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Citation *Re:Sound Tariff 3.B (2016-2020)*, 2021 CB 10

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Proposed Tariffs Re:Sound Tariff 3.B – Background Music, 2016
Re:Sound Tariff 3.B – Background Music, 2017

Considered Re:Sound Tariff 3.B – Background Music, 2018
Re:Sound Tariff 3.B – Background Music, 2019-2022

Approval of Proposed Tariffs

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Re:Sound Tariff 3.B –Background Music (2016-2020)

REASONS FOR DECISION

I. INTRODUCTION

[1] Re:Sound is a collective society that manages public performing rights and communications to the public through the telecommunication of sound recordings published on behalf of performers and sound recording producers. Re:Sound filed several proposed tariffs with the Copyright Board (the “Board”) for the use of background music for the years 2013-2016, 2017, 2018, and 2019-2022.

[2] On September 21, 2020, Re:Sound, jointly with Restaurants Canada, the Hotel Association of Canada (HAC) and the Retail Council of Canada (RCC), filed a request with the Board for the approval of a mutually agreed to settlement tariff for the use of background music for the years 2016 to 2020 (the “settlement tariff”).¹

¹ Re:Sound’s letter to the Secretary General of the Copyright Board of Canada (21 September 2020). References omitted. [Letter from Re:Sound, 21 September 2020]

[3] Re:Sound Tariff 3.B sets royalties for the performance in public or the communication to the public by telecommunication of background music from its repertoire in an establishment, including any use of such recorded music with a telephone on hold on a trunk line.

[4] We conclude that the settlement tariff can serve as a basis for approval of a fair and equitable tariff, subject to minor modifications to be made to its wording.

II. CONTEXT

[5] The Board certified *Re:Sound Tariff 3.B – Use of Background Music (2010-2015)* distinctly for the first time on September 1, 2017, for the 2010-2015 period.²

[6] Re:Sound filed four proposed tariffs that were published in the Canada Gazette on June 9, 2012 (for 2013-2016), on June 18, 2016 (for 2017), on May 13, 2017 (for 2018) and on May 5, 2018 (for 2019-2022). Note that the proposed tariff published on June 9, 2012, concerned the 2013-2016 period, but that the decision issued by the Board on September 1, 2017, concerned the 2010-2015 period³ and that nothing was planned for 2016. The Board also decided that it would initially study the settlement tariff for the 2016-2020 period, while setting aside the 2021-2022 period, to be examined at a later point.⁴

[7] Several entities expressed their objection to Re:Sound's Tariff 3.B proposed tariffs within the time limits provided for this purpose. This is the case for Stingray and Rogers for 2016, Rogers and GoodLife for 2017, Stingray, Rogers and GoodLife for 2018 and Stingray, CAPACOA, GoodLife and the Fitness Industry Council of Canada for the period from 2019 to 2022.

[8] In the case of CAPACOA, it announced its decision to withdraw its objection to the proposed Tariff 3.B on background music through an email to the Board and Re:Sound on September 14, 2020, for the proposed tariffs from 2012 to 2018. The reasons for this withdrawal are not spelled out. A few days later, Re:Sound's letter accompanying the settlement tariff mentioned this withdrawal and presented a few explanations.⁵ We will come back to this in paragraph 20.

[9] In Notice CB-CDA 2021-013 dated February 19, 2021, the Board asked the objectors to confirm before March 5, 2021, their intention to participate in the ongoing process, otherwise they would be deemed to have opted out of the proceedings. The objectors were given until March 19, 2021, to transmit their submissions to the Board.

² Re:Sound Tariff 3.B – Background Music (2010-2015) (1 September 2017) Copyright Board of Canada (CB-CDA 2017-091) [Re:Sound Tariff 3.B (2010-2015)].

³ Re:Sound's request for 2013-2016 was made jointly with those already filed in 2009, 2010 and 2011. However, the decision concerned only the years 2010 to 2015. Ibid.

⁴ CB-CDA Notice 2021-013, 19 February 2021.

⁵ Letter from Re:Sound, 21 September 2020, *supra* note 1.

[10] In their response to the Board’s Notice, Stingray and Rogers indicated that they were withdrawing their objection for the period from 2016 to 2020. CAPACOA reiterated that it was withdrawing its objection to the tariff, this time for the period from 2019 to 2022. The other objectors did not respond and were deemed to no longer wish to participate in the process.

