that communicates music to its subscribers	0.97% of revenues received during the quarter, subject to a minimum fee of \$0.64 per subscriber, per establishment, per quarter
Supplier that pays on behalf of its subscribers for the performance of music by its subscribers	3.2% of revenues from those subscribers during the quarter, subject to a minimum fee of \$2.15 per subscriber, per establishment, per quarter

III. ISSUE

[11] There is only one issue in this file. It is to determine whether the Settlement Tariff filed by Re:Sound on January 31, 2020, with the consent of the background music suppliers who remained objectors to Tariff 3.A, may form the basis for the approval of a fair and equitable tariff.

IV. ANALYSIS

[12] In evaluating whether a settlement tariff is fair and equitable, the Board typically considers the following:

- a. the representativeness of the parties to the agreement: if the parties are representative of the industry covered by the tariff, the agreement may be used as a proxy to determine what would constitute an acceptable agreement for third parties, or at least a significant portion of them;
- b. the extent to which the agreement addresses the objections raised and the extent to which non-parties to the agreement would agree with it;
- c. the extent to which the settlement tariff is similar to the previously approved tariff (where one exists): where a tariff has been previously approved and the settlement tariff does not include any modifications, or includes only minor modifications or includes modifications that were justified (by the parties or the Board), the Board may rely on this fact as an indication that the agreement is fair and equitable.²

A. REPRESENTATIVENESS OF PARTIES TO THE AGREEMENT

[13] On June 29, 2020, the Board asked Re:Sound questions to ascertain whether the objectors to the Settlement Tariff were representative of the overall group of background music suppliers.

[14] In its July 21, 2020 reply, Re:Sound stated that the royalties paid in 2016 by the suppliers who are party to the Settlement Tariff represented around 70 percent of the royalties paid to Re:Sound by all the background music suppliers. It also explained that the suppliers that are party to the Settlement Tariff are suppliers who objected to the relevant proposed tariffs, were granted standing in these proceedings, and did not later withdraw from the proceedings. Lastly, it added that it did not normally undertake discussions for the purpose of coming to an agreement with users who had chosen not to participate in the examination of proposed tariffs.

[15] However, with no information about the suppliers that are not party to the Settlement Tariff, which account for around 30 percent of the royalties, we cannot compare this group with the group of background music suppliers that are party to the Settlement Tariff. Therefore, we are unable to establish whether the background music suppliers who are party to the Settlement Tariff are

² See *Re:Sound Tariff 6.A – Use of Music to Accompany Dance (2013-2018)*, 2020 CB 004 (31 July 2020) Copyright Board [*Re:Sound 6.A (2013-2018)*]

representative of the entire background music supplier industry, although we recognize that they represent a significant portion of it.

[16] In any event, we find that this element is not, in itself, sufficient to conclude that the Settlement Tariff is not fair and equitable. Indeed, the representativeness of a settlement tariff is only one factor used to ascertain whether a settlement tariff is fair and equitable. It is not the only relevant factor.

[17] In this case, as shown below, our findings with regard to the other issues, namely the fact that the proposed rates in the Settlement Tariff are identical to the most recent rates set by the Board, and the fact that there are no valid remaining grounds for objection, lead us to conclude that the Settlement Tariff is fair and equitable.

B. OBJECTIONS RAISED BY USERS OR NON-PARTIES TO THE SETTLEMENT TARIFF

[18] In its objection to the proposed tariff for 2017, GoodLife raised two issues. We find that they are without merit and that there are no remaining issues that would constitute an obstacle to the approval of the Settlement Tariff.

[19] With regard to the first issue raised by GoodLife, under proposed Tariff 3.A, when a background music supplier pays royalties on behalf of a subscriber for the performance in public of music and this subscriber is a fitness centre, that subscriber does not have to pay the royalties set out in Re:Sound Tariff 6.B. To avoid any redundancy or duplication of royalties, GoodLife asked the Board to ensure alignment between Re:Sound Tariff 3.A and Re:Sound Tariff 6.B for the years 2013 to 2017, which was not approved at the time GoodLife raised its concern. *Re:Sound Tariff 6.B (2013-2017)* was approved on January 12, 2018.³ It provides that royalties are to be paid to Re:Sound for activities that are different from those covered by Tariff 3.A. There is therefore no duplication between these tariffs, and GoodLife's concern is moot.

[20] With regard to the second issue, GoodLife asked that the Board, following the Supreme Court decision in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.* in 2015⁴, examine Tariff 3.A in a technologically neutral manner and consider the submissions that would be made in that regard. This request likely pertains to its concern that Re:Sound attempt to seek higher royalties when an activity is made possible because of a new technology. In this case, since the rates proposed in the agreement are identical to the most recent rates set by the Board, and no argument was made on this issue, we find that GoodLife's concern is unfounded.

³ *Re:Sound Tariff 6.B – Use of Recorded Music to Accompany Physical Activities (2013-2017)*, CB-CDA 2018-004 (12 January 2018) Copyright Board.

⁴ *Canadian Broadcasting Corp v. SODRAC 2003 Inc.*, 2015 SCC 57.

