

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Citation File: Reproduction of Musical Works

Regime Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21
Copyright Act, section 70.15

Members The Honourable William J. Vancise
Mr. Claude Majeau
Mr. J. Nelson Landry

**Proposed
Tariff(s)
Considered** SODRAC Tariff No. 5

Statement of Royalties to be collected by SODRAC for the reproduction, in Canada, of musical works embodied into cinematographic works for the purposes of distribution of copies of the cinematographic works for private use or of theatrical exhibition for the years 2009 to 2012

Reasons for decision

I. INTRODUCTION

[1] On November 2, 2012, the Board certified *SODRAC Tariff No. 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition), 2009-2012*. On December 3, the Canadian Association of Film Distributors and Exporters (CAFDE) requested the suspension of the 2009-2012 tariff, the continuation, on an interim basis, of the *SODRAC Tariff for the Reproduction of Musical Works in Video-copies, 2004-2008*, and the certification of a new tariff for 2009-2012. On December 20, the Board suspended the application of the tariff for 2009-2012 and granted the application for an interim decision, with reasons to follow. On April 26, 2013, the Board filed the reasons for the December 20, 2012 decision, which can be summed up in two points. First, the November 2 decision contains an error that the Board has the power to correct. Second, since the decision was rendered in breach of procedural fairness, the 2009-2012 tariff is completely null and void.

[2] A new tariff therefore had to be certified, and that is the objective of these reasons.

[3] As indicated in the November 2 decision, the parties offered little in support of the approaches they proposed. That being said, there is sufficient evidence on the record to allow us to make a decision without asking the parties to file additional evidence, submissions or arguments.

[4] We endorse paragraphs 160 to 165 and 167 to 172 of the November 2 decision; they adequately describe the parties, their positions, the proposed tariffs and the evidence filed. We set aside paragraph 166 for the reasons stated in paragraphs 7 to 14 of the reasons of April 26, 2013.

[5] We still agree with the conclusions stated in paragraph 173 of the November 2 decision, more specifically with the assertion that because of the way rights are cleared in certain markets, royalties must vary with the amount of music used.

[6] Theatrical copies are not in issue. If they were, we would certify the same tariff for the reasons set out in paragraphs 179 to 186 of the November 2 decision.

[7] This leaves the tariff for reproducing music on DVDs for private use to be redetermined.

[8] SODRAC initially proposed the rate certified for 2004-2008, namely 1.2 per cent of distribution revenues. SODRAC then proposed that distributors be subject to the rate schedule it proposed for CBC sales of programs to consumers, as set out in the following table:

**TABLE 1: PER-MINUTE, PER-COPY RATES PROPOSED BY SODRAC /
TABLEAU 1 : TAUX PAR MINUTE, PAR COPIE, PROPOSÉS PAR LA SODRAC**

	Feature Music / Musique de premier plan	Background Music / Musique de fond
First 15 minutes / Pour les 15 premières minutes	1.92¢	0.78¢
Next 15 minutes / Pour les 15 minutes suivantes	1.18¢	0.47¢
Beyond / Par la suite	0.71¢	0.28¢

[9] In the November 2 decision, for the reasons set out in paragraph 152, we certified the following rates for CBC:

**TABLE 2: PER-MINUTE, PER-COPY RATES CERTIFIED FOR CBC SALES OF DVDS /
TABLEAU 2 : TAUX PAR MINUTE, PAR COPIE, HOMOLOGUÉS POUR LES VENTES DE DVD PAR LA SRC**

	Feature Music / Musique de premier plan	Background Music / Musique de fond
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First 15 minutes / Pour les 15 premières minutes	1.44¢	0.58¢
Next 15 minutes / Pour les 15 minutes suivantes	0.87¢	0.35¢
Beyond / Par la suite	0.52¢	0.21¢

[10] SODRAC asks that distributors targeted in Tariff 5 pay the same royalties as the CBC.¹ Consequently, it is Table 2, the rate schedule we certified for CBC, rather than what SODRAC had initially proposed, which should be considered as SODRAC's starting position for the purposes of these reasons.

[11] CAFDE proposed the following rate schedule:

**TABLE 3: PER-COPY RATE, REGARDLESS OF TYPE OF MUSIC, PROPOSED BY CAFDE /
TABLEAU 3 : TAUX PAR COPIE, SANS ÉGARD AU TYPE DE MUSIQUE, PROPOSÉS PAR L'ACDEF**

	Per-Copy Rate / Taux par copie
Work containing 1 to 15 minutes of music requiring a SODRAC licence / Œuvre contenant entre 1 et 15 minutes de musique nécessitant une licence de la SODRAC	0.65¢
Work containing 16 to 30 minutes of music requiring a SODRAC licence / Œuvre contenant entre 16 et 30 minutes de musique nécessitant une licence de la SODRAC	1.25¢
Work containing 31 to 60 minutes of music requiring a SODRAC licence / Œuvre contenant entre 31 et 60 minutes de musique nécessitant une licence de la SODRAC	2.00¢

[12] For the reasons set out in paragraph 174 of the November 2 decision, we abandon this approach in favour of the rate structure used for CBC sales of programs to consumers.

