

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** Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment (2013-2018)

**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] On March 30, 2012, pursuant to subsection 67.1(1) of the *Copyright Act* (the “Act”),<sup>1</sup> Re:Sound filed with the Board proposed Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment, 2013-2015 (Re:Sound Tariff 6.C). The scope of this tariff mirrors that of SOCAN’s Tariff 3.C – Adult Entertainment Clubs, 2013-2017 (SOCAN Tariff 3.C). The proposed tariff was published in the *Canada Gazette* on June 9, 2012. No objections were filed with the Board.

[2] Re:Sound’s Tariff 6.C is a new tariff, but covers an activity (the public performance and the communication to the public by telecommunication of published sound recordings to accompany

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<sup>1</sup> *Copyright Act*, R.S.C., 1985, c. C-42.

adult entertainment) that was previously covered under Re:Sound Tariff 6.A – Use of Recorded Music to Accompany Dance, 2008-2012;<sup>2</sup> it is in effect a carve-out tariff.

[3] On March 30, 2015, pursuant to subsection 67.1(1) of the *Act*, Re:Sound filed with the Board proposed Tariff 6.C for the years 2016-2018. The Federation of Calgary Communities (FCC) filed an objection on August 18, 2015 to a number of Re:Sound proposed tariffs, including Tariff 6.C.

[4] In response to the Board's request for clarification, the FCC indicated in a correspondence of August 26, 2015 that all of Re:Sound's proposed tariffs are problematic in the manner they are calculated and are too onerous for volunteer groups. They recommended that all tariffs be considered for a flat rate for community-based groups (i.e., not-for-profit sector).

[5] Further to Re:Sound's letter of April 24, 2015, requesting certification of Tariff 6.C for the years 2013-2015, Re:Sound requested on October 14, 2015 that Tariff 6.C also be certified for the years 2016-2018. Following Re: Sound's letter, the FCC indicated that they have no interest in Tariff 6.C.

[6] Re:Sound submitted that the rates under its requests should be based on SOCAN Tariff 3.C rather than SOCAN Tariff 18 – Recorded Music for Dancing, 2005-2010 (SOCAN Tariff 18), adjusted for inflation since 2004, and subject to a 50 per cent repertoire adjustment. The rates would be as follows: 2.6¢-2.7¢ for 2013-2015, and 2.7¢-2.8¢ for 2016-2018, per day, multiplied by the establishment's capacity.

[7] These rates are lower than the initial rates proposed in the *Canada Gazette*, which were respectively 21¢ and 6.6¢ per day, multiplied by the establishment's capacity.

## II. ANALYSIS

[8] Tariff 6.C proposes the royalties that are to be paid for the equitable remuneration for the public performance and the communication to the public by telecommunication of published sound recordings. In its notice of May 25, 2017, the Board expressed the preliminary view that it appears unlikely that "establishments," as that term is defined in the proposed tariff, communicate to the public by telecommunication to accompany adult entertainment. It asked Re:Sound to consider limiting the scope of the proposed tariff, or to provide evidence that such communications do take place.

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<sup>2</sup> *Re:Sound Tariff 6.A – Use of Recorded Music to Accompany Dance, 2008-2012* (15 July 2011) Copyright Board Decision. [*Re:Sound Tariff 6.A*]

[9] In its response of May 30, 2017, Re:Sound agreed with the Board that it may not be necessary for Re:Sound Tariff 6.C to include communication to the public by telecommunication, but that the intent of the tariff was to

cover all use of sound recordings by adult entertainment establishments that are subject to royalties under section 19 of the *Copyright Act*. Re: Sound wants to ensure that any narrowing of the scope of the tariff does not create any potential unintended gaps in coverage.

[10] Given the fact that Re: Sound seeks no separate rate for equitable remuneration for communication to the public, and given that there were no objectors to the proposed tariff, we include both activities in the certified tariff. However, we note that our analysis regarding the appropriate benchmark, as well as consideration of the repertoire adjustment, are fundamentally based on a consideration of performance in public. Both the benchmark and repertoire can be significantly different in consideration of communication to the public by telecommunication.

#### **A. BENCHMARK**

[11] The Board used SOCAN Tariff 18 as the benchmark for setting *Re: Sound Tariff 6.A*. The latter tariff established royalties in respect of any indoor or outdoor venue, including nightclubs, dance clubs, bars, restaurants, hotels, halls, clubs, schools, campuses and adult entertainment clubs, for the purposes of dancing or any similar activity.

[12] Re:Sound has supplied no calculations to answer the question of whether establishments will pay more under Tariff 6.C than they paid under Tariff 6.A (2008-2012). Based on the Board's calculations, some establishments will pay more while some others will pay less, according to the capacity of the venue, the number of days of operation per week, and the number of months of operation per year. We expect Re: Sound to file with the Board some statistics relating to the revenues collected pursuant to Tariff 6.C the next time the Board is considering this tariff. For now, since we cannot assess how much more royalties this tariff will generate per establishment compared to its predecessor, this cannot form the basis for determining the fairness of this tariff.

