

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2020-12-04

Citation *Re:Sound Tariff 1.B.2 (2013-2019)*, 2020 CB 017

Members Katherine Braun
Nathalie Théberge
Adriane Porcin

Proposed Tariffs Re:Sound Tariff No. 8 – Simulcasting, Non-Interactive Webcasting and Semi-Interactive Webcasting (2013, 2014, 2015)

Considered Re:Sound Tariff No. 8 – Non-Interactive and Semi-Interactive Webcasts (2016, 2017, 2018)
Re:Sound Tariff No. 8 – Non-Interactive and Semi-Interactive Streaming (2019)

Approval of Proposed Tariffs

As

Re:Sound Tariff 1.B.2 – Non-Commercial Simulcasts and Webcasts (2013-2019)

REASONS FOR DECISION

I. INTRODUCTION

[1] Re:Sound filed proposed tariffs for webcasting and simulcasting of sound recordings and performer’s performances for the years 2013 to 2019 under the title “Re:Sound Tariff No. 8” (the “Proposed Tariffs”). The Board approves the portion of the Proposed Tariffs that pertain to uses by non-commercial webcasters, under the title “*Re:Sound 1.B.2 – Non-Commercial Simulcasts and Webcasts (2013-2019)*”, pursuant to section 70 of the *Copyright Act*.¹

[2] On October 19, 2018, Re:Sound and community radio associations: *L’Alliance des radios communautaires du Canada*, *L’Association des radiodiffuseurs communautaires du Québec* and the National Campus and Community Radio Association/ *L’Association nationale des radios étudiantes et communautaires* (together, the “Associations”) jointly filed a text, in the form of a tariff, based on a settlement (the “Settlement Text”). This Settlement Text sets out royalties to be

¹ *Copyright Act*, RSC 1985, c C-42, s 70 [Act].

collected from non-commercial webcasters for the webcasting and simulcasting of sound recordings and performers' performances in the years 2013 to 2019.

[3] In approving the Settlement Text, we applied the considerations found in *Re:Sound 5 (2008-2012)*.² These include (1) the extent to which the parties to the agreement are representative of the interests of all prospective users and (2) whether the settlement addresses relevant objections of former parties.

[4] We find it fair and equitable to approve a single Tariff based on the Settlement Text and therefore, we approve *Re:Sound 1.B.2 (2013-2019)* and fix royalties payable for simulcasting, non-interactive webcasting, and semi-interactive webcasting by non-commercial webcasters. Royalties payable for all non-interactive webcasts and semi-interactive webcasts (other than simulcasts) carried out by a non-commercial webcaster shall be \$25 per year. The royalties payable for all simulcasts carried out by a non-commercial webcaster shall be \$25 per year. A non-commercial webcaster that offers both simulcasts and non-interactive and/or semi-interactive webcasts will pay royalties of \$50.00 per year.

II. OVERVIEW

[5] In 2014, the Board approved *Re:Sound 8 (2009-2012)*, which included uses by non-commercial webcasters.³ In doing so, the Board fixed a flat rate of \$25 per year for non-interactive and semi-interactive webcasting by non-commercial webcasters.

[6] For the years 2013 to 2019, Re:Sound proposed an annual tariff for simulcasting and webcasting pursuant to subsection 67.1(2) of the Act (as it then read). The text of these Proposed Tariffs varied across three versions: the Proposed Tariff for 2013 did not provide a preferred rate for non-commercial webcasters; the Proposed Tariffs for 2014 and 2015 proposed a flat rate of \$250 per year for "microcasters";⁴ and the Proposed Tariffs for 2016 through 2019 proposed a flat rate of \$500 per year for "non-commercial webcasters".⁵

[7] On November 9, 2017, the Board issued Notice 2017-139,⁶ identifying the proposed tariffs that would be heard together under the Online Music Services (2008-2018) proceeding (the "OMS

²*Re:Sound Tariff 5 – Use of Music to Accompany Live Events (Parts A to G), 2008-2012* (25 May 2012) Copyright Board Decision at para 10 [*Re:Sound 5 (2008-2012)*].

³*Re:Sound Tariff No. 8 – Non-Interactive and Semi-Interactive Webcasts, 2009-2012* (17 May 2014) Copyright Board (tariff), s 3 [*Re:Sound 8 (2009-2012)*].

