

Copyright Board
Canada



Commission du droit d'auteur
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Regime Collective Administration of Performing Rights and of Communications Rights
Copyright Act, subsection 68(3)

Members Mr. Stephen J. Callary
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Proposed Tariffs Considered 23 – Hotel and Motel In-Room Services (2001-2006)

Statement of Royalties to be collected by SOCAN for the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works

Reasons for decision

I. INTRODUCTION

[1] Today, hotel guests can access in their room a variety of audio-visual and musical content ranging from first-run movies to recent CDs as well as the ubiquitous adult entertainment. That content uses music that is protected by copyright. Those who own the music now want a share of what hotel and motel (hereafter “lodging establishments”) guests pay to access the content. Those who offer the content agree that they should pay for the music. This decision sets the tariff that will govern the use of music in that market.

[2] These reasons deal with Tariff 23 of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the years 1999 to 2006. Proposed statements of royalties were published each year in the *Canada Gazette*, as were notices outlining the right to object pursuant to subsection 67.1(5) of the *Copyright Act* (the “Act”).

[3] Many objections to the tariff proposals were filed for each of the years 1999 to 2005. The Canadian Cable Telecommunications Association (CCTA), Bell ExpressVu (Bell), Star Choice Communications (Star Choice), the Canadian Restaurant and Foodservices Association (CRFA)

and the Hotel Association of Canada (HAC) based their objection on various grounds. There were no objectors to the 2006 tariff proposal and the participants asked that it be certified in the present decision.

[4] This is a new tariff that targets the use of music in lodging establishments, as part of in room entertainment services. These services are primarily pay-per-view movies and other television programming similar to the non-broadcast pay and specialty services covered by SOCAN Tariff 17 (hereafter “Tariff 17”), as well as pay music services somewhat similar to the services covered by the SOCAN-NRCC Pay Audio Services Tariff (hereafter “Pay Audio Services Tariff”). The provision of in-room Internet access and video checkout are not within the scope of this tariff.

[5] On Command Canada Inc. (OCC), LodgeNet Entertainment (Canada) Corporation and GalaVu Entertainment Network Inc. (collectively, the “Services”) were granted intervenor status with full participatory rights. The Services provide lodging establishments with the in-room services targeted by Tariff 23.

[6] Prior to the hearing, CCTA, Bell and Star Choice withdrew their objections and indicated to the Board that they would not file evidence at the hearing. For their part, CRFA and HAC stated that they would not be active participants. All the objectors having withdrawn, only the Services and SOCAN were left as participants. Since GalaVu does not include the musical services in its entertainment package, it did not attend the hearing. Instant Media Network (IMN), the subsidiary of OCC that packages and offers the music services, did.

[7] The hearing took place on June 13, 2005. Part of the hearing was held in a guest room at the Ottawa hotel Novotel Les Suites, where the Board observed first-hand the operation of the music services at issue.

II. NATURE OF THE SERVICES

[8] The Services currently provide three types of on-demand entertainment services to Canadian lodging establishments.

[9] The oldest type is the analog fixed schedule system. This is a tape-based system that provides in-room entertainment on a rolling schedule or, in some upgraded variations, on-demand. Content is delivered on videocassettes via air or ground transportation and updated monthly by hand. These systems have largely been phased out of the Canadian market.

[10] The other two types offer more movie choices. One is the analog on-demand system. This is also a tape-based system consisting of a microprocessor that controls the television in each room, a hand-held remote control, and a central “head-end” video rack and a computer system, both of which are located elsewhere in the lodging establishment. Programming signals are transmitted

from videocassette players located within the head-end rack to individual rooms. This system delivers movies and games to the guest rooms. Content is delivered via air or ground transportation and updated monthly by hand. This system is also being phased out.

[11] The other is the digital system. It consists of a multimedia platform incorporating digital content storage and playback. It is capable of providing on-screen interactive multimedia menus, full length feature films and music videos, high-speed television-based Internet service, Internet based games and digital music. Audio-visual and musical content is delivered to guest rooms via a digital file server. Content is updated monthly by satellite. This is the only system that delivers the musical services at issue in these proceedings.

[12] OCC and LodgeNet act as carriers for the audio-visual services described above, and for the IMN pay music service. They operate the delivery system in the establishment and deliver IMN's musical content to the individual guest rooms. For this, IMN pays a carriage fee.

[13] Hotels and motels receive access fees from their guests; they hold them in trust for remittance to the Services, in exchange for a commission. Therefore IMN receives only a portion of the retail fee charged by the establishment, after paying a commission to the establishment and deducting carriage fees charged by OCC and LodgeNet.

