

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Regime Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21
Copyright Act, subsection 70.15(1)

Members Mr. Stephen J. Callary
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Statement of Royalties to be collected by CMRRA/SODRAC inc. for the reproduction of musical works, in Canada, by commercial radio stations (2005 and 2006)

Statement of Royalties to be collected by SODRAC for the reproduction of musical works, in Canada, by community radio stations (2006-2010)

Reasons for decision

I. CSI TARIFF FOR COMMERCIAL RADIO STATIONS

A. INTRODUCTION

Pursuant to subsection 70.13(1) of the *Copyright Act* (the “*Act*”), CMRRA/SODRAC Inc. (CSI) filed proposed tariffs of royalties to be collected for the reproduction of musical works in Canada by commercial radio stations in 2005 and 2006. The proposed tariffs were published in the *Canada Gazette* on May 1, 2004 and April 30, 2005. Prospective users and their representatives were advised of their right to object to the proposed tariffs.

Since all participants had agreed on the terms and conditions of the tariffs, this matter proceeded without a public hearing. How this agreement came about is described below.

i. The 2005 Tariff Proposal

The first tariff that the Board certified for the reproduction of musical works by commercial radio

stations was for the years 2001 to 2004.¹ CSI's proposal for 2005 is identical to that tariff in all but one respect: transitional provisions are eliminated, as they are no longer needed. Nonetheless, two objections were filed, one from the Canadian Association of Broadcasters (CAB) and another from a consortium composed of the Canadian Broadcasting Corporation, Standard Radio Inc. and Sirius Satellite Radio Inc., (collectively, Sirius Canada).

CAB objected to the 2005 proposal pending the outcome of discussions with CSI. CAB wanted CSI's tariff (authorizing radio stations to copy music) to end at the same time as the *SOCAN/NRCC Commercial Radio Tariff, 2003-2007* (authorizing radio stations to play music). This would have allowed CAB to seek a single consolidated hearing for both tariffs. However, on December 6, 2004, CAB withdrew its objection on the understanding that the tariff would be certified as filed by CSI while restating its intention to pursue consolidation in response to any future CSI commercial radio tariff proposal.

The purpose of Sirius Canada's objection was to ensure that the tariff would not apply to the multi-channel subscription radio service it has since started to operate. On September 15, 2004, CSI confirmed that the proposed tariff was not intended to target such services. On November 1, 2004, CSI agreed to amend its proposal to explicitly state that the tariff would not apply to those services. On February 16, 2005, Sirius Canada withdrew its objection.

ii. The 2006 Tariff Proposal

CSI's proposal for 2006 maintains the same rates as the 2001-2004 tariff but expands the ambit of the tariff to Internet simulcast and website operations. The proposal would allow reproductions for simulcast and would explicitly include income from simulcast in the rate base. The proposal also contains changes consequential to the addition of simulcast, including changes that would allow CSI to obtain information about that activity.

Only CAB objected to the 2006 proposal. On August 31, 2005, having reached an agreement with CSI on the terms of the tariff, CAB withdrew its objection. CSI then filed a revised proposal that reflected the agreement.

After reviewing the various proposals, the Board had concerns about a number of issues, including the ambit of the tariff, the proposed wording and consistency with the wording used in other tariffs. As a result, the Board addressed to CSI a series of questions. On January 25, 2006, after having consulted CAB, CSI provided the Board with its answers. CAB agreed with CSI's answers except for one, which is addressed below.

B. ISSUES RAISED BY CSI'S PROPOSALS

The substance of the tariffs that the Board hereby certifies reflects the revised proposals that CSI has filed. CAB and CSI were consulted on the final wording of the tariff. The rest of these reasons

¹ [Board's decision of March 28, 2003](#) certifying the CSI – Commercial Radio Tariff for the Years 2001 to 2004; 25 C.P.R. (4th) 228.

address some issues that were raised in the Board's questions.

i. Authorized Uses

Paragraph 3(a) of the 2006 certified tariff authorizes the reproduction of a work for the purpose of simulcasting. Section 2 of the tariff defines simulcast as “the simultaneous, unaltered, real-time streaming of the over-the-air broadcast signal of the station, or of another station that is part of the same network as the station, via the Internet or other similar computer network”. This definition makes it clear that, as far as Internet is concerned, the tariff allows reproductions only for the purpose of simulcasting, and only of the station's own signal. Broadcasters should be aware that the tariff does not target other Internet uses such as streaming or downloading previously aired programs, archiving, podcasting, or other such future commercial Internet products.

ii. Changes to the Rate Base

In CSI's 2001-2004 tariff, royalties were calculated on a station's “gross income” as this term is defined in the tariff. The same was true of the commercial radio tariff of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) until 2002. On the other hand, the royalties of the Neighbouring Rights Collective of Canada (NRCC), have always been calculated on a station's “advertising revenues” as this term is defined in the *Regulations Defining “Advertising Revenues”* (SOR/98-447).

