

Copyright Board
Canada



Commission du droit d'auteur
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Citation *Commercial Radio Reproduction (2020-2023)*, 2020 CB 018

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Proposed Tariffs Commercial Radio Stations (CMRRA, SOCAN, Connect/SOPROQ, Artisti: 2020)

Considered Commercial Radio Reproduction Tariff (CMRRA, SOCAN, Connect/SOPROQ, Artisti: 2021-2023)

Approval of Proposed Tariff(s)

As

Commercial Radio Reproduction Tariff (2020-2023)

REASONS FOR DECISION

I. INTRODUCTION

[1] This proceeding considers two proposed tariffs for 2020¹ and 2021-2023² (the “Proposed Tariffs”). CMRRA, SOCAN, Connect/SOPROQ and Artisti (the “Collectives”) jointly filed the Proposed Tariffs on March 29, 2019³ and on October 15, 2019⁴. The Collectives and the Canadian Association of Broadcasters (the CAB) ask⁵ the Board to approve the Proposed Tariffs, which

¹ Commercial Radio Stations (CMRRA, SOCAN, Connect/SOPROQ, Artisti: 2020) (25 May 2019) C Gaz Supplement, Vol 153, No 21, (proposed tariff) [Proposed Tariff, 2020].

² Commercial Radio Reproduction Tariff, (CMRRA, SOCAN, Connect/SOPROQ, Artisti: 2021-2023) (6 November 2019) Copyright Board (proposed tariff) [Proposed Tariff, 2021-2023].

³ Letter from Casey M Chisick to the Secretary General, Copyright Board (29 March 2019) Re: CMRRA, SOCAN, Connect/SOPROQ, and Artisti (Commercial Radio Tariff, Reproduction), 2020.

⁴ Letter from Casey M Chisick to the Registrar, Copyright Board (15 October 2019) Re: Proposed Commercial Radio Reproduction Tariff (CMRRA, SOCAN, Connect/SOPROQ, and Artisti), 2021-2023.

⁵ Joint request to the Registrar, Copyright Board (22 October 2019) Re: Proposed Tariff: Commercial Radio Reproduction Tariff (CMRRA, SOCAN, Connect/SOPROQ, and Artisti: 2020); Joint request to the Registrar, Copyright Board (11 December 2019) Re: Proposed Tariff: Commercial Radio Reproduction Tariff (CMRRA, SOCAN, Connect/SOPROQ, and Artisti: 2021-2023) [together, Joint Requests to Certify].

specify the royalties payable by commercial radio stations for the right to reproduce or to authorize the reproduction of musical works, performers' performances, and sound recordings.

[2] The Proposed Tariffs are based on an Agreement⁶ between the Collectives and the CAB, an association that represents commercial radio stations. The Agreement is an ongoing arrangement that has been amended twice.⁷ It provides for the tri-annual (previously annual) filing of proposed tariffs with agreed terms.

[3] Pursuant to the Agreement, the Proposed Tariffs are unopposed in substance.⁸ The Agreement received broad support as the vast majority of commercial radio stations in Canada have expressly agreed to be bound by its terms (the "Acknowledging Stations").⁹

[4] Under section 66.501 of the *Copyright Act*, the Board is required to "fix royalty and levy rates and any related terms and conditions under the Act that are fair and equitable."¹⁰ For the following reasons, we find that with a modification to the proposed definition of "low-use station", the Proposed Tariffs are fair and equitable. Given that the rates, terms and conditions in the Proposed Tariffs for 2020 and for 2021-2023 are identical, we approve the Proposed Tariffs in joint as a single tariff, namely *Commercial Radio Reproduction Tariff (2020-2023)*.

II. OVERVIEW

[5] The Proposed Tariffs contain a licence for three reproduction rights:

| The right to reproduce/authorize | Collectives (Represented Owners) |
|-----------------------------------------|------------------------------------------------------------------------------------------|
| Musical Works ¹¹ | CMRRA (English-language music publishers) SOCAN (French-language music publishers) |
| Performers' Performances ¹² | Artisti (certain French-language performers) |
| Sound Recordings ¹³ | Connect (English-language record producers) SOPROQ (French-language record producers) |

⁶ *Commercial Radio Reproduction Royalties Settlement Agreement (2012-2018)* (24 August 2017) [Agreement].

⁷ *Amendment to the Commercial Radio Reproduction Royalties Settlement Agreement (2012-2018)* (29 March 2018); *Amendment to the Commercial Radio Reproduction Royalties Settlement Agreement (2012-2018)* (1 October 2019) [Amendments].

⁸ The CAB filed an objection to the Proposed Tariff for 2020, seeking to preserve their participatory rights but without objecting to the proposed rate or terms and conditions.