⁴"microcaster" (as defined in the Proposed Tariffs for 2014 and 2015) "means a service that offers simulcasts, non-interactive webcasts and/or semi-interactive webcasts and has (a) annual ATH of less than 18,250; (b) annual revenues of less than \$5,000; and (c) annual expenses of less than \$10,000".

⁵"non-commercial webcaster" (as defined in the Proposed Tariffs for 2016 through 2019) "means any webcaster other than the Canadian Broadcasting Corporation, that is owned and operated by a not-for-profit organization including any campus webcaster and community webcaster, whether or not any part of the webcaster's operating costs are funded by advertising revenues".

⁶*Online Music Services / Services de musique en ligne [SOCAN: 2007-2018; Re:Sound: 2013-2018; CSI: 2014-2018; CMRRA: 2014-2018; SODRAC: 2014-2018; Artisti: 2016-2018] & Online Audiovisual Services – Music /*

(2008-2018) proceeding”). The Board included a portion of the Proposed Tariffs for 2013 to 2018 in that proceeding.

[8] On December 13, 2017, the Board stated that it would form a separate, simplified proceeding to “consider all proposed tariffs relating to all audio-only activities of the Associations”.⁷ The Board did so on December 21, 2017 when it consolidated the remaining proposed tariffs into a non-commercial radio proceeding.⁸ A portion of the Proposed Tariffs for 2013 to 2018 were included in this proceeding. However, this portion was limited to uses “only by non-commercial radio stations”.⁹

[9] Re:Sound and the Associations formed an agreement for uses proposed for 2019 as well as those proposed from 2013 to 2018. The Board received the Settlement Text on October 19, 2018.¹⁰ The rate, terms and conditions contained in the Settlement Text continue, without an inflation adjustment, the rate certified in *Re:Sound 8 (2009-2012)* for non-interactive and semi-interactive webcasting by non-commercial webcasters. Re:Sound submits that “[t]he key change from Tariff 8, is that a separate annual fee of \$25.00 applies to simulcasts and to non-interactive and semi-interactive webcasts. As a result, a non-commercial radio station that offers both simulcasts and non-interactive and/or semi-interactive webcasts would pay royalties of \$50.00 per year, while a station that only offers simulcasts or only offers non-interactive and/or semi-interactive webcasts, would pay royalties of \$25.00 per year.”¹¹

III. ISSUES

[10] The principal issue for the Board to determine is whether a Tariff based on the Settlement Text would be fair and equitable. Accordingly, we examine the following four issues:

1. As a preliminary issue, what is the scope of the proceeding?
2. Are the Associations representative of the interests of all prospective users?
3. Does the Settlement Text address the objections of former parties?
4. Are the rates and related terms and conditions fair?

Services audiovisuels en ligne – Musique [SOCAN: 2007-2018; CMRRA: 2016-2018; SODRAC: 2015-2018] (09 November 2017) CB-CDA 2017-139 (notice) [Notice 2017-139].

⁷*Online Music Services / Services de musique en ligne [SOCAN: 2007-2018; Re:Sound: 2013-2018; CSI: 2014-2018; Artisti: 2016-2018] & Online Audiovisual Services – Music / Services audiovisuels en ligne – Musique [SOCAN: 2007-2018; CMRRA: 2014-2018; SODRAC: 2014-2018]* (13 December 2017) CB-CDA 2017-157 at pp 1-2 (notice).

⁸*Non-Commercial Radio [Artisti: 2016-2018; CMRRA: 2003-2010; CSI: 2011-2018; Re:Sound: 1998-2021]* (21 December 2017) CB-CDA 2017-170 (notice) [Notice 2017-170].

⁹*Ibid* at p 3.

¹⁰Letter from Melanie Hubbard, Re:Sound to the Secretary General, Copyright Board (19 October 2018) RE: Non-Commercial Radio [Artisti: 2016-2018; CMRRA: 2003-2010; CSI: 2011-2018; Re:Sound: 1998-2021] – Notice [CB-CDA 2018-132].

¹¹*Ibid*.

IV. ANALYSIS

A. ISSUE 1: WHAT IS THE SCOPE OF THE PROCEEDING?

[11] This proceeding is limited to the portions of the Proposed Tariffs that deal with uses by non-commercial webcasters, which include radio stations and online-only audio services.

