

Copyright Board
Canada



Commission du droit d'auteur
Canada

[CB-CDA 2023-007]

ORDER OF THE BOARD

File: SOCAN Tariff 4.A – Live Performances at Concert Hall, Theatres and Other Places of Entertainment - Popular Music Concerts (2018, 2019, 2020-2021, 2022-2024)

February 9, 2023

I. CONTEXT

[1] SOCAN submitted its representations in response to Notice CB-CDA 2022-049 on February 3, 2022.

[2] Two informal technical meetings later took place with Board personnel and the parties to consider the next steps for the streamlining of the case.

[3] To this end, the Board wishes to: (i) confirm the issues to be considered; (ii) obtain information from the parties.

II. QUESTIONS TO BE CONSIDERED

[4] To facilitate a formal debate, the Board is of the view, on a preliminary basis, that the key issues to be considered in this matter are twofold:

1) THE CONCERTS WITH DISC JOCKEYS ISSUE: TARIFF SCOPE OF APPLICATION

[5] The objector, 4427319 Canada Inc., who organizes *Le Bal en Blanc* (BEB) considers this event to be “a dance event”, not a concert, and subject to *SOCAN Tariff 18 – Recorded Music for Dancing*.

[6] According to BEB, there are concerts with a disc jockey (DJ) but having a DJ as part of the promotional content of the event does not mean it is a concert. The definition of “Performer” (which includes “DJs when they are the featured performer and their identity forms part of

material used to promote the event”) should not have the effect of changing the nature of an event covered under Tariff 18.

[7] BEB is asking for a definition of “concert” to be adopted in such a way that Tariff 4.A does not encroach on Tariff 18 when it is a dance (by attendees) event.

[8] SOCAN maintains that regardless of the music type or the nature of the performer, Tariff 4.A applies as soon as the principal element of the event is a DJ playing popular electronic music. Music is in the foreground, as is the case for all popular music concerts. For SOCAN, Tariff 4.A reflects the value of music when it is in the foreground. When music plays a supporting role, as is the case when it is played for dancing by the attendees, Tariff 4.A does not apply.

Considerations

[9] It is worth mentioning that the decision to approve proposed Tariff 4.A, which included for the first time a definition of performers (containing, in addition, a reference to DJs) dates back to 2017. At the time, as the tariff had no objector, this addition was not debated nor explained in the decision [<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366759/index.do>, at para 21]. It should also be noted that, technically, the definition of performer including the DJ is necessary, but probably not sufficient to qualify an event as a “concert” under Tariff 4.A. Furthermore, this definition would probably not distinguish between an event covered by Tariff 4.A or 18 since “DJs when they are the featured performer and their identity forms part of material used to promote the event” could be the same persons who perform as a featured performer at an event in a venue covered by Tariff 18.

Question #1 for consideration:

What are the objective criteria for differentiating in a practical way a concert from a ball or another event where the attraction is not mainly a musical performance (regardless of the performer)?

2) THE ISSUE OF “EXPERIENTIAL” FESTIVALS: INCOME ALLOCATION

[10] According to *Boots and Hearts* (B&H), the royalties proposed by SOCAN are unfair to “experiential” festivals, as they overestimate the value of the musical performance during these events by failing (i) to consider the cost of non-musical entertainment; or (ii) to exclude revenues from non-musical entertainment from the royalty-base.

[11] *Canadian Live Music Association*, an association representing concert and festival promoters and organizers, indicated unofficially that many of its members organize festivals where the non-musical component contributes significantly to the attractiveness of these events.

[12] While recognizing that music festivals organized by promoters such as B&H include entertainment that is not music-focused, SOCAN maintains that the musical performance is the main attraction and purpose of these events. For SOCAN, the non-musical entertainment is complementary, if not secondary, and is often billed separately from the musical performance.

[13] In this respect, SOCAN points out that the proposed tariff includes a royalty-base, i.e., “gross box office receipts from paying concerts,” which necessarily excludes everything that does not relate to musical performances.

[14] SOCAN also provided information suggesting that (i) the promotion of B&H organized events centres mainly on the musical performance and (ii) the non-musical attractions or services are billed separately.

Considerations

[15] It is possible for “experiential” festivals to propose an “all-inclusive” formula that is comprised of non-musical commodities whose appeal is equivalent in strength to the music concert.

Question #2 for consideration:

If it is determined that non-musical attractions contribute in a relatively significant way to experiential festival revenues and that access to the event is, in fact, billed according to an “all-inclusive” formula, is an allocation of revenues justified and, if so, based on which tariff terms and conditions?

III. INFORMATION

[16] The Board is also asking the identified parties to provide the following information:

THE CANADIAN LIVE MUSIC ASSOCIATION AND BOOTS & HEARTS:

[17] Provide a comprehensive list of activities and other amenities offered during “experiential festivals”, indicating which were included in the admission charge or billed separately. For the amenities included in the admission charge, provide the cost (or an estimate) of each amenity, musical or non-musical, as well as the percentage of the admission charge that the cost represents.

BAL EN BLANC AND SOCAN:

[18] Identify objective criteria that can be put into practice to help distinguish a concert from a dancing event by the attendees (such as a ball), without consideration to the location of the event

or the nature of the performer. Please also indicate how such criteria could be applied, measured or evaluated, either by means of evidence or tariff terms and conditions.

[19] For example, under Subsection 2(1) of *Re:Sound 6.A (2013-2018)*¹, would the following definition of concert clarify the application of the tariff?

“Concert” excludes the performance of music in public for the purpose of dancing.
(« *exclut l'exécution en public de musique à des fins de danse.* »)

CANADIAN LIVE MUSIC ASSOCIATION, BAL EN BLANC AND BOOTS & HEARTS:

[20] Provide a sample of advertising and other promotional content of your activities having taken place between 2017 and 2019 (i.e. prior to the pandemic) and between 2022 and 2023.

ALL PARTIES:

[21] Provide any other information that you deem appropriate at this stage, while ensuring that you are not providing information already filed.

IV. TIMELINE

[22] The Board is requesting the parties to: 1) indicate if they agree or not with the statement of questions to be considered under Section II; 2) answer information requests indicated in Section III, at the latest on **Friday, March 10, 2023**.

[23] Any comment in response to the information provided by another party must be submitted at the latest on **Friday, March 24, 2023**.

[24] At a later point, the Board will ask the parties to submit comments on a draft proceeding schedule to be provided to them.

Lara Taylor
Secretary General

¹ *Re:Sound Tariff 6.A (2013-2018)*, 2020 CDA 004-T, August 1, 2020, <https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/item/483296/index.do>