In the decision certifying the *SOCAN/NRCC Commercial Radio Tariff, 2003-2007*,² the Board opted to use advertising revenues for SOCAN as well as NRCC, as it saw no reason to impose separate calculations based on rate bases the Board viewed as similar or identical. The Board asked CSI and CAB whether the same could be done in this tariff.

At first, CSI consented to the change, based on the understanding that the rate base would be the same. Later on, CSI developed some doubts about this. As a result, the Board formally asked CSI and CAB to comment on the existence and importance of potential differences between gross income and advertising revenues.

CSI replied that it had never considered calculating royalties by using advertising revenues. As a result, it did not know the potential ramifications of a change in rate base. CSI added that the Board should not come to any conclusions concerning the possible differences between gross income and advertising revenues without consulting NRCC, who has always operated on the basis of advertising revenues, and especially SOCAN, who has used both rate bases.

CAB, who had previously agreed that gross income should be used in the tariff, asked that the Board harmonize the rate base immediately. According to CAB, the only significant difference between gross income and advertising revenues is that production revenues are included in the former but not the latter. According to the Canadian Radio-television and Telecommunications

² [Board's decision of October 14, 2005](#) certifying SOCAN/NRCC Tariff for Commercial Radio for the Years 2003 to 2007; 44 C.P.R. (4th) 40.

Commission (CRTC) data, combined syndication and production revenues represent less than one per cent of the radio industry's total income.

CAB makes a compelling case for ensuring that royalties paid by commercial radio stations to SOCAN, NRCC and CSI eventually are all calculated using the same rate base. The Board continues to see no reason to impose separate calculations. It still believes that using a single rate base will lighten the radio broadcasters' reporting burden.

That said, the Board agrees with CSI that the choice of a rate base, unless agreed upon, is not a matter that should be disposed of without a hearing. This is all the more true given that two other collectives are indirectly concerned and probably hold information that is relevant to measuring the impact of harmonizing the rate bases.

The Board now believes that harmonizing the rate bases could have some impact. CRTC statistics highlight certain revenues which may or may not be considered advertising revenues but which are clearly gross income. On the other hand, it is not possible to measure the extent of that impact without some further evidence.

This matter should therefore be debated in a context where CAB and all affected collectives are allowed to participate. Comparisons between the information provided by specific stations for specific months to the various collectives will help assess what has occurred in practice, as might other financial evidence. This sort of preparation requires both time and money. To undertake now the examination of the issue would unduly postpone the certification of this tariff.

CSI's tariff will therefore continue to use gross income as its rate base for the time being.

On another front, the Board is of the view that the current definition of "gross income" is broad enough to capture revenues derived from simulcast operations, including revenue from banners displayed while a listener accesses a simulcast. The Board agrees that it would be helpful to remove any possible doubt on this issue. Consequently, the definition of "gross income" in the tariff for 2006 includes a declaratory provision to the effect that the rate base includes any income from simulcast.

iii. Multi-Channel Subscription Radio Services

CSI had agreed, at the request of Sirius Canada, to provide expressly that the 2005 tariff does not apply to subscription radio services and that the 2006 tariff does not apply to multi-channel subscription radio services. CAB maintains that such a provision serves no purpose. The Board agrees. Indeed, CSI has proposed a separate tariff for the years 2006 to 2009 that specifically targets those services.

iv. Qualifying as a Low-Use Station

The certified tariffs provide that a station that uses works in CSI's repertoire for less than 20 per cent of its total broadcast time qualifies as a low-use station and as such, pays less royalties.