[12] The Board, as a matter of practice, seeks to prevent overlaps and gaps between the tariffs it approves. At times, it may be necessary to split a proposed tariff into multiple proceedings to deal with matters as informally and expeditiously as possible. In these circumstances, clarity regarding the scope of each proceeding is essential.

[13] Such is the case here. The Board split the Proposed Tariffs into several proceedings, including the OMS (2008-2018) proceeding. The portion of the Proposed Tariffs dealing with “non-commercial radio stations” was joined with portions of other proposed tariffs into a proceeding titled “Non-Commercial Radio [Artisti (2016-2018); CMRRA (2003-2010); CSI (2011-2018); Re:Sound (1998-2021)]”. This proceeding eventually resulted in a settlement between Re:Sound and the Associations, pursuant to which they submitted the Settlement Text.

[14] This procedural history raises two questions over who can license simulcasting and webcasting pursuant to the Settlement Text. First, should the proceeding include non-commercial online-only audio services? Second, should the proceeding include non-commercial simulcasters of pay audio and satellite radio broadcasts?

i. The proceeding includes non-commercial, online-only audio services

[15] We include online-only audio services in this proceeding, although the proceeding that led to the settlement only dealt with uses pertaining to non-commercial radio stations.¹² We do so in response to the parties understanding that the proceeding included all non-commercial entities covered by the Proposed Tariffs.¹³ The parties submit that they drafted the Settlement Text according to this understanding, maintaining the same definition and other provisions applicable to non-commercial webcasters under the Proposed Tariffs to preserve consistency.

[16] We also agree with Re:Sound’s submission¹⁴ that it would create both inefficiencies and inequities if the category of “non-commercial webcaster” were split into two separate proceedings for 2013 to 2019. The Board certified these uses in a single tariff in *Re:Sound 8 (2009-2012)*.

¹²See Notice 2017-170, *supra* note 9; *Non-Commercial Radio [CMRRA: 2003-2010; CSI: 2011-2018; Re:Sound: 2013-2018]* (12 May 2020) CB-CDA 2020-033 (notice).

¹³Letter from Melanie Hubbard, Re:Sound to the Secretary General, Copyright Board (31 June 2020) File: Re:Sound Tariff 1.B.2 – Non-Commercial Simulcasting and Webcasting (2013-2019) Re: Adding Internet Radio “Audio Services” to the Re:Sound 1.B.2 proceeding; Letter from Freya Zaltz, the Associations to the Secretary General, Copyright Board (24 August 2020) Re: Re:Sound Tariff No. 1.B.2 (2013-2019).

¹⁴*Ibid*, Letter from Melanie Hubbard, at p 2.

Re:Sound has proposed a tariff for 2020-2024 with the same scope under the title Re:Sound Tariff No. 1.B.2 – Non-Commercial Online (2020-2024).¹⁵

[17] We also agree with the parties that non-commercial audio services should be subject to the same rates as other semi-interactive webcasters and non-interactive webcasters as set out in the Settlement Text. This aligns with the rate structure in the previously certified tariff.

ii. The proceeding excludes non-commercial simulcasters of pay audio and satellite radio

[18] To bring clarity and prevent a gap in scope, we have excluded non-commercial simulcasting of pay audio and satellite radio from this proceeding. This is in keeping with the Board’s practice of setting rates for certain types of simulcasts at the same time it approves rates for the primary activity. Further, this decision aligns with the Settlement Text, which does not include pay audio and satellite radio in the definition of simulcast.

[19] In approving *Re:Sound 8 (2009-2012)*, the Board deferred setting a rate for simulcasting, except for simulcasting by non-commercial webcasters and simulcasting of content not subject to another tariff.¹⁶ It deferred setting these rates based on the principle that “[t]he value per listener for simulcasting and for over-the-air broadcasting is the same. That value is best achieved by attaching the ancillary use to the main one.”¹⁷

[20] Following this principle, the Board split portions of the Proposed Tariffs from 2013 to 2015¹⁸ dealing with simulcasts of pay audio and satellite radio into separate proceedings. The pay audio services portion of the Proposed Tariffs for 2013 to 2015 were included in the Pay Audio Services Tariffs [SOCAN, *Re:Sound (2007-2016)*]¹⁹ proceeding. The satellite radio services portion of the Proposed Tariffs for 2013 to 2015 were included in the Satellite Radio Simulcasts [SOCAN (2007-2018); *Re:Sound (2009-2018)*]²⁰ proceeding. If non-commercial simulcasters of pay-audio or satellite radio exist, their uses during the years in consideration will be covered under the tariffs approved in those proceedings.