⁹ Joint Requests to Certify, *supra* note 5 at p 2.

¹⁰ *Copyright Act*, RSC 1985, c C-42 [Act].

¹¹ *Ibid*, s 3 (1).

¹² *Ibid*, s 15 (1)(b).

¹³ *Ibid*, s 18 (1)(b).

A. BACKGROUND OF THE PROPOSED TARIFFS

[6] The Collectives filed the Proposed Tariffs pursuant to the amended Agreement formed in 2017 between CSI, Connect/SOPROQ, Artisti and the CAB¹⁴. This is the third Commercial Radio proceeding to consider proposed tariffs based on the Agreement. The Board approved tariffs based on the Agreement in *Commercial Radio Stations (2012-2018)*¹⁵ and in *Commercial Radio Stations (2019)*¹⁶.

[7] In 2018, SOCAN acquired substantially all of the assets held by the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC).¹⁷ As a result, SOCAN now administers the French-language reproduction repertoire that was managed by SODRAC. SODRAC used to license its repertoire and collect royalties through CSI, a joint venture with CMRRA. SOCAN's acquisition means that CSI is no longer being used to collect royalties under this tariff.

[8] The Collectives and the CAB have amended their Agreement twice.¹⁸ These amendments reflect SOCAN's acquisition of SODRAC¹⁹ and changes to the Act that came into effect on April 1, 2019. The Proposed Tariffs incorporate these changes.

[9] The Collectives jointly filed the Proposed Tariff for 2020, in accordance with section 70.14 of the Act (as it then read), on March 29, 2019. The Proposed Tariff was published in the Canada Gazette on May 25, 2019.²⁰

[10] On July 24, 2019, the CAB filed an objection to the Proposed Tariff for 2020.²¹ It sought participatory rights in the proceeding but did not object to the rates and terms of the proposed tariff. As a result, the Proposed Tariff for 2020 is unopposed in substance. The Board received no other objections or comments.

¹⁴ Agreement, *supra* note 6; Amendments, *supra* note 7.

¹⁵ *Commercial Radio Stations – Application to Vary [CSI (2012-2013), Connect/SOPROQ (2012-2017), Artisti (2012-2014)]; Determination [CSI (2014-2018), Connect/SOPROQ (2018), Artisti (2015-2018)]* (14 December 2018) CB-CDA 2018-225 (decision) [*Commercial Radio Stations (2012-2018)*].

¹⁶ *Commercial Radio Stations [CMRRA/SODRAC, Connect/SOPROQ, Artisti (2019)]* (21 December 2018) CB-CDA 2018-232 (decision) [*Commercial Radio Stations (2019)*].

¹⁷ Notice from CMRRA, SODRAC, and SOCAN to the CAB, Artisti, and Connect/SOPROQ (27 February 2019) Notice of Reallocation of Royalties [Reallocation].

¹⁸ Amendments, *supra* note 7.

¹⁹ Reallocation, *supra* note 17.

²⁰ Proposed Tariff, 2020, *supra* note 1.

²¹ Letter from Gabriel van Loon to Secretary General, Copyright Board (24 July 2019) Re: Proposed Tariffs: Commercial Radio Stations – Reproductions (2020).

[11] The Collectives jointly filed the Proposed Tariff for 2021-2023 on October 15, 2019, pursuant to section 68 of the Act.²² Following section 68.2 of the Act, the Proposed Tariff was published on the Board’s website on November 6, 2019. The Board received no objections.

[12] The Collectives and the CAB jointly request that the Board approve the Proposed Tariffs.²³ They submit that, by operation of the Agreement, the Collectives and the CAB consent to certification of the Proposed Tariffs; that the Proposed Tariff is essentially the same as the last certified tariff; that the CAB and the Acknowledging Stations can represent the interests of all prospective users; and that relevant comments or arguments made by former parties and non-parties have been addressed.

B. DIFFERENCES BETWEEN THE LAST APPROVED TARIFF AND THE PROPOSED TARIFFS

[13] Because the Proposed Tariffs are based on an ongoing Agreement and are unopposed in substance, our analysis focused on differences between the last tariff approved by the Board²⁴ and the Proposed Tariffs.

[14] Below, we analyse two differences that we observed: the issue of changes to the rate structure and the issue of a change in the definition of “low-use station”.

III. ISSUES

[15] The principal decision for the Board to determine is whether the royalty rates and related terms and conditions contained in the Proposed Tariffs are fair and equitable. In our determination, we examined three issues.

1. Does the proposed division of rates between CMRRA and SOCAN and the proportioning between French-language and non French-language stations, change the total combined royalty obligations of commercial radio stations?
2. Does a change to the definition of “low-use station” in the Proposed Tariffs result in a change in the number of stations that qualify for this rate?
3. Are the royalty rates and related terms and conditions fair and equitable?