III. POSITIONS OF THE PARTIES

A. SOCAN

[14] Before 2003, SOCAN's proposed tariffs targeted only audio-visual entertainment services and sought to emulate SOCAN Tariff 17. For the years 1999 and 2000, SOCAN proposed to collect 2.1 per cent of the amount paid by guests for the services, with a minimum fee of \$1 per month per room, payable by the lodging establishment.

[15] For 2001, the proposed rate remained the same, but the reference to the lodging establishment as payor was removed. This was done after the hotel industry suggested that the Services should be paying the tariff. According to SOCAN, removing any reference to a payor allows the Board to fully canvass and decide the issue. The same proposal was filed for 2002.

[16] The 2003 proposed tariff added a fee for musical services. It stated that the fee payable would be 2.1 per cent of the amount paid by guests for audio-visual services, and 12.35 per cent of the amount payable by the guests for musical services, again with a minimum of \$1 per month per room. The 2004 proposed tariff was essentially the same, except for the rate for musical services which was increased to 16.47 per cent.

[17] In a letter to the Board on November 10, 2004, SOCAN acknowledged that the audio-visual portion of the 2004 tariff should reflect the rate of 1.9 per cent the Board had recently certified for Tariff 17.

[18] The 2005 and 2006 proposed tariffs reverted to the 2003 rates of 2.1 per cent and 12.35 per cent, but with a minimum fee of \$1.05 per month per room. The rate base remained the amount paid by guests for the services throughout.

[19] On April 29, 2005, SOCAN filed with its statement of case a further tariff proposal.¹ The proposal included four major changes. First, the rate base became the amount paid by the lodging establishment to the provider of the service, instead of the amount paid by guests to use the service. Second, the rate for audio-visual services was lowered to 1.9 per cent. Third, the minimum fee was removed. Fourth, a separate rate was provided for adult sex films, which tend to contain less music for which a SOCAN licence is required.

[20] On the musical portion of the tariff, SOCAN submits that the Board should base its valuation on the Pay Audio Services Tariff. It claims that the programming offered by IMN is virtually identical to pay audio services. The same rights are in issue, thus the rates should be similar. The appropriate rate base should be the amount paid by the lodging establishment to the provider of its in-room musical audio services, in this case, according to SOCAN, OCC and LodgeNet. This is what SOCAN calls the retail base, net of hotel commissions.

B. JOINT POSITION

[21] Shortly before the start of the hearing, SOCAN and the Services advised the Board that they had come to an agreement on the audio-visual part of the tariff. The tariff proposals for the years 1999 and 2000 are withdrawn. The parties agreed on rates of 1.05 per cent in 2001, 1.10 per cent in 2002, 1.15 per cent in 2003, 1.20 per cent in 2004 and 1.25 per cent in 2005 and 2006, of the fees paid by the guests to view audio-visual content other than mature audience films, and 0.2625 per cent in 2001, 0.275 per cent in 2002, 0.2875 per cent in 2003, 0.3 per cent in 2004 and 0.3125 per cent in the years 2005 and 2006, of the fees paid by the guests to view mature audience films containing any music in the SOCAN repertoire.

[22] The participants failed to come to an agreement on the musical portion of the tariff. Participants do agree that the tariff should also cover the year 2006, for which there were no objectors.

C. OBJECTORS

i. Canadian Cable Telecommunications Association (CCTA)

[23] The cable operators claim that when cable services are offered to a lodging establishment for distribution to guests, the cable operator is responsible for paying under Tariff 17, and

¹ Exhibit SOCAN-3.

nothing else. SOCAN appears to agree with this position. The problem that remains is finding the proper tariff wording to satisfy CCTA that the tariffs are mutually exclusive.

ii. Hotel Association of Canada (HAC)

[24] HAC submits that only the Services are responsible for the communication of the programming they offer and as such should be paying the tariff. The lodging establishment is only an intermediary between the suppliers and the guests.

iii. The Services

[25] OCC and its subsidiary, IMN, object to both the rate and the royalty base of the musical portion of the proposed tariff. They submit that the rate base should be the revenues of the service provider, and not what the lodging establishment remits to OCC. The establishments collect fees from the IMN service as an agent, in exchange for a commission. The role of OCC is likened to that of a broadcast distribution undertaking (BDU) in Tariff 17, that is, an independent carrier; thus the claim that the amount paid by OCC to IMN to offer the audio services is the proper rate base. The Services argue that the hotel operator's only purpose is to be a collection agent on behalf of the Services.