[21] As a result, this issue specifically addresses a potential gap in scope and application in the Proposed Tariffs for 2016 to 2019. This gap is the result of clause 2 of the Proposed Tariffs, which defines “simulcast” to include “communication of (...) pay audio or satellite radio broadcast via the Internet.” This language would create the possibility of simulcasts that are not excluded by

¹⁵Re:Sound Tariff No. 1.B.2 – Non-Commercial Online (2020-2024) (11 May 2019) C Gaz Supp Vol 153 No 19 at pp 12-15.

¹⁶*Re:Sound Tariff No. 8 – Non-Interactive and Semi-Interactive Webcasts, 2009-2012* (16 May 2014) Copyright Board Decision at paras 73, 217 [*Re:Sound 8 (2009-2012)*].

¹⁷*Ibid* at para 72.

¹⁸Paragraph 3(2)(a) of the Proposed Tariffs for 2013 to 2015 included simulcasts of pay audio and satellite radio as uses to which the proposed rate and terms applied.

¹⁹*SOCAN-Re:Sound – Pay Audio Services Tariffs, 2007-2016* (05 January 2016) CB-CDA 2016-002 (ruling); *SOCAN-Re:Sound – Pay Audio Services Tariffs, 2007-2016; Online Music Services [SOCAN: 2007-2018; Re:Sound: 2013-2018; CSI: 2014-2018]* (17 October 2018) CB-CDA 2018-205 (ruling).

²⁰*Satellite Radio Simulcasts [SOCAN: 2007-2018; Re:Sound: 2009-2018]* (02 August 2018) CB-CDA 2018-173 (notice).

clause 3, which excludes “simulcast[s] of programming to which ... the *Pay Audio Services Tariff (SOCAN, Re:Sound)* or the *Satellite Radio Services Tariff (SOCAN, Re:Sound, CSI)* applies.”

B. ISSUE 2: ARE THE ASSOCIATIONS REPRESENTATIVE OF THE INTERESTS OF ALL PROSPECTIVE USERS?

[22] The Associations are not representative of all prospective users. Although the Associations may not be representative of the interests of all users, the fact that they have agreed to the Settlement Text provides evidence that a large portion of the non-commercial webcasting industry find the rates and terms to be fair.

[23] The Associations represent a majority of non-commercial radio stations, with over 160 member stations and services. This represents about 70 per cent of the industry, based on 226 non-commercial stations identified in the *CRTC Communications Monitoring Report, 2019*.²¹

[24] However, the Associations only claim to represent two of the four non-commercial radio sectors: campus and community radio stations. The *CRTC Communications Monitoring Report, 2019* identifies four categories of non-commercial radio stations: campus, community, indigenous and religious radio stations.²²

[25] The Associations also claim to represent a majority of non-commercial audio services that provide services similar to licensed non-commercial radio stations. The Associations advised us that 15 of their members are online-only audio services. They were aware of a further eight online-only audio services that are affiliated with educational institutions and one community-oriented audio service. We think it is likely, however, that other audio services exist, considering that, potential users would include any not-for-profit organization that webcasts music.

[26] While the Associations may not represent all potential users, representativeness is one factor used to decide whether it is fair and equitable to approve a tariff based on the Settlement Text. Our findings with regard to other issues, namely that the rates are nominal and appropriate for incidental uses and that the settlement addresses objections raised by a former party, lead us to conclude that a Tariff based on the Settlement Text is fair and equitable.

C. ISSUE 3: DOES THE SETTLEMENT TEXT ADDRESS THE OBJECTIONS OF FORMER PARTIES?

[27] The Settlement Text addresses the objections made by former parties in relation to the Proposed Tariffs.

[28] In addition to the objections filed by the Associations, the Board also received an objection from the Federation of Calgary Communities (“FCC”) for the year 2016.²³ The FCC provides

²¹Canadian Radio-television and Telecommunications, *Communications Monitoring Report, 2019* (Ottawa: CRTC, 2020) at p 149.

²²*Ibid* at p 149.

