

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2024-12-06
Citation *Re:Sound Tariff 4 – Satellite Radio Services (2019-2021)*, 2024 CB 10
Member The Honourable Luc Martineau
**Proposed
Tariff
Considered** Re:Sound Tariff No. 4 - Use of Music by Satellite Radio Services (2019-2021)

Approval of Proposed Tariff

As

Re:Sound Tariff 4 – Satellite Radio Services (2019-2021)

REASONS FOR DECISION

I. OVERVIEW

[1] *Re:Sound Tariff 4 – Satellite Radio Services (2019-2021)* is approved on the basis of a jointly-submitted text (“JST”) filed by Re:Sound and SiriusXM Canada Inc. (“SiriusXM”) on August 6, 2020.

[2] The approved rates are 3.63% of the service provider’s revenues, with a minimum fee of 36¢ per subscriber. Effective April 29, 2020, the rate is 3.71% of the service provider’s revenues, with a minimum fee of 37¢ per subscriber.

[3] The Parties agree that the rate should increase as a result of Re:Sound’s repertoire increase. The Parties consider that legal changes have allowed Re:Sound to represent a larger repertoire. Namely, the *Statement Amending the Statement Limiting the Right to Equitable Remuneration of Certain Rome Convention or WPPT Countries*, SOR/2020-82, which came into force on April 29, 2020, removed restrictions on equitable remuneration for U.S. sound recordings.

II. BACKGROUND

[4] Other than removing references to SOCAN, which is not a party to the JST and is in separate discussions with SiriusXM with respect to its own tariff, the only change from the last-approved

tariff¹ is with respect to the rates for the period of April 29, 2020 to December 31, 2021. Compared to the last-approved tariff, the rates (and minimum fee) are subject to a small increase (less than 3%).

[5] While the tariff applies to satellite radio services, it is a fact that only one user – SiriusXM – provided such a service during the tariff effective period.

[6] SiriusXM was the only objector to the proposed tariff, which was filed with the Board on March 28, 2018.

[7] Compared to the last-approved tariff, the proposed tariff constituted a marked rate increase: 17% of the satellite radio service revenue (vs. last-approved 3.63%), subject to a minimum fee of \$1.50 per subscription (vs. last-approved 36¢), which was considered unacceptable by SiriusXM.

[8] Furthermore, unlike to the last-approved tariff, the proposed tariff explicitly covered simulcasts².

[9] The Parties were able to agree on a revised rate and filed a JST in August 2020. The JST was consistent with a 2016 agreement between the Parties, amended in 2017, which was filed with the Board in April, 2022. The Parties did not agree on the issue of simulcasts but explained that simulcasts by SiriusXM Canada are the subject of separate, ongoing negotiations³.

[10] As part of the joint request for tariff approval on the basis of the JST, the Parties filed submissions as required by the Board's *Practice Notice on Filing of Jointly-Submitted Texts in a Proceeding*⁴.

[11] The Board noted that the agreement that underpins the JST would take precedence over any eventual approved tariff for the years in question (and therefore potentially making the approval process moot). However, in the present case, after taking into account the parties' submissions (but without ruling on their merit), the Board concluded that consideration of the proposed tariff could be more expeditious and less costly than assessing whether the matter is truly moot.

¹ *Satellite Radio Services (Re:Sound: 2011-2018; SOCAN: 2010-2018)* (approved tariff) (June 3, 2017), C Gaz Supplement, Vol. 151, No. 22.

² According to the proposed tariff, simulcast means the simultaneous communication of a satellite radio broadcast to which this tariff applies, via the Internet or another digital network, to a device, which is identical to the original signal and over which the recipient is unable to exercise any control over the content or the timing of the communication.

³ At the time of this decision, the Parties had informed the Board (in response to Order CB-CDA 2024-063) that they had not yet reached an agreement with respect to a tariff for SiriusXM's simulcasting activities. Satellite radio simulcasting was part of a larger negotiation with SiriusXM involving the 2022-2024 tariff period for satellite radio.

⁴ *Practice Notice on Filing of Jointly-Submitted Texts in a Proceeding PN 2022-005 rev. 1* (March 1, 2023).

