

Copyright Board
Canada



Commission du droit d'auteur
Canada

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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 SATELLITE RADIO SERVICES: RE:SOUND (2011-2018); SOCAN (2010-2018)

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

Reasons for decision

I. INTRODUCTION

[1] On March 27, 2009, March 31, 2010, March 31, 2011, March 30, 2012, April 2, 2013, March 31, 2014, and March 31, 2015, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed, pursuant to section 67.1 of the *Copyright Act*¹ (the “*Act*”), statements of proposed royalties to be collected for the communication to the public by telecommunication of musical works by satellite radio services for the years 2010 to 2018.

[2] On March 31, 2010, March 31, 2011, March 30, 2012, March 28, 2014, Re:Sound Music Licensing Company (Re:Sound) filed, pursuant to section 67.1 of the *Act*, statements of proposed royalties to be collected for the communication to the public by telecommunication, by satellite radio services, of published sound recordings embodying musical works and performers' performances of such works for the years 2011 to 2018.

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

[3] On March 30, 2009, March 31, 2010, and March 9, 2012, CMRRA-SODRAC Inc. (CSI) filed, pursuant to section 70.13 of the *Act*, statements of proposed royalties to be collected for the reproduction of musical works, in Canada, by satellite radio services for the years 2010 to 2013.

[4] The proposed tariffs were published in the *Canada Gazette*. On each occasion, prospective users and their representatives were given notice of their right to file objections to the proposed tariffs.

[5] Canadian Satellite Radio (CSR) objected to CSI's tariffs for 2010 and for 2011-2013. CSR also objected to Re:Sound's tariff for 2011. In addition, CSR objected to SOCAN's tariffs for 2010-2011.

[6] Sirius Canada (Sirius) objected to CSI's tariffs for 2010 and for 2011-2013. Sirius also objected to Re:Sound's tariff for 2011 and to SOCAN's tariffs for 2010-2011.

[7] Sirius and CSR jointly objected to Re:Sound's tariff for 2012 and SOCAN's tariff for 2012.

[8] SiriusXM Canada (SiriusXM) objected to CSI's tariff for 2013 and to SOCAN's tariffs for 2013, 2014, 2015 and 2016-2018. It also objected to Re:Sound's tariffs for 2013-2014, and for 2015-2018.

[9] The Hotels Association of Canada (HAC) objected to Re:Sound's tariffs for 2013-2014. HAC also objected to SOCAN's tariffs for 2016-2018.

[10] Restaurants Canada objected to SOCAN's tariffs for 2016-2018.²

II. CONTEXT

[11] On October 18, 2011, SiriusXM wrote to the Board, informing it that

[...] Sirius Canada Inc. and Canadian Satellite Radio Inc. have merged to become SiriusXM. SiriusXM is a wholly-owned subsidiary of Canadian Satellite Radio Holdings Inc. and is the only "user" under the Collectives' (current and) proposed satellite radio tariffs described below.

[12] Accordingly, this decision will consider all objections by Sirius Canada, CSR and SiriusXM as if they had been filed by the successor corporation, SiriusXM.

[13] On November 10, 2011, the Board merged consideration of the proposed tariffs filed by SOCAN, Re:Sound and CSI, and ordered a hearing for February 12, 2013.

² Restaurants Canada's written objection provided no grounds for their objection.

[14] On July 20, 2012, the Board issued an order, in which it identified two possible issues emerging from contemporaneous decisions of the Supreme Court of Canada.³

First, the Board will need to determine which transactions between a satellite radio service and its subscribers involve a communication to the public by telecommunication and which do not [...] Second, given the reasons of the majority in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, the Board's analysis of fair dealing in the satellite radio services market may need to be reviewed.

[15] The Board directed that the parties address these and other relevant issues emerging from the 2012 Supreme Court of Canada copyright cases in their evidence and arguments.

[16] On September 14, 2012, the parties jointly wrote to the Board indicating that

[s]erious settlement negotiations are ongoing between SiriusXM Canada and each of the three collectives [...] Therefore, [...] the parties hereby jointly request that the Board postpone [...] the remaining steps in the schedule and the hearing *sine die* until the Board receives further information from the parties with regard to any settlement.

[17] On September 14, 2012, the Board granted the parties' request to postpone *sine die* the hearing process.

