

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Regime Collective Administration of Performing Rights and of Communications Rights
Copyright Act, subsection 68(3)

Members Mr. Stephen J. Callary
Mrs. Francine Bertrand-Venne
Mrs. Sylvie Charron

Proposed Tariffs Considered 15.A – Background Music (2005)

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

[1] Pursuant to subsection 67.1(1) of the *Copyright Act* (the “*Act*”), the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed with the Board, on March 31, 2004, proposed Tariff 15.A, allowing in 2005 the performance of background music, by means of recorded music, in establishments not covered by Tariff 16. The proposed tariff, published in the *Canada Gazette* of May 1, 2004, gave notice to prospective users or their representatives of their right to file objections.

[2] A number of objectors made their intentions known within the prescribed time frame: a group comprising the Canadian Broadcasting Corporation, Sirius Satellite Radio Inc. and Standard Radio Inc. (collectively “Sirius”), as well as A&B Sound Ltd., Best Buy Canada Ltd., Music World Ltd. and the Retail Music Association of Canada (RMAC). The latter, who represents retailers, wholesalers and distributors of recorded music in Canada, was acting on behalf of such interests as HMV Canada Inc., *Groupe Archambault inc.*, CD Plus, CD Warehouse Inc., Handleman Company of Canada and Sunrise Records.

[3] For his part, Mr. John Bowker of She Said Boom! Records and Books commented on SOCAN's proposed tariff in letters dated September 28 and December 23, 2004. He also took part in the hearing as a witness for RMAC, although he is not a member of the Association.

Best Buy Canada Ltd. withdrew its objection on March 31, 2005. Music World Ltd., which did not submit any specific evidence, said it supported RMAC. On August 5, 2005, having failed to submit their statement of case, Sirius and A&B Sound Ltd. were deemed to have abandoned their objection. Thus, only RMAC took part in the hearing, which was held on November 1, 2005.

[4] This decision deals essentially with the request of record stores that they be subject to a lower tariff for the performance of recorded music in their stores. The Board asked RMAC to proceed first, since it was challenging a tariff that had already existed for some time, that had just been certified and regarding which SOCAN was not proposing any changes.

[5] The present decision deals only with the tariff for 2005. Users who had not objected to the tariff for 2005 did so for 2006, and it would have been too complicated to combine the cases, given the advanced state of the preparation of the file for 2005.

II. TARIFF HISTORY

[6] Tariffs specifically covering background music have existed since the early 1940s, when the Copyright Appeal Board approved two tariffs for the Canadian Performing Right Society (CPRS). The first tariff covered use of background music by industrial establishments. The rates were set at 10 per cent of the subscription fees for the service when music was provided by a supplier. When the establishment used its own local device, the semi-annual rates were \$25 for the first 500 employees, and then \$5 for each additional group of 100 employees. The second tariff covered the use, by non-industrial establishments, of the services of a background music supplier. The certified rate was 10 per cent of the subscription fees.

[7] In 1959, the Appeal Board certified two new tariffs for BMI Canada Ltd. (BMI) concerning the use of background music. One covered "industrial music", i.e. music broadcast and heard on the premises of an office, a bank, a factory or a garage via a local device. The rates varied according to the number of employees and the number of hours during which music was broadcast, ranging from \$10 a year when there were between 1 and 150 employees and fewer than 20 hours of music broadcast per week, to \$60 a year when there were over 501 employees and over 20 hours of music broadcast per week. The other tariff covered "commercial music", for which the rate was \$2 a month for no more than two speakers.

[8] The tariffs' structure and rates varied significantly over time. Since 1991, following the creation of SOCAN, the Board approved two tariffs. Tariff 16 covers the performance in public or communication to the public by telecommunication of musical works in an establishment using the services of a background music supplier. Tariff 15.A targets the public performance of background music in an establishment not covered by Tariff 16. This is the case, for example, of establishments that use their own musical collection. The rate for this tariff in 1991 was \$1.13

per square metre (10.5¢ per square foot), subject to a minimum fee of \$86.65. The rate gradually increased, reaching \$1.23 per square metre (11.46¢ per square foot) in 2004, subject to a minimum fee of \$94.51. Establishments operating less than six months per year pay half the above rate, but remain subject to the minimum fee.

[9] The tariff applies to a variety of establishments whose size and nature differ greatly, including record stores. In fact, SOCAN previously concluded agreements with RMAC for the 2001-2003 period and with HMV Canada Inc. for the 2001-2005 period. These agreements, similar in nature, stipulate that the parties will abide by the terms and conditions of Tariff 15.A. In recognition of the savings made possible under this agreement with respect to royalties collection, and because SOCAN says it wants to use this agreement as a model in its dealings with other retailers that use background music, it has agreed to remit between a fifth and a quarter of the royalties that they will have paid. The agreement with HMV also states that SOCAN will absorb any eventual increase in tariffs that the Board might approve during the life of the agreement.