[26] The Services also submit that the rates to be applied should be 5 per cent for 2001 and 2002 and 5.5 per cent thereafter. This would properly take into account the start-up nature of the music service offered by IMN and its modest revenues. They contend that the Pay Audio Services Tariff proxy can and should be adjusted downwards to reflect the standalone discretionary business model of the IMN service.

IV. DESCRIPTION OF THE AGREEMENT

[27] SOCAN and the Services have asked the Board to certify the agreement they have come to as regards this portion of the tariff. In essence, the agreement boils down to the following.

A. A TARIFF FOR THE YEARS 2001 TO 2006

[28] As noted above, the tariff as originally filed covered the years 1999 to 2005. SOCAN has withdrawn the tariff for the years 1999 and 2000, and has extended the agreement to cover 2006. The Services have agreed.

B. ESCALATING RATES MUCH LOWER THAN THE ORIGINALLY PROPOSED RATES

[29] There are two issues here, and neither of them was thoroughly explained to the Board. According to counsel for the Services, while at first the tariff sought to emulate Tariff 17, the agreed-upon tariff structure recognizes the special circumstances of the industry under review and the differences it presents as compared to non-broadcast services. Also, the different rates for

mature audience and other films are a departure from the tariff filed by SOCAN. These different rates are meant to reflect the relative amount of protected music in each type of audio-visual presentation.

C. THE RATE BASE IS THE AMOUNT PAID BY THE GUEST TO VIEW MOVIES

[30] The rate base agreed upon for audio-visual content is different than the rate base proposed by either SOCAN or the Services for the musical content.

V. ANALYSIS

A. THE AUDIO-VISUAL PORTION OF THE TARIFF

[31] While it seems clear that the negotiated rates reflect a compromise between the parties, there is no indication as to whether these rates represent the true value of the relevant rights. Nevertheless, there seem to be no valid reasons to question further the agreement arrived at between the parties.

[32] The tariff will therefore be calculated as a percentage of the fees paid by guests to view audio-visual content. The rate for mature audience films (which are defined as adult entertainment having sexual activity as a primary component) is 0.2625 per cent for 2001, 0.275 per cent for 2002, 0.2875 per cent for 2003, 0.3 per cent for 2004 and 0.3125 per cent for 2005 and 2006. The rate for other audio-visual content is 1.05 per cent for 2001, 1.10 per cent for 2002, 1.15 per cent for 2003, 1.20 per cent for 2004 and 1.25 per cent for 2005 and 2006.

[33] Mature audience films for which a SOCAN licence is not required do not attract any royalties. This is somewhat different than what SOCAN and the Services proposed, i.e. that films that did not use SOCAN's repertoire be excluded from the rate base. Since it is sometimes possible for film producers, especially if they are American, to clear rights for music that is in SOCAN's repertoire otherwise than through SOCAN, the adjustment was necessary.

[34] For 2004, royalties payable on this portion of the tariff are estimated by the Board to be in the order of \$250,000.

B. THE MUSICAL PORTION OF THE TARIFF

i. The rate base

[35] The Board agrees with the Services that the rate base should be the payments made by the Services to IMN. This would properly mirror the Pay Audio Services Tariff, where the rate base consists of the affiliation payments received by the services from the BDUs.

[36] In the Board's view, the role of common carrier in this instance is more readily ascribed to the Services than to the hotel operator. The hotel operator incurs no business risk in offering the IMN service to its guests. It does not own the server, the delivery technology, or, in many instances, even the television set or the controller used to access the system. The hotel operator acts only as a collection agent; it simply grants access to its property to enable the Services to offer the music that is part of SOCAN's repertoire.

[37] OCC and LodgeNet, however, deliver the IMN service to lodging establishments' guests. They perform the role of the BDU. They are the carriers, and the amounts they pay to IMN should form the rate base upon which the tariff should be calculated.

[38] There is little doubt that IMN and the Services are involved in a single communication for which they are jointly and severally liable. However, including the Services' revenue share in the rate base would be inconsistent with other tariffs that deal with the delivery by one person of content that is programmed by another, be it SOCAN Tariff 2.A (Commercial Television Stations), Tariff 17 or the Pay Audio Services Tariff. In these instances, BDUs deliver signals and add no value to the programming carried on the signals. In this case, the Services deliver signals; they add no value to the music offered by IMN. Thus the "affiliation payments" that OCC and LodgeNet pay to IMN are the proper "level of trade" to use as the revenue base of the tariff.

ii. The rate

[39] In response to SOCAN's arguments to the contrary, IMN contends that its music service is very different from pay audio. There are indeed some notable differences between the two.