[18] On October 23, 2012, CSI and SiriusXM jointly wrote to the Board: "CSI and SiriusXM Canada wish to inform the Copyright Board that they have come to a licensing agreement [...] CSI therefore hereby withdraws its proposed Satellite Radio Services Tariffs for the years 2010-2012 and 2013, on consent of SiriusXM Canada."

[19] Given the specific facts in this file, including the licensing agreement reached by the parties, and the fact that SiriusXM was the only objector and potential user for the CSI proposed tariffs, the Board will no longer proceed with the matter.

[20] On July 23, 2014, SOCAN, Re:Sound and SiriusXM jointly wrote to the Board, attaching a Settlement Tariff for SOCAN for the years 2010 to 2018 and for Re:Sound for the years 2011 to 2018, requesting that the Board certify it. In support of this request, the parties wrote: "The parties' request for a hearing is withdrawn. SiriusXM Canada withdraws its objections to the Proposed Tariffs, conditional on a decision by the Board to certify a tariff consistent with the terms and conditions of the Settlement Tariff."

³ See *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345.

[21] In the July 23, 2014, letter, Re:Sound and SiriusXM also advised of their future intention to request – on an expedited basis and without a repertoire study – an increase to Re:Sound’s rates under the Settlement Tariff once the *Act* provisions implementing the *World Intellectual Property Organization Performances & Phonograms Treaty* (WPPT) came into force, namely on August 13, 2014.

[22] On September 15, 2014, Re:Sound and SiriusXM jointly wrote to the Board, advising of their agreement that the rates payable to Re:Sound be increased effective August 13, 2014.

[23] With a view to certifying the proposed tariffs as per the agreed-upon terms and periods, the Board issued a notice on March 6, 2015, including a copy of the Settlement Tariff between SOCAN, Re:Sound, and SiriusXM, and questions for HAC and jointly for Re:Sound and SiriusXM. HAC responded to the notice on April 15, 2015. Re:Sound and SiriusXM responded to the Notice on May 14, 2015. Re:Sound and SiriusXM also jointly replied to the answer by HAC on May 29, 2015.

[24] Question 2 of the March 6, 2015, Notice, addressed to HAC read as follows: “In the event it maintains its objections, HAC is requested to provide in writing its detailed reasons to object to the settlement tariff.”

[25] HAC’s response read as follows: “The HAC maintains the objection for two reasons namely the lodging industry continues to experience substantial and material losses in revenue. Since 2008 our revenues have declined by \$4.8 billion. Secondly this is the responsibility of Service Providers.”

[26] In a joint letter dated May 14, 2015, Re:Sound and SiriusXM wrote as follows:

A matter has arisen relating to the Satellite Radio Services Tariff that Re:Sound and Sirius are currently discussing. This matter is unrelated to the Board’s question discussed above. As a result, Re:Sound and Sirius respectfully request that the Board defer certification of *Satellite Radio Services Tariff (Re:Sound: 2011-2018; SOCAN: 2010-2018)* pending the completion of these discussions.

[27] SOCAN did not oppose this request.

[28] On September 1, 2015, Restaurants Canada and HAC objected to SOCAN’s *Satellite Radio Services Tariff 25* for the years 2016-2018.

[29] Asked by the Board to provide particulars on its objection, HAC indicated that: “Our objections are based on the fact that there is no demonstrated increased value of the music in question.”⁴

[30] In response to the same Board request, Restaurants Canada confirmed it was objecting to the tariff proposals.⁵ No reasons were given for the objection.

[31] By the time Restaurants Canada filed its objection to SOCAN’s tariff, SOCAN had already settled with SiriusXM.

[32] Re:Sound and SiriusXM filed with the Board status updates on their discussions on June 25, 2015; August 31, 2015; September 29, 2015; October 29, 2015; November 30, 2015; January 29, 2016; March 24, 2016; and June 27, 2016.

[33] On July 8, 2016, Re:Sound and SiriusXM wrote to the Board as follows:

[...] Re:Sound and SiriusXM Canada (“Sirius”) are writing to advise the Board that they have resolved the outstanding issue between them. As a result, Re:Sound and Sirius jointly request that the Board proceed to consider and certify the Settlement Tariff filed with the Board on September 15, 2014.

