Copyright Board Canada

Commission du droit d'auteur Canada

Date	2006-04-21
Citation	Files: Public Performance of Musical Works 1996 to 2006
Regime	Collective Administration of Performing Rights and of Communications Rights *Copyright Act*, subsection 68(3)
Members	Mr. Justice William J. Vancise Mrs. Francine Bertrand-Venne Mrs. Sylvie Charron
Proposed Tariffs Considered	Tariff No. 19 – Fitness Activities and Dance Instructions (1996-2006)

Statement of Royalties to be collected by socan for the public performance, in canada, of musical or dramatico-musical works

Reasons for decision

I. INTRODUCTION

Subsection 67.1(1) of the *Copyright Act* (the "*Act*") requires that the Society of Composers, Authors and Music Publishers of Canada (SOCAN) file with the Board any proposed tariffs of royalties that it plans to collect for the public performance or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works in its repertoire. These proposals are published in the *Canada Gazette*. Potential users or their representatives may object to the tariffs within the prescribed deadlines.

For the years 1996 to 2006, the Board received proposed tariffs targeting the use of SOCAN's repertoire, in conjunction with physical exercises and dance instruction (Tariff 19). The proposed tariffs for the years 1996 to 2001 provide for an annual fee per room of $2.14 multiplied by the average number of participants each week in the room, with a minimum annual fee of $64. Those rates are the same as those certified by the Board for 1995. SOCAN then proposed rates of $2.31 and $2.42, subject to minimum fees of $69.22 and $72.56, for 2002-2003 and 2004-2006 respectively. The increases in rates reflect the adjustments proposed by SOCAN to account for inflation. The proposed tariffs also provide for the addition of an explicit reference to dance instruction.

II. TRACKING PROGRESS OF THE FILE

According to the information that SOCAN regularly provides to the Board, 3,114 licences were issued in 2004, pursuant to Tariff 19, which generated $527,263 in royalties – for an average cost of approximately $170 per licence. This information does not specify the number of licences issued at the minimum rate or the amount of royalties generated by these licences. However, they do indicate that 1,566 licences, which is more than half, were issued for activities involving fewer than 60 participants per week. From a financial standpoint, the tariff under review is thus relatively modest.

That being said, the process leading to the certification of the proposed tariffs under review was long. SOCAN tried all means possible to help in the process, but the Board was eventually called on, after long delays and in the absence of significant evidence, to certify a tariff that could still raise some serious questions. For these reasons, it would be helpful to provide further details on how the matter unfolded.

Various individuals and organizations objected to one or more of the proposed tariffs: Rhapsody Rounds, Roundalab, the Ontario Square and Round Dance Federation, Mr. John H. Sellers, the Canadian Square and Round Dance Society, the Canadian Dance Teachers' Association (CDTA) and its provincial branches in British Columbia, Alberta, Quebec and Atlantic Canada, the British Association of Teachers of Dancing-Maritimes Provinces (BATD), Dannscon and the Council of the Township of Middlesex Centre. These individuals and associations are involved in all forms of dance: round and square dancing, classical, jazz, tap and ballroom.

SOCAN entered into negotiations with all of the aforementioned individuals and associations. In 1998, after agreements were reached and objections were withdrawn, the only associations still opposed were the CDTA and the BATD.

In April 1998, SOCAN asked the Board to settle the matter. In November 1998, the Board asked the objectors to make written submissions stating their point of view. Only CDTA's provincial branch in British Columbia submitted its opinion, while the others requested that the deadline be pushed back so that a case could be prepared and negotiations could be held with SOCAN. Those negotiations led to some agreements being concluded, but the matter as a whole was not resolved.

In January 2003, SOCAN indicated that negotiations had failed and asked that a schedule be established leading to the certification of the tariff. The request was sent out to the opponents. The BATD could not be reached. The CDTA claimed that the proposed schedule was unrealistic. Not long after a new written examination process was put into motion, both objectors informed the Board that they did not plan to proceed any further.

The Board thus found itself with a proposed tariff that no one appeared to object to, but for which it seemed difficult, if not impossible, to obtain information. The objectors had raised several issues that were apparently relevant, but the Board could not rule on them without additional evidence. Therefore, it seemed necessary for the Board to obtain information from the only source it had: the objectors who had most recently withdrawn from the file.

In July 2003, the Board offered the objectors the opportunity to participate in a very streamlined process, while at the same time warning them that if they did not reply, the Board would have to proceed based on the record as it stood. The objectors never replied to that letter.

III. ANALYSIS

The Board does not have enough reliable evidence to enable it to make any kind of change to the tariff under review. The objectors did raise some interesting questions, but they have remained unanswered.