[13] There are three major differences between the CBC and CAFDE schedules. First, the CBC schedule shows cents-per-minute, per-copy rates, while the CAFDE schedule shows three rates expressed as cents-per-copy. Second, the rates in the CBC schedule are 2.5 times higher for feature music than for background music, while the rates in the CAFDE schedule do not vary according to type of music. Third, the rates in the CAFDE schedule are much lower. The difference can be estimated by converting the CAFDE rates into cents-per-minute, per-copy

¹ Exhibit SODRAC-30 at para. 49a).

rates. There are many ways to make the comparison, none of which is perfect. The most intuitive way is to convert the per-copy rates in Table 3 to average per-minute rates for each of the three levels. These average rates, shown in Table 4, are obtained by dividing the per-copy rate in Table 3 by the mid-point of each category.²

TABLE 4: PER-MINUTE RATE, REGARDLESS OF TYPE OF MUSIC, CORRESPONDING TO THE CAFDE PROPOSAL /
TABLEAU 4 : TAUX PAR MINUTE, SANS ÉGARD AU TYPE DE MUSIQUE, CORRESPONDANT À LA PROPOSITION DE L'ACDEF

	Per-Minute Rate / Taux par minute
Work containing 1 to 15 minutes of music requiring a SODRAC licence / Œuvre contenant entre 1 et 15 minutes de musique nécessitant une licence de la SODRAC (0.65¢ ÷ 8)	0.08125¢
Work containing 16 to 30 minutes of music requiring a SODRAC licence / Œuvre contenant entre 16 et 30 minutes de musique nécessitant une licence de la SODRAC (1.25¢ ÷ 23)	0.05435¢
Work containing 31 to 60 minutes of music requiring a SODRAC licence / Œuvre contenant entre 31 et 60 minutes de musique nécessitant une licence de la SODRAC (2.00¢ ÷ 45,5) ³	0.04396¢

[14] The royalties in the CBC schedule are seven times higher (0.58¢ ÷ 0.08125¢) than those in the CAFDE schedule for the first 15 minutes of background music. The royalties for feature music are 18 times higher (1.44¢ ÷ 0.08125¢). The gap is smaller for subsequent categories because CBC rates decline faster than CAFDE rates.

[15] The reason for this is that further analysis indicates that both schedules are degressive. In the CBC rate schedule, the rate for a subsequent level is 40 per cent lower than the rate for the level that precedes it. In the CAFDE rate schedule, the difference is 33 per cent between the first and second level and 19 per cent between the second and third. We do not know the reasons for the degression; we note that it exists. Since the parties agree on the existence of a degression, we

² We could have also divided the additional royalties attributable to each level (i.e., 0.65¢, 0.60¢ and 0.75¢) by the mid-point of each category. Thus, the rate that applies to a 15-minute interval would be the rate that applies to the eighth minute of that interval if the royalties were being calculated by the minute. That being said, the choice of methodology has no effect on the comparisons we want to make in terms of magnitude.

³ The rate schedule stops at 60 minutes because audiovisual works with high musical content are excluded from the definition of cinematographic work in the proposed tariff.

use it to set the tariff. Moreover, since the degression proposed by SODRAC is more generous and thus more favourable to CAFDE, that is the one we choose.

[16] We then have to decide if one of the rate schedules appears to be reasonable and whether it needs adjusting. On its face, the CAFDE schedule is unreasonably low and the proposal is slipshod:

- a. The proposed rates represent 3 ($0.65\text{¢} \div \$22$) to 9 ($2.00\text{¢} \div \22) ten thousandths of the average wholesale price of a DVD.⁴
- b. If, as CAFDE maintains, most DVDs contain no more than 15 minutes of SODRAC music, 1.54 million units would have to be sold for SODRAC to collect \$10,000 in royalties at the rate proposed by CAFDE of two thirds of a cent per copy.
- c. If, as CAFDE maintains, most DVDs contain no more than 15 minutes of SODRAC music, a DVD would have to sell for 55 cents or less for the proposed 1.2 per cent cap on royalties to come into play.