III. ANALYSIS

[34] In its November 10, 2011, ruling, the Board had merged the consideration of the following tariffs: SOCAN Tariff 25 (Satellite Radio Services) for the years 2010 to 2012, Re:Sound Tariff 4 (Satellite Radio Services) for the years 2011 and 2012, and CSI Tariff (Satellite Radio Services) for the years 2010 to 2013. As mentioned above, CSI withdrew from the proceedings. As such, these reasons deal only with the tariffs for Re:Sound and SOCAN.

[35] The Settlement Tariff filed by SOCAN, Re:Sound, and SiriusXM on July 23, 2014, covered the years 2011 to 2018 for Re:Sound and 2010 to 2018 for SOCAN. It is not unusual for settlement tariffs to cover more years than the proceedings before the Board. The Settlement Tariff has the following scope:

3. (1) This tariff sets the royalties to be paid each month by a service to communicate to the public by telecommunication in Canada, published sound recordings embodying musical works and performers’ performances of such works in Re:Sound’s repertoire and musical or dramatico-musical works in SOCAN’s repertoire, in connection with the operation of the service, for direct reception by subscribers for their private use.

⁴ HAC email to the Board, September 9, 2015.

⁵ Restaurants Canada email to the Board, September 22, 2015.

(2) This tariff does not authorize: any use of a work or sound recording by a service in connection with its delivery to a commercial subscriber; or any use by a subscriber of a work or sound recording transmitted by a service other than a use described in subsection (1).

[36] In its 2012 decision on *Re:Sound Tariff 5 – Use of Music to Accompany Live Events, 2008-2012 (Parts A to G)*, the Board set out a two-part framework for certifying tariffs pursuant to agreements, in the following terms:

Before certifying a tariff based on agreements, it is generally advisable to consider (a) the extent to which the parties to the agreements can represent the interests of all prospective users and (b) whether relevant comments or arguments made by former parties and non-parties have been addressed. These are not hard and fast rules: prospective users who did not file a timely objection no longer have a right to air their views before the Board. Yet because tariffs are both prospective and of general application, some account must be taken of the interests of those who are not before us and who will be affected by our decision, especially with tariffs of first impression.⁶

[37] This framework was referenced in a recent Board decision relating to a SOCAN tariff for the use of audiovisual content.⁷ This decision was reviewed by the Federal Court of Appeal. While the Court considered that the *Re:Sound 5 framework* had not been applied correctly and returned the matter to the Board, it did not question the framework itself.⁸

[38] Accordingly, we now proceed to an analysis of the *Re:Sound 5 framework* to determine whether there are any reasons in this case justifying a refusal to certify the proposed tariff resulting from the agreement between SOCAN, Re:Sound and SiriusXM.

A. ANALYSIS OF THE *RE:SOUND 5 FRAMEWORK*

i. The extent to which the parties to the agreements can represent the interests of all prospective users

[39] As previously indicated, SiriusXM informed, on October 18, 2011, the Board that it “is the only user under the Collectives’ (current and) proposed satellite radio tariffs.”

[40] Likewise, on July 23, 2014, Re:Sound and SiriusXM jointly wrote to the Board indicating the following:

As SiriusXM Canada is the sole licensee under the Settlement Tariff, the proposed Tariff is approved by all collectives and prospective users affected by it. The Settlement Tariff

⁶ *Re:Sound Tariff 5 – Use of Music to Accompany Live Events, 2008-2012 (Parts A to G)* (25 May 2012) Copyright Board Decision at para 10.

⁷ *SOCAN Tariff 22.D.1 – Audiovisual Webcasts 2007-2013* (18 July 2014) Copyright Board Decision at para 21.

⁸ *Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2015 FCA 289 at paras 45-53.

therefore satisfies the Board's condition that an agreement represent the interests of all prospective users.

[41] In their joint reply to HAC's response to the Board's March 6, 2015, Notice, Re:Sound and SiriusXM confirmed that "Sirius is the only prospective user under the Tariff".⁹ As a result, and because the only foreseeable user is directly involved in the Settlement Tariff, the Board's view is that the Settlement Tariff represents the interest of all prospective users.