IV. ANALYSIS

[16] We find that the royalty rates and related terms and conditions—after a minor modification—are fair and equitable. The rates are unchanged for users, although rates are now divided between CMRRA and SOCAN. The definition of “low-use station” is modified to bring clarity and to protect stations that use large volumes of works in the public domain. The proposed tariffs have broad support from the industry and are unchanged from the last approved tariff.

²² Proposed Tariff, 2021-2023, *supra* note 2.

²³ Joint Requests to Certify, *supra* note 5.

²⁴ *Commercial Radio Stations (2019)*, *supra* note 16.

A. ISSUE 1 : DOES THE PROPOSED DIVISION OF RATES BETWEEN CMRRA AND SOCAN AND THE PROPORTIONING BETWEEN FRENCH-LANGUAGE AND NON FRENCH-LANGUAGE STATIONS CHANGE THE TOTAL COMBINED ROYALTY OBLIGATIONS OF COMMERCIAL RADIO STATIONS?

[17] The Proposed Tariffs do not change the total royalty obligations of commercial radio stations. Although the Proposed Tariffs contain new rate tables, these tables divide the rate previously approved for CSI between CMRRA and SOCAN. As a result, the combined royalties in the Proposed Tariff are the same as approved in *Commercial Radio Stations (2012-2018)* for 2017 and 2018²⁵ and in *Commercial Radio Stations (2019)*.²⁶

[18] In previously approved tariffs, CSI collected a single royalty for works in the repertoires of CMRRA and SODRAC. With SOCAN's acquisition of SODRAC, the Collectives propose to divide the rate previously paid to CSI between CMRRA and SOCAN. To effect this new division, the Proposed Tariffs contain a new definition of "French-language station" and new rate tables for French-language stations.

[19] The parties submit that the addition of "French-language station" and new rates do not change the combined royalty rate that was payable to CMRRA/SODRAC in the 2019 approved tariff.²⁷ Our analysis confirms their submission. We find that these changes reflect SOCAN's acquisition of SODRAC and are fair because they result in no change to the combined royalty rate.

B. ISSUE 2: DOES A CHANGE TO THE DEFINITION OF "LOW-USE STATION" IN THE PROPOSED TARIFFS RESULT IN A CHANGE IN THE NUMBER OF STATIONS THAT QUALIFY FOR THIS RATE?

[20] The Proposed Tariffs contain a change to the definition of "low-use station". As a result, stations that paid the low-use rate under the *Commercial Radio Stations (2019)* tariff might no longer qualify for a reduced rate. Because the Collectives submit they proposed the change to avoid confusion and it is clear they did not intend this effect, we approve the tariff with a modified definition of low-use station.

[21] The Proposed Tariffs provide a reduced rate for low-use stations. Criteria in the definition determine whether a radio station is "low-use" and therefore qualifies for these rates. In previously certified tariffs, a station was considered low-use if less than 20 per cent of its broadcast time contained works in SOCAN's repertoire.

[22] The Collectives proposed changing this definition so that a station would be considered low-use if less than 20 per cent of its broadcast time contained "musical works".

²⁵ *Commercial Radio Stations – Application to Vary [CSI (2012-2013), Connect/SOPROQ (2012-2017), Artisti (2012-2014)]; Determination [CSI (2014-2018), Connect/SOPROQ (2018), Artisti (2015-2018)]* (15 December 2018) C Gaz Supplement, Vol 152, No 50, ss 4(c), 5(c) (approved tariff).

²⁶ *Commercial Radio Stations [CMRRA/SODRAC, Connect/SOPROQ, Artisti (2019)]* (22 December 2018) C Gaz Supplement, Vol 152, No 51, ss 4, 5 (approved tariff) [*Commercial Radio Stations Tariff (2019)*].

²⁷ Joint Requests to Certify, *supra* note 5.

[23] The Act defines “musical work” as “any work of music or musical composition, with or without words, and includes any compilation thereof”.²⁸ While copyright subsists in many musical works, some musical works—particularly classical music—are in the public domain. As a result, the proposed definition has the potential to exclude stations that broadcast large volumes of musical works in the public domain.

[24] In Notice CB-CDA 2020-032, we asked the Collectives why they sought to change the definition. CMRRA and SOCAN submit that their purpose was to ensure clarity and ease of use for the commercial radio stations that report and pay royalties under the tariff.²⁹ They seek to prevent confusion over which one of SOCAN’s repertoires the tariff references.