[17] We have certified the CBC rate schedule for CBC. It is therefore *prima facie* fair, subject to our analysis of CAFDE's reservations regarding its possible application to distributors, which can be summarized as follows.

[18] First, the CBC schedule distinguishes between background and feature music. CAFDE proposed making no distinction on the grounds that it would be difficult to apply.⁵ The evidence on record and what we know about market practices leads us to conclude that feature music is worth more than background music. Furthermore, the distinction seems not to have raised issues for CBC. Lastly, the reporting requirements under the tariff are such that the burden of identifying what is in repertoire essentially falls on SODRAC. That being said, we are willing to accommodate CAFDE on that point for now.

[19] Second, the CBC schedule sets royalties minute by minute. CAFDE proposes a flat fee for DVDs containing 1 to 15 minutes of SODRAC music, another for those containing 16 to 30 minutes, and a third for DVDs containing more than that. In CAFDE's opinion, this structure would be easier to apply and would avoid the need to split hairs about duration.⁶ Here, too, we would tend to believe that the problems raised by CAFDE are not as serious as it claims. Distribution contracts always stipulate that the distributor is entitled to a copy of the musical cue sheet.⁷ And here, too, under the reporting requirements, SODRAC has to do most of the timing work. That being said, we are willing to accommodate CAFDE on that point also.

⁴ The average wholesale price of a DVD is \$22: Transcripts (SODRAC 5, 2009-2012), Volume 2 at 261.

⁵ Transcripts (Arbitration *SODRAC v. CBC & Astral*), Volume 13, 2862:14-21.

⁶ *Ibid.* 2862:22-2263:3.

⁷ Admittedly, this is a right that distributors exercises only sparingly: November 2 decision at para. 200.

[20] Third, CAFDE claims there is a difference, a major one in its opinion, between the film distribution market and the CBC program sales market, and relies on this difference to argue that the rate schedule that applies to the latter cannot be used to establish the rate schedule for the former. Distributors offer all movies on DVD, irrespective of their commercial success.⁸ By contrast, CBC distributes only its most popular shows on DVD. For that reason, distributors' rates should necessarily be lower than CBC's. We do not find this argument convincing. First, CAFDE did not provide any evidence to support it. Then, according to the distributors, the more a DVD sells, the less likely it is to contain SODRAC music;⁹ if this is true, then in any case, the more popular the film is, the smaller the royalties will be. Lastly, the argument supposes that the Board has imposed a selection premium on CBC, or that distributors should get a discount because they cannot exercise such a selection. Yet selection is not the sole prerogative of CBC. Distributors engage in selection also, although in a different way, by making fewer copies of a movie that will sell poorly than of the latest box office hit.

[21] CAFDE also blamed SODRAC of inconsistency regarding so-called volume discounts: SODRAC states that it does not provide such discounts, but the CBC rate schedule contains degressive rates. The inconsistency, if it exists at all, is not relevant. The discount CBC was seeking, which SODRAC stated it did not practise and which the Board denied, concerns a lump-sum, blanket licence for all synchronization copies that CBC makes in a year. CBC experts argued that the discount should be granted to account for economies of scale that a blanket licence provides over a series of transactional licences.¹⁰ The licence under Tariff 5 is neither blanket nor lump-sum: royalties will be calculated by SODRAC, for each minute of repertoire music, per work and per copy. Furthermore, this is not a synchronization licence, but a licence allowing the reproduction on DVD of music already synchronized in the audiovisual work. Lastly, as we have already pointed out, the parties themselves propose that the rates be degressive.

[22] Despite CAFDE's claims, we remain satisfied that it is fair to import the CBC rate schedule into SODRAC Tariff 5, while agreeing this time to accommodate CAFDE on two aspects already mentioned. The best way to achieve this is to offer distributors the option, which they could exercise once a year, in advance, to be bound by either a tiered rate schedule with a single rate (what CAFDE proposes) or the CBC rate schedule. The structure proposed by CAFDE will apply to distributors who fail to exercise the option. Once exercised, the option will apply until the distributor waives it.

⁸ Transcripts (Arbitration *SODRAC v. CBC & Astral*), Volume 13, 2863:11-2864:9.

⁹ Transcripts (Tariff 5 SODRAC), Volume 2, 146:8-147:12: Hollywood blockbusters contain little or no SODRAC music.

¹⁰ Exhibit DEF-3 at para. 136. See also paragraph 132 of the November 2 [decision](#).

[23] We now have to develop a tiered rate schedule containing a single rate based on the rates in the CBC schedule. To this end, the feature music and background music rates have to be merged into a single rate, and the per-minute rates have to be converted into per-copy rates.

