

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**Date** 2021-10-01

**Citation** *SOCAN Tariff 9 (2018-2023)*, 2021 CB 9

**Members** Katherine Braun  
Nathalie Théberge  
René Côté

**Proposed Tariffs** SOCAN Tariff 9 – Sports Events, 2018  
SOCAN Tariff 9 – Sports Events, 2019

**Considered** SOCAN Tariff 9 – Sports Events, 2020  
SOCAN Tariff 9 – Sports Events, 2021-2023

### **Approval of Proposed Tariffs**

**As**

*SOCAN Tariff 9 – Sports Events (2018-2023)*

### **REASONS FOR DECISION**

#### **I. INTRODUCTION**

[1] The Society of Composers, Authors and Music Publishers of Canada (SOCAN) is a collective society that manages public performing rights in musical works on behalf of Canadian and foreign songwriters, composers, and music publishers. SOCAN filed four proposed tariffs with the Copyright Board (the Board) for the performance in public, in Canada, of musical works in its repertoire at sports events, specifically Tariff 9 for 2018, 2019, 2020, and 2021-2023 (the “Proposed Tariffs”).

[2] For the following reasons, we find that the Proposed Tariffs are fair and equitable, except for rate increases proposed for the years 2021, 2022, and 2023. These proposed increases are rejected, and the tariff is approved without any rate increase. We approve extending the minimum fee to all events for the years 2021, 2022, and 2023. No adjustment to the tariff is required owing to the COVID-19 pandemic.

[3] With the above modifications, we approve the Proposed Tariffs under the title *SOCAN Tariff 9 – Sports Events (2018-2023)*.

## II. OVERVIEW

[4] SOCAN Tariff 9 allows users to perform in public, musical works in SOCAN’s repertoire at any time and as often as desired, by means of performers in person or by means of recorded music, in connection with baseball, football, hockey, basketball, skating competitions, races, track meets and other sports events.

[5] The Board last approved *SOCAN Tariff 9 – Sports Events (2013-2017)* on May 5, 2017.<sup>1</sup> The rate in the last approved tariff was fixed at 0.1% of gross receipts from ticket sales.

[6] This proceeding considers four proposed tariffs:

<b>Proposed Tariff</b>	<b>Date filed with the Board</b>	<b>Date published</b>
SOCAN Tariff 9 (2018)	March 31, 2017	April 29, 2017 <sup>2</sup>
SOCAN Tariff 9 (2019)	March 29, 2018	May 5, 2018 <sup>3</sup>
SOCAN Tariff 9 (2020)	March 28, 2019	May 18, 2019 <sup>4</sup>
SOCAN Tariff 9 (2021-2023)	October 15, 2019	November 5, 2019 <sup>5</sup>

[7] The sole objector to this proceeding, Restaurants Canada, filed objections to the 2018 and 2019 Proposed Tariffs. However, Restaurants Canada failed to respond to Notice CB-CDA 2020-056,<sup>6</sup> requesting that it confirm its participation in the proceeding and was therefore deemed not to be a participant. As a result, no objectors participated in the hearing.

[8] For the years 2018 to 2020, the proposed rate structure and related terms and conditions are the same as in the last approved tariff (2013-2017) at 0.1% of gross receipts from ticket sales. SOCAN is seeking a rate increase in each of the years 2021, 2022, and 2023 and, also proposes to extend the minimum fee in these years to all sports events, which is currently applicable only to events where no admission fee is charged. The proposed minimum fee would be otherwise unchanged.

[9] On February 15, 2021, the Board asked SOCAN, in Order CB-CDA 2021-011<sup>7</sup>, to provide submissions and evidence to support its analysis of the proposed tariffs. In its March 29, 2021, response, SOCAN submits that Tariff 9 undervalues the use of music at sporting events and argues that a gradual, incremental inflationary rate adjustment is appropriate. SOCAN argues that the rates it has proposed are fair and equitable and that proposed changes to the minimum fee is fair

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<sup>1</sup> *SOCAN – Various Tariffs, (2007-2017)*, (5 May 2017) C Gaz I Sup, Vol 151 No 18, at p 21 (approved tariff).

<sup>2</sup> SOCAN Tariff No 9 for 2018, (2017) C Gaz I Sup, Vol 151, No 17, p 32 (proposed tariff).