[13] Re: Sound submits that the more appropriate benchmark for its new Tariff 6.C is SOCAN Tariff 3.C – Adult Entertainment Clubs (2011-2012), as it applies to the very same use, namely the use of recorded music in an adult entertainment club. We agree with Re: Sound. The list of types of venues covered by Tariff 6.A (2008-2012) contains one anomaly, adult entertainment clubs, in which – unlike in the other venues – the music is used (at least in part) to accompany a performance. By benchmarking Tariff 6.C to SOCAN 3.C, we are addressing this anomaly.

[14] Re: Sound submits that harmonizing the rates and structure of the Re:Sound and SOCAN tariffs applicable to adult-entertainment venues will simplify the administration of the tariff for

both Re:Sound and establishments and allow for greater efficiencies such as joint licensing initiatives between Re:Sound and SOCAN. We accept Re:Sound's submissions in this respect.

## **B. INFLATION**

[15] The rate payable under SOCAN Tariff 3.C for 2011-2012 was 4.4¢ per day, multiplied by the establishment's capacity. This rate had not increased since 2004. On May 5, 2017, the Board certified SOCAN Tariff 3.C for 2013-2017. The Board set rates of 4.4¢ per person per day for 2013-2014, and 4.7¢ for 2015-2017. In the reasons issued with that decision, the Board described the new rate as "adjusted for inflation."<sup>3</sup> However, the Board also noted that SOCAN did not use the correct methodology for adjusting for inflation, accounting for less than half of the inflation that had accrued since that time.<sup>4</sup>

[16] In its decision certifying *Re:Sound Tariff 6.A*, the Board adjusted SOCAN Tariff 18 for inflation since 2004, before using it as a benchmark for setting Re:Sound's royalties, stating that, "this is necessary because SOCAN Tariff 18 is stated in dollar terms and does not preserve the purchasing power of SOCAN members".<sup>5</sup> Re: Sound submits that the same methodology should be applied to Tariff 6.C. We agree.

[17] There is an inconsistency in using both SOCAN Tariff 3.C as a benchmark and adjusting it for inflation using the Board's methodology in the decision *SOCAN-Re: Sound CBC Radio, 2006-2011*.<sup>6</sup> The inconsistency arises because, at the time of Re: Sound's requests for certification, SOCAN Tariff 3.C had not been adjusted for inflation since 2004. In order to address this inconsistency, we follow Re:Sound's submissions and set Re:Sound's tariff as a fraction (equal to the repertoire share) of what SOCAN's tariff would have been had it requested and received all inflationary increases to which it was entitled using the correct calculation. As an example, the SOCAN rate so obtained for 2016 would have been 5.5¢ per person per day, compared to the rate of 4.4¢ that was in force at the time of the requests for certification.

[18] Re: Sound has asked that the rate be adjusted for inflation for all the years under examination. At the date of Re:Sound's request, inflation rates for the years 2015 to 2018 were not known, and Re:Sound used the midpoint of the Bank of Canada's target range, namely 2 per cent, to approximate inflation. We do not use this approach for the following reason.

[19] The actual inflation rate will never equal 2 per cent, except by pure coincidence. Hence, rates adjusted by 2 per cent will miss the correct adjustment almost systematically. As an

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<sup>3</sup> *SOCAN Various Tariffs, 2007-2017* (5 May 2017) Copyright Board Decision at para 31.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Supra* note 2 at para 32.

<sup>6</sup> *SOCAN-Re:Sound CBC Radio Tariff, 2006-2011* (8 July 2011) Copyright Board Decision at paras 84-91.

example, while Re:Sound was asking for an inflation adjustment of 2 per cent for each of 2015 and 2016, the actual inflation rates were respectively of 1.77 and 1.26 per cent. The adjustment proposed by Re:Sound would have led to an overpayment of royalties by establishments.

[20] We prefer to use the actual inflation rate when it is known. Thus, we use the actual inflation rates to adjust the rate for the years 2013 to 2016. For the years 2017 and 2018, we do not adjust the rate for inflation and keep it at its 2016 level. According to the principle expounded below, Re:Sound will be able to request that future royalty rates (i.e., rates for 2019 and onwards) be adjusted for inflation that will have occurred in particular for 2017 and 2018.

[21] As the Board said in an earlier decision on the issue of inflation adjustment,<sup>7</sup> we believe that efficiency is better served by the collectives filing multi-year tariffs without an automatic adjustment for inflation. From time to time, the collectives could request an inflation adjustment and expect that such an adjustment reflect the fluctuations in inflation in all of years for which no adjustments were made. This is what SOCAN is currently doing. The “time-to-time” adjustment would thus cumulate inflation starting on the last year for which such an adjustment took place and up until the last year for which a full set of Consumer Price Index data is available prior to certification. In our view, this approach is simpler for all parties and the Board.

