

Copyright Board
Canada



Commission du droit d'auteur
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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 Re:Sound Tariff 6.B – Use of Recorded Music to Accompany Fitness Activities (2013-2017)

Statement of Royalties to be collected for the public performance or the communication to the public by telecommunication, in Canada, of published sound recordings embodying musical works and performers' performances of such works

Reasons for decision

I. INTRODUCTION

[1] Re:Sound Music Licensing Company (Re:Sound) filed with the Board its proposed Tariffs 6.B for the use of recorded music in fitness venues for the years 2013 and 2014-2017, on March 30, 2012, and March 28, 2013 (the “Proposed Tariffs”), pursuant to section 67.1 of the *Copyright Act* (the “Act”).¹ The Proposed Tariffs were published in the *Canada Gazette* on June 9, 2012, and June 15, 2013, respectively. Prospective users and their representatives were informed of their right to object by August 8, 2012, and August 14, 2013.

[2] The tariffs set out the royalties which Re:Sound proposed to collect for the performance in public or the communication to the public by telecommunication, of published sound recordings embodying musical works and performer’s performances of such works for all uses in all areas

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

of fitness and skating venues, and to accompany a fitness activity including fitness classes (which include skating lessons) and dance classes.

[3] GoodLife Fitness Centres Inc. (GoodLife), the Fitness Industry Council of Canada (FIC), Life Time Fitness Inc., Canadian Dance Teachers' Association – Alberta Branch, Zoom Media Inc., and Mood Media Corporation filed objections.

[4] The Federation of Calgary Communities and Gymnastics Saskatchewan filed objections after the prescribed deadline and consequently were not considered as objectors in this proceeding. They did not apply for intervenor status. They however submitted that – in essence – the proposed rates constituted an unreasonable increase for not-for-profit organizations.

[5] In March 2015, the Board issued its decision on the Redetermination of Tariff 6.B for the years 2008-2012 (the “*Redetermination Decision*”).²

[6] In July 2015, Re:Sound, GoodLife, FIC, Zoom Media Inc., and Mood Media Corporation jointly requested that the Board certify Tariff 6.B for the years 2013-2017 in form and content as set out in a negotiated tariff (the “*Settlement Tariff*”).

[7] As a result, only the following entities remained as objectors: Canadian Dance Teachers' Association – Alberta Branch, and Life Time Fitness Inc. Furthermore, the Settlement Tariff included provisions, which were not originally published in the *Canada Gazette*. Notably, the Settlement Tariff provided that where recorded music is provided by a background music supplier, the supplier's royalties and reporting requirements are determined pursuant to *Re:Sound Tariff 3.A – Background Music Suppliers*.³ On April 18, 2017, the Board asked Re:Sound to explain why the interests of non-represented members of the background music industry would not be adversely affected by the Settlement Tariff.

[8] On April 18, 2017, the Board ordered the remaining objectors to provide comments on the Settlement Tariff or else they would be deemed to have withdrawn their objections to the Proposed Tariffs for 2013-2017. No written submissions were provided, before or after the prescribed deadline, and, accordingly, the remaining objectors are deemed to have withdrawn their objections.

[9] The Board also requested Re:Sound to provide particulars on the negotiations, the negotiating parties and the negotiated terms. Particulars were provided in April 2017 and a reply was provided by GoodLife in May 2017.

² *Re:Sound Tariff No. 6.B – Use of Recorded Music to Accompany Fitness Activities, 2008-2012* (March 27, 2015) Copyright Board Decision. [*Redetermination Decision*]

³ *Re:Sound Tariff 3.A – Background Music Suppliers, 2010-2013* (September 2, 2017) *Canada Gazette*. [*Re:Sound Tariff 3.A (2010-2013)*]

[10] On May 25, 2017, after reviewing the information provided by the parties, the Board asked additional questions in light of potential inconsistencies within the Settlement Tariff that could warrant modifying some of its text.

[11] On June 8, 2017, Re:Sound provided its response, indicating notably that the parties were in discussion on certain issues with the goal of providing amended Settlement Tariff language to the Board.

[12] From June through August 2017, Re:Sound provided regular updates on the status of discussions and a revised version of the Settlement Tariff was eventually provided on September 12, 2017 (the “Revised Settlement Tariff”).

II. THE SETTLEMENT TARIFF

[13] The Settlement Tariff applies to three situations: (i) music is played as background music by a fitness venue (except a skating venue); (ii) music is played as part of a dance and fitness class; and (iii) music is played by a skating venue.