²³ Letter from Leslie Evans, Federation of Calgary Communities to Secretary General, Copyright Board (18 August 2015) Re:Sound Objections (including Re:Sound 8 for 2016).

support to over 200 not-for-profit organizations, most of which are community associations located in the Calgary area. In its letter of objection, the FCC notes two challenges that community organizations face in understanding, implementing, and administering Re:Sound's tariffs: the complexity of tariff administration and the ability of their member organizations to pay royalties based on commercial models. The FCC specifically asked the Board to accommodate community organizations with a "one-time fee" model and a "simpler system" for tariff administration and reporting.²⁴

[29] The Board deemed that the FCC was not a party to the proceeding after Re:Sound challenged its status as a prospective user and it did not respond.²⁵ Nonetheless, we believe that the Settlement Text addresses the FCC's concerns. The Settlement Text implements a fixed, yearly fee for all non-commercial webcasts and provides a simpler administration with minimal reporting requirements for users compared to the Proposed Tariffs. This suggests that the Settlement Text addresses the unique circumstances of non-for-profit organizations, supporting our finding that the rates and terms are fair. We have received no other comments in this matter.

D. ISSUE 4: ARE THE RATES AND RELATED TERMS AND CONDITIONS FAIR?

[30] We find the rates and related terms and conditions in the Settlement Text to be fair, concluding they are nominal and appropriate for incidental uses, they address the comments of a former party, and they continue the previously approved rate.

[31] An annual flat fee of \$25 per year for webcasting and \$25 per year for simulcasting in the Settlement Text is nominal and likely reflects the cost of administering the tariff. Pursuant to subsection 72(3) of the Act, community radio stations pay Re:Sound \$100 per year for their primary activity: over-the-air broadcasting. We think it appropriate that simulcasting attracts a lower rate because it is incidental to broadcasting. Although webcasting can be a primary activity (for example, non-interactive webcasting by an online-only audio service), we agree with Re:Sound that the rate of \$25 per year is appropriate for these non-commercial uses.

[32] The flat rate fee structure avoids any unnecessary reporting burden. Nominal royalties are appropriate to a flat fee structure and support affordability for non-profit organizations. The Settlement Text addresses the unique circumstances of non-commercial webcasters in this regard.

[33] The Board found a royalty rate of \$25 per year for webcasting to be fair in *Re:Sound 8 (2009-2012)*. The Settlement Text continues this rate without an adjustment for inflation. We have no evidence of changes to the industry that would lead us to question the fairness of this rate. The

²⁴*Ibid* at 2.

²⁵*Online Music Services / Services de musique en ligne [SOCAN: 2007-2018; Re:Sound 2013-2018; CSI: 2014-2018; CMRRA: 2014-2018; SODRAC: 2014-2018; Artisti: 2016-2018]* (07 December 2017) CB-CDA 2017-150 (notice); See also Letter from Melanie Hubbard, Re:Sound to Secretary General, Copyright Board (20 October 2017) Re: Online Music Services [SOCAN: 2014-2018; Re:Sound 2013-2018; CSI: 2014-2018; CMRRA: 2014-2018; SODRAC: 2014-2018; Artisti: 2016-2018] (commenting in response to Notice CB-CDA 2017-105, the proposed consolidation of Online Music Service Tariffs).

addition of a royalty rate of \$25 per year for simulcasting ensures users pay additional royalties for additional uses of sound recordings.

[34] Finally, we amend the Settlement Text to include pre-judgement interest. In *CBC Radio (2006-2011)* the Board wrote: “[t]he practice of using interest factors should be generalized.”²⁶ The Board, in *Access Copyright (Governments 2005-2014)*, explained, “the term ‘generalized’ implies that there need to be special circumstances for interest factors not to be applied.”²⁷ There are no such special circumstances here. These new interest factors appear in the “Transitional Provision” clause of the approved Tariff.

V. CONCLUSION AND DECISION

[35] We conclude that a Tariff based on the Settlement Text, with a minor modification to include pre-judgement interest, is fair and equitable, and we approve it as *Re: Sound Tariff 1.B.2 – Non-Commercial Simulcasts and Webcasts (2013-2019)*.

²⁶*SOCAN – Re: Sound CBC Radio Tariff (2006-2011)* (08 July 2011) Copyright Board Decision at para 131.

²⁷*Access Copyright (Provincial and Territorial Governments), 2005-2014* (22 May 2015) CB-CDA 2015-029 at para 522 (decision).