[11] On July 20, 2018, Totem Media Inc. (Totem) asked to obtain intervenor status for Re:Sound Tariff 3.B – Background Music 2019-2022. In its Notice CB-CDA 2021-028, the Board denied Totem’s intervenor request on the grounds that it is not a user of Re:Sound Tariff 3.B, but rather a supplier of background music subject to Re:Sound Tariff 3.A. However, in the same Notice, the Board invited Totem to present written submissions if it so desired, by June 23, 2021. The Board did not receive any communication from Totem within the given timeframe.

[12] The settlement tariff contains a significant difference compared to proposed tariffs published in 2012, 2016 and 2017, in that the settlement tariff’s structure is reversed and follows the model of SOCAN Tariff 15.A. This change is intended to simplify the administration of the tariff for the establishments through Entandem, a joint venture between Re:Sound and SOCAN to manage musical licences.

[13] The settlement tariff royalties are as follows:

Table 1 – Comparison of Re:Sound Tariff 3.B Royalties

Royalties	Settlement Tariff Text (2016-2020)	Proposed for 2019-2020	Proposed for 2018, 2017	Proposed for 2016	Last Certified Tariff (2015)
(1) recorded music by telephone on hold on a trunk line	(i) for 2016-2019: \$49.85 for the first trunk line; \$1.11 for each additional trunk line (ii) for 2020: \$52.45 for the first trunk line; \$1.17 for each additional trunk line	\$126.42 for the first trunk line; \$2.82 for each additional trunk line	\$120.41 for the first trunk line; \$2.67 for each additional trunk line	\$98.84 for the first trunk line; \$27.00 for each additional trunk line	\$49.85\$ for the first trunk line; \$1.11 for each additional trunk line

(2) In addition to any royalty payable pursuant to subsection 1:					
(2)(a) the number of square metres (square feet) of the area to which the public has access, multiplied by the number of days of operation during which background music was played, multiplied by:	(i) 0.2910¢ (0.0268¢) in 2016-2019 (ii) 0.3062¢ (0,0282¢) in 2020	0.7380¢ (0.0679¢)	0.7028¢ (0.0647¢)	0.92¢ (0.084¢)	0.2910¢ (0.0268¢)
(2)(b) if paragraph (a) does not apply, and the capacity of the establishment can be verified, that number, multiplied by the number of days of operation on which recorded music was played, multiplied by:	(i) 0.1745¢ in 2016-2019 (ii) 0.1836¢ in 2020	0.4425¢	0.4215¢	N/A	0.1745¢
(2)(c) if neither paragraphs (a) nor (b) apply and the number of admissions, attendees, or tickets sold for one day or one event during which recorded music was played can be established with certainty, that number multiplied by:	(i) 0.0931¢ in 2016-2019 (ii) 0.0980¢ in 2020	0.2361¢	0.2248¢	0.294¢	0.0931¢
(2)(d) if paragraphs (a), (b) and (c) do not apply, the royalty	(i) \$49.85 in 2016-2019 (ii) \$52.45 in	\$126.42	\$120.41	\$98.84	\$49.85

payable for the relevant year shall be:	2020				
In all cases, the minimum annual royalties for all recorded music uses under subsection (2) shall be:	(i) \$25.00 per establishment in 2016-2019 (ii) \$35.00 per establishment in 2020	\$126.42	\$120.41	\$98.84	\$25.00

III. ISSUE

[14] An issue emerges from this file: determining whether the settlement tariff agreed to by Re:Sound and user groups of background music, i.e. Restaurants Canada, the HAC and the RCC, filed on September 21, 2020, can serve as a basis to certify a fair and equitable tariff, pursuant to section 66.501 of the *Copyright Act*.⁶

IV. ANALYSIS

[15] In its assessment of a fair and equitable settlement tariff, 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 could serve as reference to determine what would constitute an acceptable agreement for third parties or, at least, a significant portion thereof. Thus, an agreement may, in some way, represent a “market agreement”, indicating that the royalties are in line with what, according to the market, is fair and equitable;
- b) the extent to which the agreement addresses the objections raised and the extent to which potential users who did not participate in the agreement would agree with it;
- c) the extent to which the settlement tariff differs from the previous certified tariff (as the case may be): when a previous tariff was certified and the settlement tariff has not been modified or contains only minor modifications, or the modifications have been justified (by the parties or the Board), the Board may rely on this fact as an indication that the agreement is fair and equitable.⁷

⁶ R.S.C. 1985, c. C-42.