<sup>3</sup> SOCAN Tariff No 9 for 2019, (2018) C Gaz I Sup, Vol 152, No 18, p 27 (proposed tariff).

<sup>4</sup> SOCAN Tariff No 9 for 2020, (2019) C Gaz I Sup, Vol 153, No 20, p 30 (proposed tariff).

<sup>5</sup> SOCAN Tariff No 9 for 2021-2023, (2019) *Copyright Board* (website), online: [https://cb-cda.gc.ca/sites/default/files/inline-files/1TAR\\_-\\_2019-10-15\\_-\\_SOCAN\\_Tariff\\_9\\_%282021-2023%29\\_-\\_EN.pdf](https://cb-cda.gc.ca/sites/default/files/inline-files/1TAR_-_2019-10-15_-_SOCAN_Tariff_9_%282021-2023%29_-_EN.pdf)

<sup>6</sup> *SOCAN Tariff 9 – Sports Events (2018-2023)*, (16 December 2020) CB-CDA 2020-056 (notice).

<sup>7</sup> SOCAN Tariff 9 – Sports Events, 2018-2023 (15 February 2021) CB-CDA 2021-011 (order).

to users. In addition, SOCAN suggests that no changes to the proposed tariffs are required owing to the COVID-19 pandemic.

[10] To gain a better understanding of the sports event marketplace — its trends and the impact of tariffs on users—the Board also asked SOCAN to provide details on all payments it received under Tariff 9 between the years 2014 and 2020. The data SOCAN provided suggests that the market for sports events has been generally stable over a six-year period (2014-2019), with the number of events significantly declining in 2020 when the COVID-19 pandemic brought many such activities to a halt.

[11] An average of 3,422 sports events per year were subject to Tariff 9 between 2014 and 2019, generating approximately \$1.1 million in annual royalty revenue for SOCAN over the period. The data also confirms that a small number of events produced the majority of collected royalties: the top 20 payments over the time period accounted for over 80% of total receipts. This is not surprising as professional sports events, such as those of the National Hockey League (NHL) and Canadian Football League (CFL), which sell more tickets and at higher prices, are covered by this tariff.

### III. ISSUES

[12] We identified four issues in the Proposed Tariffs for the Board to consider in this proceeding. In our deliberation, we carefully examined the market data provided by SOCAN in addition to assessment of the characteristics contemplated in Section 66.501 of the *Copyright Act*<sup>8</sup> : The four issues considered by the Board are:

1. Is an increase in the proposed royalty rates for the years 2021, 2022, and 2023 appropriate?
2. Is it appropriate to set a \$5 minimum fee on all events for the years 2021, 2022, and 2023?
3. Are the rates and related terms and conditions set out in of the proposed tariffs fair and equitable?
4. Is a rate adjustment warranted because of the COVID-19 pandemic?

### IV. ANALYSIS

#### **A. IS AN INCREASE IN THE PROPOSED ROYALTY RATES FOR THE YEARS 2021, 2022, AND 2023 APPROPRIATE?**

[13] We reject the proposed rate increases for the years 2021, 2022, and 2023. The proposed tariffs specify a rate increase, from 0.1% in 2020 to 0.12% (2021), to 0.122% (2022), and to 0.124% (2023). In Order CB-CDA 2021-011, the Board requested that SOCAN provide the grounds on which the proposed rate increases were determined and evidence supporting its submissions.

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<sup>8</sup> RSC 1985, c C-42 [the Act].

[14] SOCAN did not submit evidence that Tariff 9 is currently undervalued. Rather, to justify the proposed increases, SOCAN relied solely on the fact that the Board had recognized in past decisions, such as *SOCAN Tariff 9 (1998-2001)*, that Tariff 9 has been historically undervalued. Nor was any evidence submitted that speaks to how music is used or valued in sports events that might support a rate increase. The notion of music being undervalued can be understood in a few different ways. It could mean, for example, that music plays an increasingly relevant role in an event or that different uses of music should arrive at an equivalent value for the music played. It could also mean that more music is being played per event.

