

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2017-01-27

Citation CB-CDA 2017-008

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

Members The Honourable Robert A. Blair
Mr. Claude Majeau
Mr. J. Nelson Landry

Proposed Tariffs Considered SOCAN Tariff No. 22.D.1 – Internet – Online Audiovisual Services (2007-2013)

Statement of Royalties to be collected by the performance in public or the communication to the public by telecommunication, in Canada, of musical works

Reasons for decision

I. INTRODUCTION

[1] On July 18, 2014, the Board rendered a decision certifying *SOCAN Tariff No. 22.D.1– Internet – Online Audiovisual Service (2007-2013)*. This tariff targets interactive online audiovisual services that deliver webcasts of audiovisual works to end users.

[2] In its decision, the Board determined there was insufficient evidence to challenge the fairness of the minimum fee it certified for services that offer free trials. Due to its failure to participate in the opposition process and on the delays which would necessarily occur if it were allowed to participate at a late stage of the proceedings, Netflix had not been allowed to introduce new evidence or make submissions in this respect.

[3] The panel which rendered the Board's decision comprised the Honourable William J. Vancise, Mr. Claude Majeau and Mr. J. Nelson Landry.

[4] On August 15, 2014, Netflix filed an application for judicial review before the Federal Court of Appeal (the “Court”) to set aside paragraph 3(b) of *Tariff 22.D.1* (2007–2013), which deals with royalties for free trial subscriptions.

[5] Netflix based its application on the ground – among others – that, essentially, it had been denied the right to be heard on paragraph 3(b) of *Tariff 22.D.1*, a provision which did not appear in the proposed versions of the tariff that were published in the *Canada Gazette* pursuant to paragraph 67.1(5) of the *Copyright Act*.¹

[6] On December 17, 2015, the Court rendered its decision. It granted Netflix’s application and set aside the Board’s decision insofar as it pertains to royalties payable for the offering of free trial subscriptions. The Court returned the matter to “a differently constituted panel of the Board for redetermination.”²

[7] The Court found that a breach of duty of fairness had occurred as a result of the Board’s refusal to allow Netflix to put forward its position. The Court indicated that although Netflix had not availed itself in a timely fashion of the 60-day window to participate in the opposition process and, as result, did not have the right to be heard, “the industry affected by the provision at issue enjoyed that right and therefore [Netflix] should have the opportunity to be heard and put its case forward.”³

[8] The Court went on to state the following:

[43] Since tariffs certified by the Board are of general application, the interests that must be considered are those of an industry as opposed to those of an individual or an entity. This is a relevant factor that must be taken into account when determining whether a breach of the duty of procedural fairness has occurred.

[44] Another factor that must necessarily be considered is that through section 67.1 of the *Copyright Act* Parliament established an opposition mechanism allowing affected parties to be heard. That right cannot be lost or denied whenever the Board certifies a tariff which contains subject matter that did not appear in the tariff publicly advertised. There can be no doubt that the notice publicly given to the industry by way of the *Canada Gazette* is crucial to the decision to object or not to a proposed tariff.⁴

[9] On July 21, 2016, the Board set out a process to redetermine the royalties for free trials in accordance with the Court’s decision. Parties were asked to provide submissions on the nature of the redetermination process, the composition of the panel, the nature of the evidence that would

¹ *Copyright Act*, R.S.C. 1985, c. C-42.

² *Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2015 FCA 289 at para 53.

³ *Ibid* at para 42.

⁴ *Ibid* at paras 43-44.

be needed to redetermine the issue, the schedule of the proceedings, and any other issue perceived as relevant to the file.

[10] In respect of the second issue, the composition of the panel, the Board indicated that it was of the preliminary view that a panel constituted of the currently appointed members would be appropriate in this matter. Since the Court's decision, the composition of the Board has been altered with the replacement of the Honourable William J. Vancise by the Honourable Robert A. Blair, as Chairman.

[11] Final submissions by all parties were to be filed no later than Friday, September 2, 2016.

[12] On August 22, 2016, SOCAN and Netflix requested an extension of time to October 31, 2016, to respond to the Board's notice. This would allow them to engage in discussions with each other regarding a potential resolution of the free trial issue, which would avoid a contested redetermination, and to negotiate and draft its terms and to consult with the other parties.

[13] The same day, the Board granted the extension, providing that final submissions by all parties were to be filed no later than Monday, November 14, 2016.

[14] On October 31, 2016, the Board was informed that SOCAN and Netflix had engaged in negotiations and had agreed, with the consent of Cineplex Entertainment LP, on proposed wording to replace paragraph 3(b) in the certified tariff as follows:

(b) For a service that offers subscriptions to end-users: 1.7% for the years 2007-2010 and 1.9% for the years 2011-2013 of the amounts paid by subscribers, subject to a minimum monthly fee of 6.8¢ for the years 2007-2010 and 7.5¢ for the years 2011-2013 per subscriber. In the case of a single, initial free trial of no more than one month's duration in any 12 month period offered to induce a prospective subscriber to enter into a paid subscription, there shall be no royalty fee payable; ("Settlement proposal").

[15] SOCAN and Netflix further indicated that a hearing would not be necessary and asked the Board to certify *Tariff 22.D.1* (2007-2013), as amended above in respect of paragraph 3(b).

[16] On November 7, 2016, counsel for Bell Canada, Yahoo! Canada, Rogers Communications, and Quebecor Media Inc. (collectively "the Services") notified the Board that the Services did not object to the wording proposed by SOCAN and Netflix.

[17] The same day, both the Canadian Association of Broadcasters and Facebook notified the Board that they took no position in respect of the Settlement proposal.