A. FITNESS VENUE

[14] In terms of (i) background music, the tariff distinguishes between (a) music provided by background music suppliers, and (b) other music. In the former case, the venue is not subject to royalties and reporting requirements. Instead, the background music supplier is subject to *Re:Sound Tariff 3.A (2010-2013)*, unless the fitness venue has an arrangement with the background music supplier under which the fitness venue pays the royalties for background music rather than the supplier. In such a case, the royalties payable by the subscriber are determined under subsection 4(2) of Tariff 3.A, and are calculated based on the amounts paid by that subscriber to the background music service and the number of establishments of that subscriber.

[15] With respect to (b) background music that is not supplied by a background music supplier, the rates differ from the *Redetermination Tariff*.⁴ The rates payable under this tariff and Re:Sound Tariff 3.B (Use of background music) are based on either the number of attendees, the capacity of the venue or the size of the venue. The parties submit that this structure requires detailed reporting by fitness venues, many of which do not accurately track attendance, and is very difficult for Re:Sound to monitor and verify. The Board rejected the attendance-based formula used in SOCAN Tariff 19 (Physical Exercises and Dance Instruction) in its initial

⁴ *Re:Sound Tariff No. 6.B – Use of Recorded Music to Accompany Fitness Activities, 2008-2012* (March 28, 2015) *Canada Gazette*. [*Redetermination Tariff*]

decision certifying Tariff 6.B.⁵ The Board found that such a structure was, “unenforceable, unenforced, misunderstood or some combination of these.”⁶

[16] As set out in subsection 4(2) of the Settlement Tariff, Re:Sound, GoodLife and FIC propose a simplified tariff structure, with a flat annual payment based on the number of members of the fitness venue regrouped in three categories: less than 1 000 members; between 1 000 and 5 000 members; and more than 5 000 members. Re:Sound submits that the royalties payable reflect the value of music as they vary based on the size of the fitness venue and the number of members listening to recorded music. Membership data is much easier for a fitness venue to track and report and for Re:Sound to verify. It also allows a fitness venue to estimate its royalty obligations in advance with reasonable certainty as the rate categories are wide enough that membership is unlikely to fluctuate from year to year between the different rate tiers.

[17] The proposed rates were calculated by using the number of members from the mid-point of each category,⁷ multiplied by the Tariff 3 (2003-2009) attendance rate increased for inflation since 2006,⁸ multiplied by the average number of times per year a member attends.⁹

B. DANCE AND FITNESS CLASSES

[18] Regarding (ii) dance and fitness classes, the Settlement Tariff proposes the same structure and rates as those in the *Redetermination Tariff*, subject to incremental annual rate increases. The parties submit that the royalty per class structure reflects the use and value of music as it varies based on the number of classes held by a fitness venue. Applying the same rate to both dance classes and fitness classes is consistent with the royalties payable to SOCAN under its Tariff 19 and reflects the fact that recorded music is used in a similar fashion in both types of classes. The parties refer to the Board, which held in the *Redetermination Decision* that “the *Settlement Tariff* does however provide us with a basis for setting a tariff, which we consider fair and equitable”¹⁰ and that, “the industry’s best interests lie in the certainty, stability and finality the Settlement Tariff offers.”¹¹

⁵ *Re:Sound Tariff No. 6.B – Use of Recorded Music to Accompany Fitness Activities, 2008-2012* (July 6, 2012) Copyright Board Decision.

⁶ *Ibid* at para 147.

⁷ For the under 1 000 members category, 500 was used to calculate the royalty; for the category between 1 000 and 5 000, 2 500 was used; for the over 5 000 category, 5 000 was used.

⁸ Calculations were done in 2013, using CPI of 12.33% for 2006-2013, plus average CPI of 1.67% for each of the years 2014 to 2017 for a total increase of 19.01%. The attendance rate under Tariff 3 of 0.0831¢ was increased by 19.01% to 0.0989¢.

⁹ According to the 2012 International Health, Racquet & Sportsclub Association (IHRSA) *Global Report on the State of the Health Club Industry*, the average U.S. member attends 102.5 times per year. Data on Canada was not available. The IHRSA is the trade association representing the global health club and fitness industry.

¹⁰ *Supra* note 2 at para 37.

¹¹ *Ibid* at para 35.