[22] In addition to rates that embody an inflation adjustment, Re:Sound also asks for an inflation-adjustment clause. This is not the first time Re:Sound has asked for such a clause; in fact the Board certified such a clause in *Background Music, 2003-2009*.<sup>8</sup>

[23] That being said, and for the reasons mentioned above, we do not include in this tariff sections 5 and 6 of the proposed tariff, under subheading “Rate Adjustments to Account for Inflation,” which cannot coexist with the preferred “time-to-time” approach.

### **C. REPERTOIRE ADJUSTMENT**

[24] Re:Sound submits that the Tariff 6.C rate should be subject to a 50 per cent repertoire adjustment, in accordance with the Board’s decision in *Re:Sound Tariff 6.A*.<sup>9</sup> In that tariff, the Board used a 50 per cent repertoire adjustment in all places where recorded music for dancing is played (including adult-entertainment venues, the subject of the present matter), essentially on consent of the parties.<sup>10</sup>

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<sup>7</sup> *SOCAN Various Tariffs, 1998-2007* (19 March 2004) Copyright Board Decision at 20.

<sup>8</sup> *NRCC Tariff 3 – Use and Supply of Background Music, 2003-2009* (20 October 2006) Copyright Board Decision. [*Background Music, 2003-2009*]

<sup>9</sup> *Supra* note 2 at para 31.

<sup>10</sup> *Ibid.*

[25] We are concerned, as the Board was in 2011 when it certified *Re:Sound Tariff 6.A*, that 50 per cent may not a reasonable measure of the use of Re:Sound's repertoire in adult-entertainment venues. Nevertheless, in the absence of evidence to the contrary, we follow the Board's decision in that decision and use a 50 per cent repertoire adjustment.

### III. DISPOSITION

[26] The Board certifies the following rates: 2.6¢ for the years 2013 and 2014 and 2.7¢ for the years 2015 to 2018, per day, multiplied by the establishment's capacity.

### IV. TARIFF WORDING

[27] We note that Re:Sound has requested the right to share confidential information with its "service providers." The Board has addressed this issue recently, in its decision relating to commercial radio. In that decision, the Board provided that any sharing with service providers shall be only "to the extent required by the service providers for the service they are contracted to provide." In addition, a service provider with which confidential information about an establishment is shared is required to sign a confidentiality agreement prior to getting access to such information."<sup>11</sup> Our decision does likewise and the tariff is adjusted accordingly.

[28] Subsection 6(3) of the tariffs filed by Re:Sound in its requests for certification described the process of updating the information and payment filed with Re:Sound. For a given calendar year, the establishment must estimate the amount owed and the number of days of operation no later than January 31. No later than January 31 of the following year, the establishment must provide Re:Sound with a report of the actual days of operation for the given year, and adjust the payment accordingly. This subsection provides that "[n]o interest is payable with respect to overpayments." The subsection is silent with respect to underpayments.

[29] The asymmetry of no interest on overpayments but possible interest on underpayments is unreasonable. The Board has consistently refused asymmetric treatment of overpayments and underpayments, for example, in *Re:Sound 5, 2008-2012*,<sup>12</sup> *Access K-12 Redetermination, 2005-2009*,<sup>13</sup> and *Commercial Radio, 2016*.<sup>14</sup>

[30] To resolve the asymmetry, we either need to have interest on overpayments and underpayments, or no interest on either one. In our view, the latter is more appropriate. A

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<sup>11</sup> *Commercial Radio Tariff (SOCAN: 2011-2013; Re:Sound: 2012-2014; CSI: 2012-2013; Connect/SOPROQ: 2012-2017; Artisti: 2012-2014)* (21 April 2016) Copyright Board Decision at para406.

<sup>12</sup> *Re:Sound Tariff 5 – Use of Music to Accompany Live Events, 2008-2012 (Parts A to G)* (May 25, 2012) Copyright Board Decision at paras 53, 61. [*Re:Sound 5, 2008-2012*]

<sup>13</sup> *Access Copyright (Educational Institutions) 2005-2009 – Redetermination* (18 January 2013) Copyright Board Decision at paras 39-40. [*Access K-12 Redetermination, 2005-2009*]

<sup>14</sup> *Supra* note 11 at para 409.

payment made one year later than the due date because information is being updated is not a late payment. In particular, if the estimates are made in good faith and based on the previous year's operation, there is no reason to have interest paid for either type of adjustment. As such, we reword subsection 5(3) to read "No interest is payable with respect to overpayments or underpayments."

## **V. TRANSITIONAL PROVISIONS**

[31] The tariff contains certain transitional provisions made necessary because it takes effect partly in the past. These provisions relate to the payments of retroactive amounts and interest due thereon. The interest factors are calculated using the un compounded, monthly Bank of Canada rate and apply symmetrically to overpayments and underpayments.

A handwritten signature in black ink, appearing to read "Gilles McDougall". The signature is fluid and cursive, with the first name being the most prominent.

Gilles McDougall  
Secretary General