[40] For instance, the IMN service is not delivered to viewers from a cable head-end or a satellite operator, as is a pay audio service. Rather, IMN content is loaded onto a local server at each establishment offering the service, and is delivered from that server to each guest room ordering the service.

[41] Pay audio services are unique, premium services, unprecedented in sound quality. They come to the in-home customer in a vast variety of highly focussed programming formats put together by highly skilled music directors. By contrast, the IMN service is programmed randomly from lists of music genres obtained from the major American record producers.

[42] The manner in which music is packaged is also different. The IMN service consists of three components. The first is *Radio Interactive*, which offers 50 or 60 channels of music, commercial free, categorized by genre. While enjoying uninterrupted music, the guest has the ability to see a display of the name of the artist and other such information, as well as the possibility to dim the light from the television screen. This is an option to set the mood one wants to achieve while the music is playing. The second feature is *CD Jukebox*, which allows the guest to listen to an entire

CD from a list of genres of music. Again, selected information about the artist and the album is available. Finally, *Music Video Jukebox* allows the guest to watch music videos selected from different genres of music. These extra features are more than what is offered by pay audio services and serve to enhance the services and make IMN's offering more valuable to the customer.

[43] The retail price also differs. For pay audio services, BDU customers do not perceive a charge for the services, as they are offered "free". Their cost is in fact buried in the total bill. It is different for lodging establishments: OCC offers IMN's musical service for \$9.99 for two hours of music, while LodgeNet charges \$13.95 a day. Further, the IMN service is a true on-demand system, while pay audio services are "on" all the time; you need only turn on the television set to the proper channel to get access to the music.

[44] In both cases, there seems to be an extensive use of technology. The sound quality, in both cases, is constrained by the quality of the receiving equipment, either in the home or in the hotel and motel room. Neither type of service produces its own content, relying exclusively on pre-existing, published sound recordings. In the case of IMN, the current business model seems to seriously curtail the profitability of this kind of venture, and also limits access to some of the world repertoire of music.² Furthermore, access to music is limited, by space available on the server, which can hold between 600 and 1,000 CDs.

[45] As well, in the present case, IMN's parent company, OCC, subsidizes hardware to a much greater extent than BDUs do. OCC provides television sets to customers, BDUs do not.

[46] Finally, the possibility for large profit margins is much reduced for IMN. This is certainly not the case for pay audio services. The business models are completely different. IMN offers a true discretionary, on-demand service, while broadcast pay audio is regulated by the CRTC and offered to all digital subscribers. Pay audio is thus assured of a fairly constant customer base, while the IMN service carries more risk from a business point of view. Although IMN's owner, Mr. DiLorenzo, states that market penetration for IMN is on the rise,³ it is still a new business, and uncertainty surrounds its structure, the nature of its offering and its business plan.

[47] The rate proposed by SOCAN is 12.35 per cent of retail revenues of carriers less hotel commissions, and that suggested by IMN is 5 per cent of its revenues. While the IMN service does offer access to wall-to-wall music, and theoretically could be worth as much and even more than the pay audio services, its discretionary nature and the fact that it is in its infancy militate for a lower rate than for pay audio services. In a mature and stable market, the full value of

² Transcripts at pages 98, 122.

³ Transcripts at page 204.

music to IMN might well be at least equal or even higher than for pay audio services. However, for the reasons outlined above having to do with ability to pay, the tariff will be set at 5 per cent for 2001 and 2002 and 5.5 per cent for 2003, 2004, 2005 and 2006, of the revenues of the operator of the in-room musical audio service. The Board does not expect the ability to pay of this industry to increase very quickly. The Board also realizes that the total royalties payable under this part of the tariff are modest. This tariff will be reevaluated once the business model becomes more certain.

C. A "TARGET NEUTRAL" TARIFF

[48] The proposed tariff for 1999 and 2000 targeted the lodging establishments. This was changed for 2001, and the tariff is now target neutral, so that in effect SOCAN can collect royalties from any party liable either for the communication to the public by telecommunication, or the authorization of the communication in providing the services. As part of the agreement with SOCAN, the three major Services will pay the royalties they agreed upon. However, the target neutrality of the tariff the Board certifies will allow SOCAN to collect from other parties should new entrants to this industry refuse to pay.

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

Claude Majeau
Secretary General