[15] SOCAN submits that the Board observed that rates in *SOCAN Tariff 9 (1998-2001)* were undervalued. To adjust, the Board implemented a percent-based rate for 2001 and increased the Tariff 9 royalty rate by 100%.<sup>9</sup> Then, between 2002 and 2011, the tariff rate was gradually increased from 0.05% to 0.1% of gross receipts (at an increment of 0.005 percentage points per year). SOCAN notes that the Board concluded these increases were fair.<sup>10</sup>

[16] However, referencing a twenty-year-old Board decision that approved a rate increase, such as *SOCAN Tariff 9 (1998-2001)*, does not provide sufficient justification for the Board to approve a future rate increase for the years 2021, 2022, and 2023, especially since there were various rate increases approved since that decision. In the present case, the Board requires evidence to justify the proposed rate increases.

[17] SOCAN also proposes to use an inflation-forecasted approach to underpin the proposed rate increases, suggesting rates be calculated based on forecasts of future inflation for the years 2021, 2022, and 2023, using the Consumer Index (CPI). We have two concerns with this approach. First, it is not appropriate to apply an inflation-based increase to this royalty rate. In *SOCAN Tariff 9 (1998-2001)*, the Board ruled that a tariff based on a percentage of revenue “ensures that the value of music relative to the licensee’s activity remains constant, automatically adjusting for market-specific inflation.”<sup>11</sup> Using inflation to calculate a rate increase would contradict the above principle underlying percentage-based rates, which already adjusts for fluctuation of revenues, including those related to inflation. Second, even in a proceeding where an inflation adjustment is appropriate, the Board, as a general rule, does not grant inflation adjustments for the future, as is the case in this request.<sup>12</sup> Inflation adjustments are usually approved only for the past when the rate of inflation is known.

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<sup>9</sup> *SOCAN Tariff 9 – Sports Events (1998-2001)*, (15 September 2000) Copyright Board Decision at pp 8-9, 13. In its decision the Board noted that rates in Tariff 9 were two orders of magnitude lower than rates in other tariffs for comparable uses of music.

<sup>10</sup> *SOCAN Tariff 9 – Sports Events (2010-2012)*, (29 June 2012) Copyright Board Decision at para 32.

<sup>11</sup> *SOCAN Tariff 9 (1998-2001)*, *supra* note 9 at p 12.

<sup>12</sup> See e.g. *NRCC Tariff 3 – Background Music (2003-2009)*, (20 October 2006) Copyright Board Decision at paras 143-147; *Re: Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment*, (21 July 2017) CB-CDA 2017-076 at paras 18-21 (decision).

**B. IS IT APPROPRIATE TO SET A \$5 MINIMUM FEE ON ALL EVENTS FOR THE YEARS 2021, 2022, AND 2023?**

[18] Based on our analysis, we approve the proposed \$5 minimum fee per event and gauge that any impacts will be minimal on users and the market in general. The benefits of this change relate more to simplification of reporting and administration than to its financial impact.

[19] SOCAN proposes that a minimum fee of \$5 per event, currently applied only when no admission fee is charged, be extended to all sports events. It submits that an across-the-board minimum fee would simplify reporting and administration. SOCAN also submits that the current structure is unfair because it causes licensees holding free events to pay proportionally more than licensees that charge a nominal price. For example, an event that generates \$3,000 in ticket sales, was required to pay \$3 to SOCAN based on the approved rate, whereas free events paid the \$5 minimum fee.

[20] SOCAN argues that an across-the-board minimum fee would eliminate this unfairness and also recognize the minimum inherent value of music, as well as simplify reporting and administration. It calculates that this change would increase the per-event fee for low-revenue events by an average of \$3.29, or 0.19% of the average per-event revenue. Our analysis verifies SOCAN's calculations. We expect this change to generate, on average, an additional revenue of approximately \$3,000 per year (or 0.3% of the average yearly revenue from this tariff) for SOCAN.

**C. ARE THE RATES AND RELATED TERMS AND CONDITIONS SET OUT IN OF THE PROPOSED TARIFFS FAIR AND EQUITABLE?**

[21] Section 66.501 of the Act requires the Board to fix royalty rates and related terms and conditions that are fair and equitable. The provision sets out a non-exhaustive list of considerations in this task. Based on our assessment, we determine that, with the modifications, the rate and related terms and conditions set out in the Proposed Tariffs form the basis for approving a fair and equitable tariff for the years under consideration.

[22] Where a proposed tariff does not differ substantially from the previously approved tariff, the Board may rely on the last approved tariff as an indication that the proposed tariff is fair and equitable, particularly when there have been no changes in the relevant market. Given that we reject the proposed rate increase, and as we are not aware of any market changes, we conclude that the proposed tariffs set out royalty rates and related terms and conditions that are fair and equitable.