C. COMPARISON OF SETTLEMENT TARIFF WITH LAST APPROVED TARIFF

[21] The royalties in the Settlement Tariff are identical to the royalties in the last approved tariff. As for the terms and conditions, they are similar to those in the last approved tariff. We note some minor changes, such as the addition of a definition of “quarter” or amendments to the section on the delivery of notices and payments, in addition to three other changes, which are discussed below. We are of the opinion that these changes are reasonable, except with regard to confidentiality, where we amend the proposed wording.

i. Authorization

[22] Subsection 3(1) of the Settlement Tariff has been amended such that the notion of authorization appearing in the last approved tariff has been removed.

[23] In the last approved tariff, subsection 3(1) read as follows:

3. (1) This tariff sets for the years 2010 to 2013 the royalties to be paid to Re:Sound, [...] by a background music supplier, for the communication to the public by telecommunication of recorded music in the repertoire of Re:Sound or for the authorization of a subscriber to perform in public recorded music in the repertoire of Re:Sound [...] [Emphasis added]

[24] The Settlement Tariff reads as follows:

3. (1) This tariff sets for the years 2014 to 2018 the royalties to be paid to Re:Sound, [...] by a background music supplier, for the communication to the public by telecommunication of recorded music in the repertoire of Re:Sound and for the performance in public by an establishment of recorded music in the repertoire of Re:Sound supplied by the background music supplier [...]

[25] The language in the last approved tariff reproduced the wording of the settlement to which the parties agreed at the time. In a notice dated May 17, 2017, the Board had asked the parties to explain why they were referring to the concept of authorization when Re:Sound, unlike SOCAN, was not entitled to authorize the public performance of sound recordings.⁵

[26] The parties had then explained that “authorization” was not being used in its legal sense. This word was simply supposed to reflect the fact that the tariff allowed background music suppliers to pay, on their subscribers’ behalf, the royalties for the public performance of music in their subscribers’ establishments. After receiving the parties’ explanations, the Board agreed to include the concept of authorization in the tariff but expressed some reservations in this regard.

[27] In the present matter, we are of the opinion that removing the concept of authorization from the Settlement Tariff is reasonable.

⁵ See *Re:Sound 3.A (2010-2013)*, *supra* note 1, paras. 41 *et seq.*

ii. Confidentiality

[28] Subsection 7(2) of the Settlement Tariff provides as follows:

Information received from a background music supplier pursuant to this tariff may be shared

- a. with Re:Sound's agents and service providers, to the extent required by the service providers for the service they are contracted to provide, subject to confidentiality being preserved.

[29] The language in paragraph 7(2)(a) is new. On March 13, 2020, the Board asked the parties to explain why this addition had been made and what the words "agents" and "service providers" meant.

[30] On March 20, 2020, Re:Sound explained that "agents" referred to Entandem, the joint venture set up by Re:Sound and SOCAN to make it easier to obtain a licence through a one-stop shop. As for the phrase "service providers", it would apply to any businesses that Re:Sound might contract for services, such as an IT company, that may need access to its databases.

[31] Considering these explanations, we are of the opinion that this addition is reasonable. However, we find that, as currently worded, it does not sufficiently protect the information to which service providers may have access. Therefore, we are removing the phrase "subject to confidentiality being preserved" and adding a separate subsection (subsection 7(3)) to the effect that when information is shared with service providers in accordance with paragraph 7(2)(a), they must sign a confidentiality agreement.⁶

[32] In addition, to better align the French text of the Settlement Tariff with the English version, and to improve readability, we are rewording paragraph 7(2)(a) in French; it now provides that information may be supplied:

- a. *aux mandataires et aux fournisseurs de services de Ré:Sonne, dans la mesure requise aux fins d'effectuer les tâches pour lesquels les services des fournisseurs de service ont été retenus.*[Emphasis added]

iii. Records and audits

[33] Subsection 6(4) of the Settlement Tariff concerns the situation where an audit shows that Re:Sound has not received all the amounts to which it is entitled. In that case, the Settlement Tariff provides that the background music supplier will reimburse Re:Sound for the costs of this audit within 30 days. Re:Sound added to the language of the last approved tariff to specify that amounts

⁶ See also *Re:Sound 6.A (2013-2018)*, *supra* note 2.

owed, as disclosed by an audit, must be paid to Re:Sound within the prescribed time for the costs of the audit to be reimbursed.

6(4) If the audit discloses that royalties owed to Re:Sound during any period have been understated by more than 10 per cent, the background music supplier that was the subject of the audit shall pay the reasonable costs of the audit to Re:Sound within 30 days of the demand for such payment. The amount of any understatement shall be paid within 30 days of the demand for such payment. [Emphasis added]

[34] We are of the opinion that this addition is reasonable. Indeed, if an audit shows that Re:Sound is owed money, it is legitimate to set a deadline for repayment.

V. CONCLUSION

[35] We conclude that a tariff based on the Settlement Tariff and incorporating the changes mentioned above is fair and equitable, and we approve it as *Re:Sound Tariff 3.A –Background Music Suppliers (2014-2018)*.