III. PARTIES' POSITION AND EVIDENCE

A. RMAC

[10] RMAC initially argued that the public performance of music in the premises of a record store constitutes fair dealing for the purpose of private study, criticism or review on the part of their clientele, pursuant to sections 29 and 29.1 of the *Act*. RMAC withdrew this argument.

[11] RMAC also claimed that the performance of background music in its members' stores is aimed at stimulating sales of sound recordings. Music authors, composers and publishers thus benefit from increased compensation from the remuneration linked to the reproduction rights of musical works. RMAC contended that the Board must take account of this increased benefit for SOCAN members and reduce the amount of royalties accordingly. Later on, RMAC filed an alternative tariff proposal whereby establishments primarily engaged in the sale of recorded music would pay half of the royalty otherwise applicable under the certified tariff.

[12] RMAC justified this 50 per cent discount as follows. In a record store, background music is used to both entertain customers and promote the sale of recorded music. This promotional value associated with the sale of recorded music must be deducted from the background music tariff.

[13] As a starting point, RMAC used SOCAN's estimate that half of the total square footage of stores engaged primarily in the sale of recorded music is dedicated to CDs. Next, it posited that in this space dedicated to CDs, background music serves above all to promote CD sales, and that this promotional value corresponds to 75 per cent of the total value of the background music. In the space that is not set aside for CDs, RMAC posited that the promotional value corresponds to only 25 per cent of the total value of the background music. The average reduction to be made in the background music tariff for the entire store is therefore 50 per cent.

[14] To support its arguments, RMAC filed four main exhibits. The first is a survey carried out primarily with clients of HMV's website. The second is a report prepared by Mr. Craig Parks, a lawyer specializing in the field of music; the report deals with the promotional value of background music and examines the discounts contained in other SOCAN tariffs. The third is a series of layout plans for certain HMV stores, illustrating – among other things – the relative importance of CD and DVD displays. The fourth consists of certain excerpts from an annual survey, on the reasons for the respondents' most recent CD purchase.

[15] The witnesses that RMAC offered sought above all to confirm the important promotional role played by music heard in record stores. In particular, Mr. Graham Henderson, President of the Canadian Recording Industry Association (CRIA), spoke of the symbiotic relationship between the sound recording industry and record stores, a relationship that is taking on added importance in these difficult times for the industry. The efforts and budgets that record stores seem to be putting in hiring specialized personnel and selecting specific pieces of background music speak, in fact, to the importance of this relationship.

[16] Mr. Bowker, who owns two independent record stores specializing in the sale of alternative music, underscored the important role played by background music in his stores. Since he deals in alternative music, the in-store music he plays is often the only opportunity for customers to hear (and purchase) these CDs. Here again, the music's promotional role was highlighted.

[17] RMAC President and CEO, Mr. Humphrey Kadaner, and its Secretary and Treasurer, Mr. Roger Whiteman, presented the results of the survey on the role of background music in HMV stores. The survey was conducted with a portion of HMV's clientele, consisting mainly of customers who had previously purchased HMV products via the company's website. Some 3,000 responses were obtained, or 2.5 per cent of the total sample of 120,000 names. The survey suggests that 66.2 per cent of the respondents are more aware of the background music played in record stores than that played in other types of retail stores. Moreover, 36.4 per cent of the respondents feel that the music played in record stores is not background music, and 38.2 per cent of them acknowledge that the music played in-store may incite them to make a music purchase. According to RMAC, these findings show that the music played in their stores has more than a background music role.

[18] Mr. Stephen Simon of Sony BMG Music presented partial results from an annual survey commissioned by CRIA. These indicated that in the case of their most recent CD purchase, 7 per cent of the respondents first heard the CD while rummaging through the store.

[19] Lastly, during the hearing, counsel for RMAC asked the Board if she could submit, in writing and on a personal basis, her arguments as to the Board's authority to set a *nil* tariff. The Board allowed her to do so, while granting SOCAN a right of reply. However, this position was not adopted by RMAC, and since – in any event – the Board does not plan to follow that road, there is no need to discuss the matter in this decision.

B. SOCAN

[20] SOCAN proposed the same tariff for 2005 as the one that had been approved for 2004. In particular, it requested that it continue to apply, as in the past, to record stores.

[21] SOCAN disputed RMAC's interpretation that the performance of background music in record stores constitutes fair dealing. Since RMAC withdrew this argument, there is no need to review SOCAN's arguments in this respect.

[22] Neither does SOCAN believe that record stores should enjoy a discount for the background music that they use. It argues that the correlation between listening to a specific musical work in-store and the sales of CDs incorporating that same work is generally fairly weak. Moreover, if that correlation does exist, it should not give rise to a discount. CD sales generate remuneration in connection with so-called mechanical rights, which are a component of reproduction rights. The SOCAN tariff targets performing rights. These rights are protected separately and independently; a variation in the royalties paid in connection with one type of rights should not generate a variation in the royalties paid in connection with the other type of rights.