[24] To merge the feature music and background music rates into a single rate, we assume that a DVD contains an average of three minutes of background music for one minute of feature music. This choice is arbitrary, but necessary. Our starting point, the CBC schedule, makes a distinction between these two types of music. CAFDE seeks a rate schedule that does not make this distinction; however, it did not file any evidence that would enable us to establish the relative importance of these two types of music in the relevant market. The cue sheets filed by SODRAC do not make it possible to establish the distinction either. Moreover, it is very likely that only SODRAC would be able to do so; however, it would be an undue burden at this stage of the process to request that SODRAC bear the cost of an exercise that is meant to benefit distributors. Furthermore, to the extent that the ratio is not accurate, it probably favours distributors: as we will see later on, it caps royalties to the approximate amount that would be payable if distributors had to pay 1.2 per cent of their distribution revenues. In applying the 3:1 ratio of background music to feature music to the CBC rate schedule, we obtain the following per-minute rates:

TABLE 5: PER-MINUTE RATES CORRESPONDING TO THE RATES CERTIFIED FOR THE CBC, IRRESPECTIVE OF THE TYPE OF MUSIC /
TABEAU 5 : TAUX PAR MINUTE CORRESPONDANT AUX TAUX HOMOLOGUÉS POUR LA SRC, SANS ÉGARD AU TYPE DE MUSIQUE

	Per-Minute Rate / Taux par minute
First 15 minutes / Pour les 15 premières minutes	0.79¢
Next 15 minutes / Pour les 15 minutes suivantes	0.48¢
Beyond / Par la suite	0.2875¢

[25] Converting a per-minute rate to a tiered rate involves two choices. First, we must decide how to calculate the rate for each interval. All things being equal, the most equitable way to proceed seems to be to multiply the relevant per-minute rate by the mid-point of each interval. Thus, the rate that applies to a DVD containing no more than 15 minutes of music is the rate that would be payable, under a per-minute schedule, for a DVD containing 8 minutes of music; the rate applicable to a DVD containing 16 to 30 minutes of music is the rate that would be payable, under a per-minute schedule, for a DVD containing 23 minutes of music; and so on.

[26] The magnitude of each interval then has to be determined. In the approach proposed by CAFDE, subtlety is sacrificed for simplicity. For example, if the 15-minute intervals proposed by CAFDE were applied to the entire schedule, the rate would jump from 6.4 cents ($8 \times 0.795¢$) for

a DVD containing 15 minutes of SODRAC music to 15.8 cents $((15 \times 0.795\text{¢}) + (8 \times 0.48\text{¢}))$ for a DVD containing 16 minutes. To decrease the price gap between the intervals, they need to be shorter. That being said, since the schedule is degressive, the price gap decreases as the quantity of music increases. It is therefore possible to provide longer intervals for DVDs containing more music, while maintaining the 40 per cent degression per 15-minute tier set out in the CBC schedule. In our opinion, two 5-minute intervals, two 10-minute intervals and two 15-minute intervals would strike a balance between subtlety and simplicity.

**TABLE 6: PER-COPY ROYALTIES /
TABLEAU 6 : REDEVANCE PAR COPIE**

Minutes of music requiring a SODRAC licence contained in the audiovisual work / Minutes de musique nécessitant une licence de la SODRAC contenue dans l'œuvre audiovisuelle	Per-Copy Royalty / Redevance par copie
No more than 5 / Pas plus de 5	2.39¢
More than 5 and no more than 10 / Plus de 5 et pas plus de 10	6.36¢
More than 10 and no more than 20 / Plus de 10 et pas plus de 20	11.85¢
More than 20 and no more than 30 / Plus de 20 et pas plus de 30	16.97¢
More than 30 and no more than 45 / Plus de 30 et pas plus de 45	21.43¢
More than 45 and no more than 60 / Plus de 45 et pas plus de 60	25.74¢

[27] Per-copy, per interval royalties were first calculated using the per-minute rates in Table 5 for each possible tier of minutes of music in a copy, from 1 to 60 (see the table in the appendix). The rate averages for the selected intervals are shown in Table 6. The rate schedule stops at 60 minutes because audiovisual works with high musical content are excluded from the definition of cinematographic work in the proposed tariff.

[28] As we indicated earlier, this rate schedule is undoubtedly favourable to the distributors because it caps the royalties at just under the 26 cents that distributors would pay at the rate of 1.2 per cent on a DVD averaging \$22 wholesale. The information that SODRAC will be able to gather under the certified tariff should make it possible to assess more accurately the true value of the rights at issue.