⁷ See Re:Sound Tariff 6.A – Use of Recorded Music to Accompany Dance (2013-2018), (31 July 2020) Copyright Board of Canada (2020 CB-CDA-004), para 16. [Re:Sound Tariff 6.A (2013-2018)]

A. REPRESENTATIVENESS OF USERS

[16] In its letter of transmission of the tariff agreed between Re:Sound and its partners, Re:Sound submitted the following:

Restaurants Canada, the Hotel Association of Canada (HAC) and the Retail Council of Canada (RCC) collectively represent the vast majority of businesses that are subject to the settlement tariff, through their representation of the Canadian retail, restaurant, bar and food service, hotel and lodging industries.

Restaurants Canada is a national, not-for-profit association representing Canada's restaurant and food service industry. Its members comprise 30,000 businesses in every segment of the industry including restaurants, bars, caterers, institutions and their suppliers. The HAC is the effective voice of the Canadian hotel and lodging industry, representing 8,289 hotels, motels and resorts across Canada. The RCC is the voice of retail in Canada. It is a not-for-profit association representing over 45,000 independent, regional, national mass and specialty retail businesses and online merchants in general merchandise, drugs and groceries.

The Board has previously found that Restaurants Canada, the RCC and the HAC adequately represent the interests of the prospective users under Tariff 3.B. Restaurants Canada, the RCC and the HAC remain as representative of their industries today as they were in 2017. The parties therefore submit that the parties to the settlement tariff are representative of the industry affected by it.⁸

[17] If the grouping formed by Restaurants Canada, the HAC and the RCC may at first glance appear to represent a large proportion of the industries according to their activity area, it is worth noting the extremely broad character of establishments prescribed by Tariff 3.B. The definition of the word "establishment" reads as follows: "place to which the public has access, and includes, but is not limited to, a retail store, restaurant, hotel, bar, workplace, park, club or school, as well as a means of public transportation (...)." The wording used here encompasses some establishments that are not at all represented by the three professional groupings that are party to the agreement.

[18] We are unable to conclude that the parties to the settlement tariff agreement are representative of all Tariff 3.B users. However, if this conclusion does not allow us to consider that the settlement tariff is an indicator of its fair and equitable character for all concerned users, we consider that it is so for some of them. We use it as a reference point of fairness and equity for all. Thus, in the absence of other elements of evidence, the settlement tariff constitutes a useful reference point to understand and accept the agreed-upon royalty increase. We also note that the agreed increase in royalties is in line with inflation.

⁸ Letter from Re:Sound, 21 September 2020, *supra* note 1.

B. CONSIDERATION OF OBJECTIONS

[19] As previously mentioned, the Board must ensure that it takes into account the objections to the proposed tariffs on the part of potential users who did not participate in the settlement tariff agreement.

[20] We have already stated that there are no longer any objectors to this proceeding. CAPACOA had raised concerns related to the new structure of proposed Tariff 3.B in the proposed tariff 2019-2022, that gives precedence to royalties according to the accommodation capacity of a location compared to royalties according to admission numbers, which would be a disadvantage for performing arts venues. CAPACOA explains that a tariff based on accommodation capacity is more suitable for restaurants and other like places, where each seat can be occupied by different people during the course of one day, while for performing arts venues it is difficult to present more than one performance per day. According to CAPACOA, royalty certification associated with accommodation capacity for a performing arts organization would result in these organizations incurring significantly higher fees per client than a restaurant or another type of establishment using background music for which royalties based on accommodation capacity is better adapted.

[21] We have no evidence allowing us to evaluate and validate the argument presented by CAPACOA, particularly in relation to the accommodation capacity of performing arts venues per day, and to assess the number of people who can circulate in the areas where background music is played, per establishment type. We conclude that there are no outstanding issues.