The *SOCAN/NRCC Commercial Radio Tariff, 2003-2007* provides that a station pays a lower rate

to NRCC based on its use of SOCAN's repertoire rather than NRCC's. This was done by the Board to lighten the reporting burden of radio broadcasters. Eventually, the same likely should be done with the CSI tariff. The CSI and SOCAN repertoires consist of the same musical works, while NRCC's repertoire consists of sound recordings. Consequently, with respect to CSI, the reasons for favouring the use of the SOCAN repertoire are even more compelling.

v. Reporting on Simulcast

Paragraph 7(c) of the 2006 tariff sets out the information a station must provide with respect to its simulcast activities. Even though the Board does not know how that information might help to improve the distribution of royalties to rights holders, it is clear that receiving information concerning the existence and extent of simulcasts will help CSI, and eventually the Board, to better understand the evolution of this part of the radio market. The fact that the information is to be supplied only when it is available lessens the risk that the requirement might create difficulties for some (probably smaller) stations.

vi. Information on Repertoire Use

Section 8 of the 2006 tariff is broader than section 8 of the 2005 tariff. This reflects in part the addition of simulcast to the list of authorized uses. It also recognizes the growing ability of radio stations to provide more precise information, in electronic form, about their use of music. This explains why the 2006 tariff makes express reference to Universal Product Code (UPC) and International Standard Recording Code (ISRC), which are to be provided if the station's computerized logging system includes them.

Section 8 of the 2006 tariff is worded differently than its equivalent in the *SOCAN/NRCC Commercial Radio Tariff, 2003-2007*. As soon as the 2006 tariff ends, the Board will likely seek to achieve full standardization of reporting requirements. The Board is committed to this simplification, even if it means that collective societies may be required to share information amongst themselves. The Board also intends to standardize other administrative provisions dealing with confidentiality, audits and notices.

vii. Addresses for Notices

Sections 13 to 15, which specify where and how notices and payments can be delivered, have been rewritten to make them clearer, as well as to allow for, and in one case mandate, the use of electronic mail. This wording will likely be imported into other tariffs.

viii. Transitional Provision

Pursuant to section 70.18 of the *Act*, the 2001-2004 CSI tariff applied on an interim basis until the day of this decision. To date, only the reporting requirements set out in that tariff applied to radio stations. The 2006 tariff adds new reporting requirements. Without a transitional provision, radio stations that have complied with the 2001-2004 tariff until now would find themselves having defaulted on their reporting obligations for 2006. Section 16 of the 2006 tariff ensures that this does not occur.

ix. Rates and Amounts Generated by the Tariffs

The rates set in the tariffs are the same as before. Stations where works from the repertoire account for less than 20 per cent of their broadcasting time and stations that neither make nor keep hard drive copies will pay 0.12 per cent on the first \$625,000 of gross annual income, 0.23 per cent on the second \$625,000 and 0.35 per cent on all other income. The rates applicable to other stations will be 0.27 per cent, 0.53 per cent and 0.8 per cent respectively. This is expected to generate royalties of approximately \$7.2 million per annum.

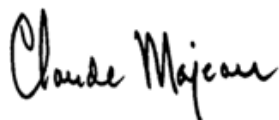
II. SODRAC TARIFF 3.B FOR COMMUNITY RADIO STATIONS

Pursuant to subsection 70.13(1) of the *Copyright Act*, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada and SODRAC 2003 Inc. (together, SODRAC) filed a proposed tariff of royalties to be collected for the reproduction of musical works in Canada by community radio stations licensed to operate in a language other than English in 2006 to 2010. The proposed tariff was published in the *Canada Gazette* on May 14, 2005. Prospective users and their representatives were advised of their right to object to the proposed tariffs; however, there were no objections.

The first SODRAC tariff dealing with this group of users was certified for the years 2001 to 2005. It reflected the terms of an agreement reached between SODRAC and two associations of users, the *Association des radiodiffuseurs communautaires du Québec* and the *Alliance des radios communautaires du Canada*. The proposed tariff is identical to the preceding tariff in all but two respects. First, a transitional provision, which is no longer relevant, has been eliminated. Second, the tariff allows notices to be sent using email as well as other means.

The Board considered harmonizing the wording of the SODRAC community radio tariff with the wording of the CSI commercial radio tariff that is certified in this decision. SODRAC expressed the view that, given the very modest amounts involved,³ it would not be cost-efficient to reopen discussions with targeted users at this stage. The Board agrees.

The tariff is therefore certified as filed. In due course, the Board will consult with SODRAC and users to develop a text that is harmonized with CSI's commercial radio tariff. This will give SODRAC the opportunity to file as its next proposed tariff, a text that is acceptable to SODRAC, to users and to the Board.



³ Currently, SODRAC has issued 48 licences, generating yearly royalties of \$12,000. Potentially 64 stations could be licensed under this tariff, for total generating yearly royalties of \$16,000.

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Secretary General