[29] The CBC schedule contains special provisions concerning programs where music is dominant. Since programs with significant musical content are excluded from the proposed tariff, there is no need to repeat these provisions in the certified tariff. However, the certified tariff should reflect the CBC schedule's special provisions on commissioned music and box sets for distributors who opt for the per-minute tariff. The tariff also provides, with respect to the per-

minute schedule, that where SODRAC administers only part of the rights in a musical work, the applicable rate is the relevant rate multiplied by SODRAC's share in the musical work. None of these special provisions shall extend to distributors who opt for the tiered tariff, because this would compromise the simplicity sought by CAFDE.

[30] CAFDE proposed capping royalties at 1.2 per cent of distribution revenues. For the reasons stated in paragraph 177 of the November 2 decision, we will not do so, at least not for each individual reproduction. However, to avoid a debate on the fairness of the process used to render this decision, distributors who opt for the CBC rate schedule should not have to pay more than what SODRAC was requesting at the outset for the period covered by the tariff. We are therefore putting a cap of 1.2 per cent of distribution revenues on the total amount of royalties that distributors have to pay for the four-year period from 2009 to 2012.

[31] We still agree with SODRAC that the tariff should extend to direct-to-video releases. The fact that few Canadian audiovisual works are released in this manner is no reason for not certifying the tariff.¹¹

[32] The November 2 decision provided for more extensive reporting requirements than before. This is required because of the change from a formula based on a percentage of distribution revenues to a schedule that takes the amount of music used into account. Since the change to such a schedule is maintained, reporting requirements remain essentially the same as those set out in the November 2 decision: the information remains critical in calculating the royalties and administering the tariff. The same information will help distributors exercise their option in a more informed manner in the future.

[33] The tariff that was certified on November 2 contained transitional provisions made necessary because the tariff takes effect on January 1, 2009, while it was being certified much later. The transitional provisions remain essentially the same, subject to the appropriate adjustments. For example, the term "readily available," which applied to transactions occurring by December 31, 2012, will now apply to transactions occurring before June 30, 2013, namely the end of the first half of the year. Information for 2009-2011 and for the first half of 2012, which should have been provided by January 31, 2013, will be provided by July 31, 2013, and apply to the second half of 2012 as well.

[34] Given the date on which the tariff is certified, distributors will be able to opt for one of the rate schedules for 2009 to 2013 by July 31, 2013. Distributors will have to opt for one rate schedule for the entire period.

¹¹ November 2 [decision](#) at para. 178.



Gilles McDougall
Secretary General

Appendix / Annexe

**TABLE: CALCULATION OF THE AVERAGE ROYALTIES OF THE INTERVAL, PER COPY /
TABLEAU: CALCUL DE LA REDEVANCE MOYENNE DE L'INTERVALLE, PAR COPIE**

Minutes of music requiring a SODRAC licence contained in the audiovisual work / Minutes de musique nécessitant une licence de la SODRAC contenue dans l'œuvre audiovisuelle	Per-Copy Royalty / Redevance par copie (¢)	Interval / Intervalle (minutes)	Average Royalties of the Interval, per Copy / Redevance moyenne de l'intervalle, par copie (¢)
1	0.795	No more than 5 / Pas plus de 5	2.39
2	1.59		
3	2.385		
4	3.18		
5	3.975		
6	4.77	More than 5 and no more than 10 / Plus de 5 et pas plus de 10	6.36
7	5.565		
8	6.36		
9	7.155		
10	7.95	More than 10 and no more than 20 / Plus de 10 et pas plus de 20	11.85
11	8.745		
12	9.54		
13	10.335		
14	11.13		
15	11.925		
16	12.405		
17	12.885		
18	13.365		
19	13.845		
20	14.325	More than 20 and no more than 30 / Plus de 20 et pas plus de 30	16.97
21	14.805		
22	15.285		
23	15.765		
24	16.245		
25	16.725		
26	17.205		

27	17.685		
28	18.165		
29	18.645		
30	19.125		
31	19.4125	More than 30 and no more than 45 / Plus de 30 et pas plus de 45	21.43
32	19.7		
33	19.9875		
34	20.275		
35	20.5625		
36	20.85		
37	21.1375		
38	21.425		
39	21.7125		
40	22.00		
41	22.2875		
42	22.575		
43	22.8625		
44	23.15		
45	23.4375		
46	23.725	More than 45 and no more than 60 / Plus de 45 et pas plus de 60	25.74
47	24.0125		
48	24.3		
49	24.5875		
50	24.875		
51	25.1625		
52	25.45		
53	25.7375		
54	26.025		
55	26.3125		
56	26.6		
57	26.8875		
58	27.175		
59	27.4625		
60	27.75		