For example, while it is likely that all music used during aerobics classes is from SOCAN's repertoire, it would be difficult to draw the same conclusion for dance instruction. It is also probable that some types of instruction (classical dance) are more likely than others (jazz ballet, tap dance) to use the public domain. It would therefore be necessary to know more, for example, about musical works that are incorporated into sound recordings used by schools[1] or about the repertoire performed by rehearsal pianists. There is also the possibility that music specially designed for teaching dance is available on the Internet and that SOCAN would not hold any rights over it.[2]

In the same way, it is possible that music is used less in certain kinds of dance instruction (advanced, technical, theory) than in others (Saturday classes). That hypothesis, even if proven, cannot be taken into consideration if nothing is known of the market proportion represented by those types of instruction.

The time has come to put an end to a process that has dragged on too long. Despite the uncertainties that remain, a tariff must be certified and this matter must be resolved. As interesting as they are, the issues raised might only have a marginal impact, given that the amounts involved are small. It will still be possible to revisit those issues within another context. For now, the important thing is that the tariff under review be certified for the years 1996 to 2006.

Before this matter can be concluded, four other issues must be addressed.

IV. WORDING OF THE TARIFF

The wording of the tariff was changed to reflect the language used in the Board's most recent tariffs.[3]

V. EXPLICIT REFERENCE TO DANCE INSTRUCTION

Until 1988, tariffs of PROCAN and CAPAC (SOCAN's predecessors) dealt with the matter differently. Both tariffs relating to physical exercises also targeted dance studios. While the

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[1] Some opponents claimed that some musical works are created specifically for use during dance instruction.
[2] This claim by the objectors was impossible to verify, even after a fairly extensive research on the Internet.
[3] See, among others, Tariffs 3.A and 12.A, which the Board certified on March 20, 2004.

PROCAN tariff explicitly mentioned dance studios, the CAPAC tariff did not. SOCAN subsequently adopted CAPAC's approach with the intention of continuing to target dance studios by including in its tariff the expression "similar activities"; that led to some uncertainty as to the actual ambit of the tariff. Some users use the fact that this reference was removed to try to avoid paying royalties. For its part, SOCAN has always claimed that the wording of the tariff implicitly refers to dance instruction. Reinstating that reference settles the issue for the period under review.

VI. FACTORING IN INFLATION

In letters of September 29, 2004, and March 20, 2006 addressed to the Board, SOCAN abandoned its requests for adjustments to account for inflation and proposed that the Board certify the same rates for the period from 1996 to 2006 that it certified in 1995. So, for 1996 to 2006, the Board certifies a rate of $2.14, subject to a minimum fee of $64.

VII. STATUS OF AGREEMENTS

In this matter, as in several others, the conclusion of agreements has led to the withdrawal of several objections. The purpose and legal status of agreements that SOCAN enters into with users, whether or not they are subject to a tariff, continue to raise problematic issues.

The *Act* deals with agreements differently depending on whether or not they involve the general regime or the SOCAN regime. In the former, agreements take precedence over tariffs,[4] while in the latter, the issue is not addressed.

From a legal viewpoint, the very notion of agreement seems inconsistent with the scheme of the SOCAN regime. The *Act* does not appear to contemplate the existence of a parallel market – one that is often not very transparent – for music performing rights. Agreements also raise problems of a practical nature, especially when they appear to run against the tariff certified by the Board. In the case under review, the certified tariff centres on a room; however, with regard to round and square dancing, SOCAN has agreed to issue licences to an individual or a couple for all events called by that individual or couple, regardless of the number of rooms. Those same agreements provide for a fixed price equal to the minimum fee, regardless of the number of participants; the tariff rate, established so that the amount of the royalty fluctuates depending on the significance of the activity, loses its meaning.

Agreements usually target restricted sectors of all the markets targeted under a tariff, creating a fragmentation in regimes. Is that fragmentation a bad thing or, on the contrary, a sign of market adaptation? Is there a need to ensure that users with practices similar to those of individuals who have entered into an agreement have access to the same conditions and, if so, how can this be achieved?

Practically speaking, such agreements are useful; they make it possible to set terms and

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[4] *Copyright Act*, s. 70.191.

conditions that correspond to actual uses of the repertoire. They simplify regime administration and help avoid debates that are often long and costly. When it comes time to certify a tariff, they are often taken into account; if no objections remain, those agreements often become the only evidence the Board has.

For these reasons, the Board continues to wonder what place private agreements hold under the regime that SOCAN is subject to.

VIII. CONCLUSION

The Board certifies SOCAN's Tariff 19 (Physical Exercises and Dance Instruction) for the years 1996 to 2006 based on the terms and conditions previously described. The Board thanks SOCAN for its co-operation and patience throughout the course of this matter.

Claude Majeau
Secretary General