[25] With its acquisition of SODRAC, SOCAN now administers two repertoires. Since 1990, SOCAN administered the rights to perform in public and to communicate to the public by telecommunication the musical works in its repertoire (“SOCAN’s performing rights repertoire”). This repertoire includes the performing rights in Canada of virtually all copyright owners in musical works³⁰ and is the repertoire referenced by the *Commercial Radio Stations Tariff (2019)*. Beginning in 2018, SOCAN now administers a second, smaller repertoire previously administered by SODRAC. This repertoire consists of the right to reproduce predominantly French-language musical works (“SOCAN’s reproduction rights repertoire”).

[26] CMRRA and SOCAN submit that the existing definition of low-use station is now unclear.³¹ They proposed the change to prevent confusion. They are concerned that a radio station might misinterpret the definition and base their calculation on the smaller repertoire of works in SOCAN’s reproduction repertoire.

[27] In response to our questions, CMRRA, SOCAN and the CAB submit that they did not consult with the Acknowledging Stations about the proposed change to the definition.³² In response to questions about the potential impact of the proposed change, CMRRA, SOCAN and the CAB submitted that 62 radio stations paid the low-use rate in 2019.³³ However, they were unable to provide the Board with information to calculate what proportion of these stations broadcasted musical works for more than 20 per cent of its total broadcast time, claiming that “it would be extremely time- and cost-intensive and onerous to calculate this information”.³⁴

²⁸ Act, *supra* note 10, s 2 “musical work”.

²⁹ Joint response of CMRRA, SOCAN, and the CAB to the Registrar, Copyright Board (08 June 2020) Re: Commercial Radio Reproduction (2020, 2021-2023) Notice of the Board [CB-CDA 2020-032] at p 2 [Joint Response to Notice 2020-032].

³⁰ *Commercial Radio [SOCAN (2008-2010); Re: Sound (2008-2011); CSI. (2008-2012); AVLA-SOPROQ (2008-2011); ArtistI (2009-2011)]* (09 July 2010) Copyright Board Decision at para 9.

³¹ Joint Response to Notice 2020-032, *supra* note 50 at p 2.

³² *Ibid* at pp 1-2.

³³ *Ibid* at p 3.

³⁴ *Ibid* at p 3.

[28] Having reviewed the evidence and considering the potential impact of the proposed definition, we approve the tariff with a modification to the definition of low-use stations. We adopt the definition used in the *Commercial Radio Stations Tariff (2019)*³⁵ with a change to clarify that the definition references SOCAN's performing rights repertoire. This will satisfy the parties' intent for clarity while protecting low-use stations. The following definition is inserted into the approved tariff:

“as to CMRRA and SOCAN, broadcasts works in the performing rights repertoire of the Society of Composers, Authors and Music Publishers of Canada for less than 20 per cent of its total broadcast time (excluding production music) during the reference month;”

C. ISSUE 3 : ARE THE RATES AND RELATED TERMS AND CONDITIONS FAIR AND EQUITABLE?

[29] We are satisfied that, with a change to the definition of “low-use station”, the royalty rates and related terms and conditions contained in the Proposed Tariffs are fair and equitable. By amending the definition of low-use station, the Proposed Tariffs provide clarity and will have the same effect as *Commercial Radio Stations (2019)*, which maintains the status quo for low-use stations.

[30] We find in Issue 1 that the Proposed Tariffs continue the royalty rates that the Board approved in *Commercial Radio Stations (2012-2018)* and in *Commercial Radio Stations (2019)*. Since we are not aware of any changes to the commercial radio industry that would warrant a change to the previously approved rates and terms, we have found no reason to question the fairness of the Proposed Tariffs.

[31] Further supporting this finding is the fact that the Proposed Tariffs are based on an agreement between the Collectives and the CAB. The Collectives submit that stations “who represented more than 94% of the gross revenue of the 686 stations who were paying royalties to CSI at the time the Agreement was signed in 2017 – have expressly agreed to be bound by the Settlement Agreement”.³⁶ No station or station groups rejected the Agreement. The Board in *Commercial Radio Stations (2012-2018)* analyzed the representativeness of the same group of Acknowledging Stations and found they were representative of the interests of all users.³⁷ We similarly conclude that the Proposed Tariffs are reflective of the interests of all users and as such, are fair and equitable.

³⁵ *Commercial Radio Stations Tariff (2019)*, *supra* note 27, s 2 “low-use station” (a).

³⁶ Joint Requests to Certify, *supra* note 5 at p 2.

³⁷ *Commercial Radio Stations (2012-2018)*, *supra* note 15 at paras 43-49.

V. DECISION

[32] Having reviewed the Proposed Tariffs, we are satisfied that the royalty rates and related terms and conditions are fair and equitable, and we approve them with a minor modification, as a single tariff under the title Commercial Radio Reproduction Tariff (2020-2023).