III. ISSUE

[12] The Board identifies the following decision-point: Does the JST provide an appropriate benchmark for the proposed tariff under consideration?

IV. ANALYSIS

[13] In their joint-request for approval on the basis of the JST (August 6, 2020), the Parties submit that the parties to the JST are fully representative of the industry affected by it and the JST addresses the economic aspects of all objections made against the Proposed Tariff.

[14] Because the effective period is completely in the past, and because there is only one user during that period who supports the JST, the Board agrees with the Parties' submission.

[15] The Board also observes that the JST is consistent with the last-approved tariff. As mentioned, the only change concerns the rate, which coincides with legislative changes that essentially entitled Re:Sound to represent pre-1972 U.S. sound recordings. Before these legislative changes, those sound recordings were not eligible for equitable remuneration in Canada.

[16] The Parties agree that Re:Sound's repertoire has increased as a result, and that the rate should increase accordingly: from 3.63% to 3.71% of revenues (a 2.20% increase) and from 36 cents to 37 cents minimum per subscriber fee (a 2.78% increase).

[17] The Board has accepted rate increases as a result of repertoire-use adjustments that are agreed to (rather than measured through a repertoire use study). The Board has also accepted rate increases resulting from repertoire-use increases "as of right",⁵ in similar situations where legal changes have permitted a collective society to expand its repertoire. Furthermore, there is no reason to believe that the expanded part of the repertoire falls outside of the 'use' included in the scope of the tariff.

[18] In approving this tariff, the Board uses the last-approved tariff as a benchmark combined with the JST as a measure of repertoire-use upward adjustment.

[19] The Board, however, makes three changes.

[20] First the Board notes that the JST provides that the tariff "permit[s] the use of wireless functionalities (such as a WiFi or Bluetooth functionality) integrated with a satellite radio receiving device that allows the relay of a satellite radio signal to local speakers for subscribers' private use." This language purports to authorize acts that likely are not acts covered by copyright since the wireless performance by Wifi or Bluetooth is for private use and therefore not a public performance. In any event, since the Board is dealing with equitable remuneration,

⁵ For ex., *Satellite Radio Services (Re:Sound: 2011-2018; SOCAN: 2010-2018)*, CB-CDA 2017-064 (reasons) (June 2, 2017), at para 61.

the term “permit” is not appropriate as there is no exclusive right to enforce. The Board therefore replaces the words “...but does permit the use...” in subsection 3(3) with “...but covers the use...”. The Board leaves the reference to wireless private uses for clarification purposes only and underscores that no value attribution to this kind of use can be inferred from this clarification exercise.

[21] Second, as per its *Practice Notice on Filing a Proposed Tariff*⁶, the Board modifies subsection 3(3) by removing circular references to other tariffs. Furthermore, such references are not necessary because the tariff’s scope is in and by itself narrow, specific to the satellite radio use, as well as unequivocal with the “for greater certainty” clause included in subsection 3(3).

[22] Third, as informed by the Parties, the Board acknowledges that the issue of simulcasts made by SiriusXM is the subject of separate, ongoing negotiations. The Board expects that Re:Sound and SiriusXM will continue to provide updates on the status of those negotiations. In the meantime, the approved tariff therefore explicitly excludes simulcasts,⁷ which will be considered in a future proceeding. This also contributes to a clear scope.

[23] Finally, since the parties have an agreement and that they are not asking for interest on royalties owed, the Board does not include a transitional provision with interest factors to account for tariff retroactivity and the differential between the last-approved and the approved rates.

V. DECISION

[24] Having given consideration to the record, and subject to the changes made by the Board, it is satisfied that the royalty rates and related terms and conditions in the JST are fair and equitable.

[25] The Proposed Tariff, with changes based on the JST, is approved under the title *Re:Sound Tariff 4 – Satellite Radio Services (2019-2021)*.

⁶ *Practice Notice on Filing a Proposed Tariff PN 2019-004 rev. 4* (July 24, 2024).

⁷ As defined in the proposed tariff, which definition is included in the approved tariff.