[23] SOCAN also points out that record stores sell other products; in fact, recorded music takes up on average only half of a store's total surface area. Background music is heard by all the customers in the store, not just those purchasing recorded music.

[24] In support of its arguments, SOCAN presented a panel composed of Ms. France Lafleur, Mr. Paul Spurgeon and Mr. Laurence Godfrey, all from SOCAN. They outlined the tariff application details and the reasons why the tariff should apply without change to record stores.

IV. ANALYSIS

[25] The Board rejects RMAC's arguments, for three reasons. First, the evidence submitted is insufficient to establish that the use made by record stores of SOCAN's repertoire contributes significantly to the sale of sound recordings of these same works. Second, and more fundamentally, the Board does not believe that the promotional value associated with the use of musical works should result in a discount. Third, given the relatively modest amounts that record stores are required to pay, it is difficult to believe that these payments could create worries concerning this group of users' ability to pay.

[26] The body of evidence intended to support the promotional value of record stores' use of music does not include information on the reliability of that evidence. Testimony was anecdotal. There is no reason to conclude that the HMV survey was reliable: in fact, the Board's knowledge of statistical methods leads it to doubt the reliability of the results of such a survey, for which the sample was self-selected. As for the annual survey commissioned by CRIA, nothing was said about its context, objectives or methodology.

[27] It could be that in a record store, background music plays a dual role. As in any other retail store, music serves to create an atmosphere conducive to buying. In a record store, background music could also contribute directly to promoting the sales of specific recordings. Unlike RMAC, the Board does not believe that this contribution should lead to a discount. This second role in no way diminishes the importance of the first. The tariff under consideration provides remuneration for the public performance right. For right holders, CD sales generate remuneration for the reproduction right. Both rights being distinct and independent, so too must their remuneration. The Board has always refused to discount a tariff to take into account the contribution of a group of users to the music industry. Again, in its recent decision dealing with SOCAN-NRCC commercial radio tariff, it wrote:

Also, for reasons that have been stated time and again, the Board refuses to take into consideration the fact that commercial radio makes substantial contributions to the Canadian music industry or that it provides ongoing promotional support to Canadian artists in setting the tariff.¹

[28] The same reasoning applies here. The Board is convinced that record stores must pay at least the same rate for their background music as that paid by other types of retail stores. The use is the same, and so too is the value.

[29] Mr. Parks maintained that the tariff under consideration should take account of the economic benefits that record stores' use of background music generates for SOCAN members, on the grounds – among others – that in the past the Board has granted discounts for all sorts of reasons. Mr. Parks was unable, however, to identify a single example of a discount that the Board might have granted for these economic benefits, be it with regard to the public performance or the reproduction of music. On the contrary, a closer analysis of the Board's decisions shows that the discounts it approves generally take into account either a lower use of music or a lower value of music.

[30] There remains the question of ability to pay. According to SOCAN's data, in 2004 the tariff generated, for all the establishments to which it applies, a total of \$1.26 million. SOCAN estimates that there are 272 stores whose chief activity consists in selling music, and that the royalties paid by these stores total nearly \$80,000. Thus, the average annual royalty per store comes to about \$290. The larger stores pay just over \$2,000, while the smaller ones, whose premises are also smaller, pay less, and some pay only the minimum fee, i.e. an annual amount below \$100. The

¹ [Board's decision of October 14, 2005](#) dealing with SOCAN-NRCC Tariff 1.A (Commercial Radio Stations) for 2003-2007, page 19.

See also the [Board's decision of August 13, 1999](#) dealing with NRCC's tariff for commercial radio stations for 1998-2002, page 29, and the [Board's decision of March 28, 2003](#) dealing with the tariff of CMRRA/SODRAC Inc. (CSI) for commercial radio stations for 2001-2004, page 14.

Board does not believe that payment of these royalties by record stores has a serious impact on their bottom line.

V. CONCLUSION

[31] The Board hereby certifies for the year 2005 the same tariff that it approved for 2004, i.e. an annual rate of \$1.23 per square metre (or 11.46¢ per square foot), subject to an annual minimum fee of \$94.51. This rate applies to all establishments that use background music and that are not covered by Tariff 16, including record stores.

[32] Lastly, the Board notes that Messrs. Bleeker and Bowker, both record store owners, stated during the hearing that they do not pay royalties under this tariff, at least not at this time, or that they have yet to make a decision regarding the future. HMV President, Mr. Kadaner, also said that he had not yet decided as to payment of the tariff beyond the end of the agreement between HMV and SOCAN. The Board reminds users that payment of royalties to SOCAN for specific uses of music is not a voluntary matter; rather, it is mandatory under the *Act*.

A handwritten signature in black ink that reads "Claude Majeau". The signature is written in a cursive, flowing style.

Claude Majeau
Secretary General