C. SKATING VENUE

[19] The proposed rates for (iii) skating venues in section 6 of the Settlement Tariff are the same as under the *Redetermination Tariff*, with the exception of the minimum fee which has been increased from \$38.18 to \$49.05.

[20] The parties submit that the Settlement Tariff provides for a structure and rates which have been carefully considered and agreed-upon by the parties that will be subject to it, namely the rights holders represented by Re:Sound, the Canadian fitness industry as represented by FIC and GoodLife, and background music suppliers represented by Zoom Media Inc. and Mood Media Corporation.

III. ANALYSIS

[21] First, we note that the rates agreed-to in the Settlement Tariff are lower than the initial rates proposed by Re:Sound in the Proposed Tariffs. As such, it can be assumed that prospective users who did not object to the Proposed Tariffs would not object to the Settlement Tariff.¹²

[22] Second, as the Board found in its *Redetermination Decision*, “FIC and Goodlife represent the majority of fitness venues in Canada; together they account for over 5 000 fitness venues with over four million members.”¹³ The Board also held that, “where a resolution on a tariff is supported by an industry association representing the vast majority of users, the Board ‘can take it for granted that the agreement is in the interest of all users subject to the tariff.’ ”¹⁴ FIC and GoodLife collectively represent a wide range of Canadian fitness venues, from small 10-member clubs to very large chains such as GoodLife. In addition, Zoom Media Inc. and Mood Media Corporation represent two major background music suppliers that supply recorded music to fitness venues. We are therefore satisfied that the Settlement Tariff represents the interests of all prospective users.¹⁵

[23] The Board must also assess the Settlement Tariff in light of comments made by non-parties such as the Federation of Calgary Communities and Gymnastics Saskatchewan.¹⁶ These organizations were either concerned with the Proposed Tariffs’ increase or about the fact that the royalty payments under Tariff 6.B would be in addition to payments made under any applicable SOCAN tariff.

¹² *Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2015 FCA 289 at para 44: “[...] 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.”

¹³ *Supra* note 2 at para 55.

¹⁴ *Ibid.*

¹⁵ *Re:Sound Tariff 5 – Use of Music to Accompany Live Events, 2008-2012 (Parts A to G)* (May 25, 2012) Copyright Board Decision at para 10.

¹⁶ *Ibid.*

[24] Re:Sound is entitled to a tariff for the use of sound recordings by fitness venues, whether these are for-profit or not-for profit organizations. Both strive to meet their costs including music royalties – to the extent they choose to use protected content. The fact that Re:Sound Tariff 6.B is payable in addition to any applicable SOCAN tariff should not in itself be a ground for denying Re:Sound’s right to a tariff.

[25] Furthermore, the rates potentially applicable to community centres and other not-for-profit organizations remain reasonable. For example, the annual cost for playing background music by a venue that does not track its number of members is \$250; admission-free skating venues pay an annual flat fee of \$49.05; a community centre that would have held 100 dance or fitness classes in 2017 will pay \$40.04.

[26] In light of the foregoing, we certify the Revised Settlement Tariff, with technical modifications pertaining to references it makes to Tariff 3.A (Background Music Suppliers).

[27] Under the Revised Settlement Tariff, the applicable royalties when a fitness venue sources its music from a background music supplier are determined by reference to Tariff 3.A. The intended effect of this reference is to ensure that a background music supplier continue to be subject to a single Re:Sound tariff instead of being also subjected to Tariff 6.B.

[28] Where a fitness venue has an arrangement with a background music supplier under which the fitness venue pays the royalties, the Revised Settlement Tariff provides that the royalties payable by the subscriber (i.e. the fitness venue) are determined by reference to subsection 4(2) of Tariff 3.A. However, this latter provision covers the situation whereby the background music supplier pays on behalf of the subscriber.

[29] We understand the parties’ implicit intent to refer to subsection 4(2) “with the necessary adaptations.” To enhance clarity, we modify the Revised Settlement Tariff such that royalties for music sourced by a fitness venue from a background music supplier, and assumed by the fitness venue, are based on a 3.2 per cent rate (as found in *Re:Sound Tariff 3.A (2010-2013)*). This rate is to be applied to the amounts paid by a given subscriber for the background music service for each establishment of that subscriber, subject to a minimum fee of \$2.15 per fitness venue per quarter.

A handwritten signature in black ink, appearing to read "Gilles McDougall". The signature is fluid and cursive, written in a professional style.

Gilles McDougall
Secretary General