C. TERMS AND CONDITIONS OF THE SETTLEMENT TARIFF

i. Royalties

[22] As shown in Table 1, the settlement tariff royalties are lower than the royalties set out in the proposed tariffs. Furthermore, the royalties, as well as the minimum annual fees set out in the settlement tariff, are identical to the last certified royalties for 2015. As of 2020, the royalties increase by 5.21 per cent to account for inflation calculated for the period from January 2016 to December 2018. These calculations to account for inflation reflect the method established and used by the Board for many years. Also, as of 2020, the minimum annual fee is increased from \$25.00 to \$35.00. The parties to the agreement explain that one reason for the increase is the recognition of the disparity between the minimum annual fee set out in Re:Sound Tariff 3.B compared to the one set out in SOCAN Tariff 15.A, which is \$94.51.⁹

[23] Whereas nothing leads the Board to conclude that there were any significant changes in the market covered by this tariff since its adoption in 2015, and whereas the royalties for the period from 2016 to 2019 remain unchanged and those of 2020 are increased solely to account for

⁹ Letter from Re:Sound, 21 September 2020, *supra* note 1.

inflation for the period from January 2016 to December 2018, and whereas all parties to the settlement tariff agree on these increases, we conclude that these royalties may constitute a basis for a fair and equitable tariff. As the tariff is based on the number of days where background music is played in an establishment, no adjustment is necessary to take into account the health measures adopted in the fight against the COVID-19 pandemic for the year 2020.

[24] With regards to the minimal annual fee increase for the year 2020, we accept that SOCAN Tariff 15.A represents a valid point of reference and, considering that the amount of the agreed minimum fee is lower than the minimal fee of SOCAN Tariff 15.A, we also accept it.

ii. Tariff Structure

[25] Three elements allow for the determination of the fee to be paid by an establishment, pursuant to section 4 of the settlement tariff. The first element relates to the number of main trunk lines where the background music is played by telephone on hold. The second element relates to the areas/capacity/tickets sold for a physical venue at the public's disposal by an establishment that uses background music. The proposed structural change focuses on this second element. The third element sets a minimum annual fee for each establishment.

[26] As previously mentioned, the settlement tariff structure differs from the proposed tariffs for the years 2016, 2017 and 2018, which followed the same structure of the last tariff certified by the Board, but it is identical to the proposed tariff for 2019-2022. In real terms, the order of the different criteria regarding the setting of royalties as of subsection 4(2) is now reversed and follows the following structure:

- a) the number of square metres (square feet) of the area to which the public has access, multiplied by the number of days of operation during which background music was played;

(the establishment area appeared in (c) in the last certified tariff and in the proposed tariffs for the years 2016, 2017 and 2018)

- b) if paragraph (a) does not apply, and the capacity of the establishment can be verified, that number, multiplied by the number of days of operation on which recorded music was played;

(the capacity of the establishment was at the same level in the last certified tariff and in the proposed tariffs for the years 2016, 2017 and 2018)

- c) if neither paragraphs (a) nor (b) apply and the number of admissions, attendees, or tickets sold for one day or one event during which recorded music was played can be established with certainty;

(the number of admissions appeared in (a) in the last certified tariff and in the proposed tariffs for the years 2016, 2017 and 2018)

- d) if paragraphs (a), (b) and (c) do not apply, the royalty payable for the relevant year shall correspond to a fixed amount.

[27] As mentioned in paragraph 21 about the impact of the tariff structure reversal to favour royalties based on the establishment area on the users represented by CAPACOA, in the absence of other elements of evidence, the settlement tariff constitutes a reference point to validate the tariff structure corresponding to the 2019-2022 proposed tariff.

[28] Furthermore, this new structure is similar to the SOCAN Tariff 15.A and its harmonization will facilitate, for the users, the administration of both SOCAN and Re:Sound tariffs that apply to background music.

iii. Other Terms and Conditions

[29] In addition to modifications made to royalties and the tariff structure, the settlement tariff makes several minor changes to the proposed tariff terms and conditions. Some changes were accepted but others were either rejected or reformulated. We also removed some inappropriate tariff provisions. The changes in the settlement tariff retained in the approved tariff are as follows:

a. Reference to another Re:Sound tariff

[30] Subsection 3(3) presents the following provision: “This tariff does not apply to a performance in public or a communication to the public by telecommunication that is subject to another Re:Sound tariff.” The Board recently ruled on a similar provision and rejected it.¹⁰ The scope and conditions of a tariff must be clearly defined and easy to determine. As this is the case here for Tariff 3.B with a well-defined scope, there is no need to refer to another hypothetical Re:Sound tariff. Not only is this modification rejected, we also rule to eliminate subsection 3(3) from the tariff.