II. ANALYSIS

A. COMPOSITION OF THE PANEL FOR REDETERMINATION

[18] None of the parties provided comments on the Board's preliminary view that a panel constituted of the currently appointed members would be appropriate in this matter.

[19] It is the Board's opinion that the notion of a "differently constituted panel" includes any panel where the constituting members are not all the same rather than the more restricted view that it is limited to a panel composed entirely of different members. More specific language is generally used by the courts when a completely different panel is required.⁵

[20] In any event, the doctrine of necessity⁶ would operate in these circumstances to permit a panel constituted of currently appointed members to redetermine the case even if the Chairman is the only one who did not participate in the original decision, in our opinion. Necessity also stems from the fact that the Board is the only decision maker statutorily mandated to make the redetermination decision and is presently comprised of only three members.

B. SETTLEMENT PROPOSAL

[21] The Settlement proposal's only differences with the initially certified tariff is an additional minimum fee per subscriber and a new clause whereby any single free trial month within a 12-month subscription is royalty-free (see the Annex comparing the initially certified wording and the wording of the settlement proposal).

[22] As indicated above, all parties were given the opportunity to comment on the Settlement proposal and none opposed it. Furthermore, for the period covered, the Board is of the view that the Settlement proposal now takes into account the interests of all relevant potential users, including online audiovisual services which offer free trials such as Netflix.

III. TARIFF WORDING

[23] Paragraph 3(b) under the Settlement proposal refers to a free trial of no more than one month's duration. The Board's understanding is that the reference is to a calendar month, which may in effect range from 28 to 31 days. To remove any ambiguity and ensure clarity, the tariff ought to explicitly provide that the free trial duration can be for a period of up to 31 days (see the Annex comparing the wording of the settlement proposal and the Board's certified wording).

⁵ See *Dulmage v. Ontario (Police Complaints Commissioner)* (1994) 21 OR (3d) 356, 1994 CanLII 8773 (ON SCDC); see e.g. *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337 at para 24.

⁶ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 SCR 3 at para 6.

[24] Accordingly, the Board replaces paragraph 3(b) of the initially certified tariff with the following, and certifies the tariff accordingly:

3(b) For a service that offers subscriptions to end-users: 1.7% for the years 2007-2010 and 1.9% for the years 2011-2013 of the amounts paid by subscribers, subject to a minimum monthly fee of 6.8¢ for the years 2007-2010 and 7.5¢ for the years 2011-2013 per subscriber. In the case of a single, initial free trial of up to 31 days in any 12-month period offered to induce a prospective subscriber to enter into a paid subscription, there shall be no royalty fee payable;



Gilles McDougall
Secretary General

Annex / Annexe

Initially certified wording	Wording of the settlement proposal	Certified wording
3(b) For a service that offers subscriptions to end users: 1.7% for the years 2007-2010, and 1.9% for the years 2011-2013, of the amounts paid by subscribers. In the case of free trials, a minimum monthly fee of 6.8¢ for the years 2007-2010 and 7.5¢ for the years 2011-2013 per free trial subscriber shall apply;	3(b) For a service that offers subscriptions to end-users: 1.7% for the years 2007-2010 and 1.9% for the years 2011-2013 of the amounts paid by subscribers, subject to a minimum monthly fee of 6.8¢ for the years 2007-2010 and 7.5¢ for the years 2011-2013 per subscriber. In the case of a single, initial free trial of no more than one month's duration in any 12 month period offered to induce a prospective subscriber to enter into a paid subscription, there shall be no royalty fee payable;	3(b) For a service that offers subscriptions to end-users: 1.7% for the years 2007-2010 and 1.9% for the years 2011-2013 of the amounts paid by subscribers, subject to a minimum monthly fee of 6.8¢ for the years 2007-2010 and 7.5¢ for the years 2011-2013 per subscriber. In the case of a single, initial free trial of no more than one month's duration <u>up to 31 days</u> in any 12-month period offered to induce a prospective subscriber to enter into a paid subscription, there shall be no royalty fee payable;
Libellé initialement homologué	Libellé de la proposition de règlement	Libellé homologué
3b) pour un service qui offre des abonnements aux utilisateurs : 1,7 % (années 2007 à 2010) et 1,9 % (années 2011 à 2013) des montants versés par les abonnés; dans le cas d'abonnements d'essai gratuits, un minimum mensuel	[TRADUCTION] 3b) pour un service qui offre des abonnements aux utilisateurs : 1,7 % (années 2007 à 2010) et 1,9 % (années 2011 à 2013) des montants versés par les abonnés, sujet à un minimum mensuel de 6,8 ¢ (années 2007 à 2010) et de	3b) pour un service qui offre des abonnements aux utilisateurs : 1,7 % (années 2007 à 2010) et 1,9 % (années 2011 à 2013) des montants versés par les abonnés, sujet à un minimum mensuel de 6,8 ¢ (années 2007 à 2010) et de 7,5 ¢ (années 2011 à 2013) par abonné. Dans le

de 6,8 ¢ (années 2007 à 2010) et de 7,5 ¢ (années 2011 à 2013) par abonné au service gratuit s'applique;	7,5 ¢ (années 2011 à 2013) par abonné. Dans le cas d'un unique et premier essai gratuit d'une durée d'au plus un mois inclus dans toute période de 12 mois destiné à inciter un abonné potentiel à souscrire à un abonnement payant, aucun paiement de redevance n'est dû;	cas d'un unique et premier essai gratuit d'une durée d'au plus un mois <u>31 jours</u> inclus dans toute période de 12 mois destiné à inciter un abonné potentiel à souscrire à un abonnement payant, aucun paiement de redevance n'est dû;
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