[42] While HAC continues to object to the Settlement Tariff, the Board agrees with Re:Sound's and SiriusXM's joint submission that HAC is not a prospective user. Specifically, in their May 29, 2015, submissions to the Board, Re:Sound and SiriusXM offered the following arguments:

Pursuant to subsections 67.1(5) and 68(3) of the Copyright Act (the "Act"), the Board is only required to have regard to objections filed by "prospective users or their representatives." Sirius is the only prospective user under the Tariff. While the Board allows anyone to comment in writing on any aspect of these proceedings under its Directive on Procedure, the weight given to such comments should be commensurate with their direct interests (or lack thereof) in the Tariff. HAC and its members are not prospective users under the Tariff as it is limited to the activities of a service for direct reception by subscribers for private use and does not apply to the use of sound recordings by a service in connection with its delivery to commercial subscribers.

[43] The Board underscores that the provision in the *Act* providing that "prospective users or their representatives" may object to a proposed tariff also applies to proposed tariffs filed under section 70.13 of the *Act*. This is in clear contrast with subsection 83(6) of the *Act* which provides that "*any person*" (our emphasis) may object to a proposed tariff for private copying levies.

[44] HAC's website describes the association as: "[t]he effective voice of the Canadian Hotel & Lodging industry [...] The Hotel Association represents more than 8,178 hotels, motels and resorts that encompass the \$18.4 billion Canadian hotel industry which employs 304,000 people across Canada."¹⁰

[45] There is no indication that HAC members would be subject to the Settlement Tariff. On the contrary, it can be logically presumed that hotels, motels and resorts are not in the business of providing satellite radio services.

[46] The same reasoning applies to Restaurants Canada's members. Restaurants Canada's website describes it as "a national, not-for-profit association representing Canada's diverse and

⁹ Re:Sound letter to the Board, May 29, 2015.

¹⁰ Hotel Association of Canada, online : <http://www.hotelassociation.ca/home.asp>.

dynamic restaurant and foodservice industry.”¹¹ Evidence would be required to support the view that the foodservice industry is also in the business of providing satellite radio services.

[47] Furthermore, to be considered a “prospective user” one would have to meet the definition of “service” provided in the Settlement Tariff, namely “a multi-channel subscription satellite radio service licensed by the Canadian Radio-television and Telecommunications Commission as well as any similar service distributed in Canada.” As such, there is no indication that would lead us to believe that the hotel or restaurant industries are subject to the Settlement Tariff.

[48] Accordingly, the Board is satisfied that the Settlement Tariff represents the interests of all prospective users.

ii. Whether relevant comments or arguments made by former parties and non-parties have been addressed

[49] The corollary of the fact that HAC and Restaurants Canada are not prospective users is that they cannot be considered as objectors or parties to the proceedings. To the extent that they are relevant, comments or arguments they made may, however, be addressed by the Board.

[50] As previously mentioned, the only arguments made by these non-parties were made by HAC, stating the following: “The HAC maintains the objection for two reasons namely the lodging industry continues to experience substantial and material losses in revenue. Since 2008 our revenues have declined by \$4.8 billion. Secondly this is the responsibility of Service Providers.”¹²

[51] In their May 29, 2015, letter, Re:Sound and SiriusXM also replied that “HAC has provided no evidence to substantiate its claim of financial losses by the Canadian hotel industry or any link between such losses and the Tariff which has no application to commercial subscribers.” [emphasis in original]

[52] We too fail to understand how the Settlement Tariff – which does not concern HAC members – is in any way linked to losses of the magnitude referenced by HAC. If anything, the comments seem to suggest that they are geared towards the relationship between HAC members and the satellite radio subscription providers, not the collectives. As a result, we are of the view that HAC’s comments are not relevant for the purpose of this tariff, which does not apply to commercial subscribers¹³ such as potential HAC members.

¹¹ Restaurants Canada, online: <https://www.restaurantscanada.org/about-us/>.

¹² HAC email to the Board, April 15, 2015.

¹³ The Settlement Tariff explicitly provides that: “3. (2) This tariff does not authorize: (a) any use of a work or sound

B. STATUS QUO ANALYSIS

[53] The portion of the Settlement Tariff that applies to SOCAN (2010-2018) is similar to the SOCAN tariff certified by the Board for 2005-2009. There are some small differences in the reporting requirements and in some minor provisions, but they are not material differences. The royalties in the Settlement Tariff are the same as in the last certified tariff: 4.26 per cent of its service revenues for the reference month, subject to minimum fees of 43¢ per subscriber.