b. Replacing the word “person” with the word “establishment”

[31] In section 6 of the settlement tariff that focuses on records and audits, it is proposed to replace the word “person” with the “establishment.” As this section relates to record keeping, it is normal to specify that the obligations fall to the establishment covered by the tariff. We have similar suggestions on changing the word “person” with the word “establishment” for sections 7, 8, 9 and

¹⁰ Re:Sound Tariff 6.C — Use of Recorded Music to Accompany Adult Entertainment (2019-2022), (26 February 2021) Copyright Board of Canada (2021 CB-CDA-002), para 34. [Re:Sound Tariff (2019-2022)] This decision refers also to the Practice Notice on Filing of Proposed Tariffs (August 2019) Copyright Board of Canada [PN CB-CDA 2019-004].

10 of the settlement tariff. All these change proposals to the Tariff 3.B text are accepted as they are consistent with the spirit of the obligations contained in the tariff, obligations which relate to establishments.

c. Establishment of a deadline for the payment of a royalty following an audit

[32] Still in section 6 of the settlement tariff, 4th paragraph, it is expected that if an audit of records discloses that royalties are owed, they shall be paid within 30 days of the demand for such payment. The Board rules that this request to establish a deadline for payment is acceptable and is incorporating it to the tariff.¹¹

d. Confidential treatment

[33] Compared to the last certified tariff, the settlement tariff contains several proposed modifications in section 7 on confidential treatment. To support these modification requests, Re:Sound submitted the following:

Paragraphs 7(a) and (d) have been revised for consistency with more recently certified Re:Sound tariffs and to ensure that Re:Sound is able to share information where necessary with its agents such as Entandem and service providers such as IT professionals and accountants.¹²

[34] The creation of the joint Entandem venture between Re:Sound and SOCAN represents an initiative to facilitate the management of tariffs, both for collective societies and users. The Board was favourable to this joint business, referred to as an “agent” in the settlement tariff, in its decision regarding *Re:Sound Tariff 6.C (2019-2022)*:

Entandem’s objective is to increase efficiency and reduce the burden in the administration of the tariff. This will provide establishments with a single point of contact. In order for Entandem to operate effectively, Re:Sound must be able to share information obtained under its tariffs with Entandem. We agree with this change, which allows for a single point of contact for users.¹³

[35] For the same reason, we agree with the new wording proposed in paragraph 7(2)(a). The minor modifications proposed for subsection 7(3) concerning information that is already at the public’s disposal are also accepted, as they do not present any particular issue.

[36] Several recent Board decisions required adding a new paragraph in section 7 of certified Re:Sound tariffs. This is the case for Tariff 3.A where the Board stated:

¹¹ The Board also adopted this wording in *Re:Sound Tariff 6.C (2019-2022)*, subs 6(4).

¹² Letter from Re:Sound, 21 September 2020, *supra* note 1.

¹³ *Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment (2019-2022)*, *supra* note 10, para 42.

However, we are of the opinion that the wording does not protect the information adequately to which the service providers could have access. Hence, we are deleting “as long as the confidential treatment is respected” and we are adding a distinct paragraph (in this case subsection 7(3)) to the effect that where confidential information is shared with a service provider pursuant to paragraph 7(2)(a), these service providers shall sign a confidentiality agreement.¹⁴

[37] Consequently, we decided to insert, between subsections 7(2) and 7(3), a new paragraph stating that: “(3) Where confidential information is shared with a service provider pursuant to paragraph (2)(a), that service provider shall sign a confidentiality agreement.”

V. CONCLUSION

[38] We conclude that a tariff based on the settlement tariff, integrating the above-mentioned modifications to the terms and conditions, is fair and equitable and we approve it as *Re:Sound Tariff 3.B – Background Music (2016-2020)*. We find that royalties did not increase from the last approved tariff, except for an increase linked to inflation as of 2020. We also accept the increase for the minimum annual fee. We support the request to change the fee structure. We are making some changes to the terms and conditions of the settlement tariff.

¹⁴ Re:Sound Tariff 3.A – Background Music Suppliers (2014-2018), (9 October 2020) Copyright Board of Canada 2020 CB-CDA 015 [Re:Sound Tariff 3. (2014-2018)]. The same wording was also added to Re:Sound Tariff 6.C (2019-2022), subs 7(3).