[23] Despite asking, the Board did not receive any submissions on the criteria in paragraph 66.501(a) of the Act. Given the facts of this proceeding, we have insufficient evidence to conclude what rates and related terms and conditions a willing buyer and willing seller would agree to while acting in a competitive market with all relevant information, at arm's length and free of external constraints.

[24] However, the absence of information does not mean that the proposed rate and the related terms and conditions are not fair and equitable. In our evaluation, we did not find grounds to cast doubt on the last approved tariff. The rate has remained unchanged at 0.1% of gross receipts from

ticket sales since 2011. Our analysis concludes that the market for sports events has remained relatively stable over the 2014-2019 period.

[25] Paragraph 66.501(b) of the Act provides that the Board will also consider public interest in determining whether a proposed tariff is fair and equitable. The record raises no other public interest concerns not already addressed in this proceeding.

#### **D. IS A RATE ADJUSTMENT WARRANTED BECAUSE OF THE COVID-19 PANDEMIC?**

[26] Pursuant to paragraph 66.501(d) of the Act, the Board may also consider any other criterion it considers appropriate. The Board recognizes there are potential impacts posed by the COVID-19 pandemic and has begun requesting submissions to help assess whether any adjustments to a proposed tariff are appropriate for the year 2020 and beyond.

[27] In its response to Order CB-CDA 2021-011, SOCAN submitted that the pandemic had a significant impact, particularly in the number of actual sports events in 2020, which was also confirmed by our internal analysis. There was a marked drop in reported sports events for the second, third, and fourth quarters of 2020.

[28] That said, SOCAN's view is that no changes are required to the existing Tariff 9 structure or proposed rate. The rate set out in the Proposed Tariffs is "self-adjusting", meaning that as revenues for sporting events decline, so do licence fees. Additionally, the rate is assessed as a fee-per-event in which music is performed, so royalties are only payable when the event actually takes place. Applying the minimum fee to all events does not change this analysis. As such, we conclude that no changes to the proposed tariff are necessary to account for the effects of the COVID-19 pandemic.

#### **V. TARIFF WORDING**

[29] In addition to the changes identified above, we find it appropriate to modify the wording of the proposed tariffs in three ways. First, to improve readability, we have integrated the "General Provisions" of the proposed tariffs into a "Terms and Conditions" section located after the "Royalties" section.

[30] Second, we have removed references to "licenses" from the proposed tariffs in order to distinguish between the terms "tariff" and "licence".<sup>13</sup>

[31] Third, we have removed a reference to "Tariff 4". To facilitate comprehension and meaningful consideration of a proposed tariff, the scope, terms, and conditions of a tariff should be clearly defined and readily ascertainable from the proposed tariff itself. Since, in our opinion, this is the case, there is no need to refer to another SOCAN tariff. Moreover, the reference to a hypothetical tariff may make the scope, terms, or conditions of this tariff undeterminable. Consequently, as per the Board's *Practice Notice on Filing of Proposed Tariffs* [PN 2019-004], we remove such reference from this tariff.

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<sup>13</sup> See *York University v Access Copyright*, 2021 SCC 32.

## **VI. DECISION**

[32] Given our examination and having duly considered all submissions and the criteria set out in Section 66.501 of the Act, we conclude that the rate and the related terms and conditions in the Proposed Tariffs are fair and equitable, with the following modifications.

[33] We reject the proposed rate increase in the years 2021, 2022, and 2023. Therefore, the rate will remain at 0.1% of gross receipts from ticket sales (exclusive of sales and amusement taxes) for the full term of the tariff, 2018-2023. We approve extension of the \$5 minimum fee to all events for the years 2021, 2022, and 2023. No adjustment to the tariff is required owing to the COVID-19 pandemic and interest factors are not warranted in this proceeding.

[34] Approving the Proposed Tariffs, with the modifications, provides users and rights holders with familiar tariff conditions to support management of their costs and revenues to 2023. The approved tariff provide for a mechanism that simplifies lawful use of musical works by users in return for an acceptable fee, thus ensuring compensation to rights holders for the use of their works.

[35] With the above noted modifications, we approve the Proposed Tariffs under the title *SOCAN Tariff 9 – Sports Events (2018-2023)*.