[54] With respect to Re:Sound, there are two tariff periods to consider. The first runs from January 1, 2011 to August 12, 2014. For this period, the tariff is unchanged from the previously certified Re:Sound tariff (2007–2010). The second period runs from August 13, 2014 to December 31, 2018. For this period, the tariff changed from the previously certified tariff only in respect of its royalty rate.

[55] The rate for this second period is 3.63 per cent of its service revenues for the reference month, subject to a minimum fee of 36¢ per subscriber. Re:Sound's originally proposed tariffs for 2013-2014 and for 2015-2018 provided for a rate of 17 per cent of the service's revenues for the reference month, subject to a minimum fee of \$1.50 per subscription. Of note is the fact that the Settlement Tariff rates are lower than the initially proposed tariff rates.

[56] On March 6, 2015, the Board put the following question to Re:Sound and SiriusXM:

Please indicate how the adjustment increase to Re:Sound's repertoire was calculated. In particular, please provide any study or repertoire analysis demonstrating how the music used by Satellite Radio Services consists, as of August 13, 2014, of about 83%¹⁴ of Re:Sound's repertoire, compared to 27% in 2009, taking into account the coming into force of section 19(1.2) of the *Act* and the limitation on the term of rights for U.S. recordings under the *Statement limiting the Right to Equitable Remuneration of Certain Rome Convention or WPPT Countries*.

[57] Re:Sound and SiriusXM responded as follows:

Re:Sound and Sirius came to a similar agreement with respect to their joint request for a rate increase to reflect the increase to Re:Sound's repertoire as a result of the coming into force of section 19(1.2) of the *Act*, as limited by the Ministerial Statement. No repertoire study was conducted as one of the key purposes of reaching a negotiated settlement is to avoid the need to hire experts and conduct time-consuming and expensive studies such as music use and

recording by a service in connection with its delivery to a commercial subscriber [...]"

¹⁴ As calculated by the Board.

repertoire studies. The agreement between Re:Sound and Sirius, which is the sole payor under the tariff, represents the overall compromise reached by the parties.¹⁵

[58] Re:Sound and SiriusXM then listed a number of Board decisions that accepted the principle of a repertoire adjustment without a repertoire study: *SOCAN-NRCC Pay Audio Services 1997-2002*, *Commercial Radio 2005*, *Commercial Radio 2010*, and *Re:Sound 5 – Use of Music to Accompany Live Events 2008-2012 (Parts A to G)*.

[59] Finally, as the parties indicated in their earlier correspondence of July 23, 2014: “The agreement of the parties with respect to the Settlement Tariff reflects the overall compromise reached by the parties in their resolution, including the matters raised by the Board in its Order of July 20, 2012.”

[60] We would have preferred that the first Re:Sound tariff certified after Canada’s WPPT ratification take into account a repertoire study. However, given that SiriusXM is the only user that will be affected by this tariff and that it has agreed to it, the Board accepts the proposed repertoire adjustment. In doing so, the Board does not rule on the accuracy of the repertoire adjustment as proposed by the parties. The Board looks forward to future repertoire studies, whether undertaken in connection with this tariff or other related tariffs.

[61] Overall, but for the repertoire adjustment “as of right” due to the 2014 eligibility of additional sound recordings to equitable remuneration resulting from Canada’s WPPT ratification, both Re:Sound’s and SOCAN’s tariffs remain substantially similar to their previously certified versions.

[62] Accordingly, save for minor wording changes, we certify tariffs for Re:Sound and SOCAN identical to the Settlement Tariff filed jointly with SiriusXM. The rates certified are indicated in the Annex.



Gilles McDougall
Secretary General

Annex

RATES CERTIFIED

¹⁵ Re:Sound and SiriusXM letter to the Board, May 14, 2015.

SOCAN	Re:Sound	
	January 1, 2011, to August 12, 2014	August 13, 2014, to December 31, 2018
4.26% of revenues	1.18% of revenues	3.63% of revenues
Minimum fee: 43¢ per subscriber	Minimum fee: 12¢ per subscriber	Minimum fee: 36¢ per subscriber