

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2018-07-20

Citation CB-CDA 2018-159

Regime Collective Administration in Relation of Rights Under Sections 3, 15, 18 and 21
Copyright Act, subsection 70.15(1)

Members The Honourable Robert A. Blair
Mr. Claude Majeau

**Statements of Royalties to be collected by cbra for the fixation and reproduction of works
and communication signals, in canada, by commercial and non-commercial media
monitors for the years 2017 to 2019**

Reasons for decision

I. INTRODUCTION

[1] On March 31, 2016, pursuant to section 70.13 of the *Copyright Act*¹ (the “Act”), the Canadian Broadcasters Rights Agency (CBRA) filed proposed statements of royalties to be collected for the fixation and reproduction of works and communication signals, in Canada, by commercial and non-commercial media monitors for the years 2017 to 2019. The proposed statements were published in the *Canada Gazette* on June 11, 2016. Prospective users or their representatives were informed of their right to object to the statements by August 10, 2016.

[2] On August 19, 2016, the Copyright Board informed CBRA that it had received no objections to the proposed tariffs it had filed.

[3] On March 21, 2018, the Board issued Notice 2018-055 requesting additional information from CBRA. In particular, CBRA was asked to explain how a series of licence agreements contemporaneous to the 2017-2019 period between itself and several institutional or commercial

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

users, that it filed with the Board pursuant to section 70.5 of the *Act*, compare to the proposed tariffs for 2017-2019.

[4] CBRA provided the requested information on May 1, 2018.

II. ANALYSIS

A. QUESTIONS ASKED BY THE BOARD

[5] In order to assess the tariff proposals' consistency with market practices, comparative analysis of recent licence agreements can offer useful benchmarking.

[6] Accordingly, the Board asked CBRA to provide explanations for variations, if any, in various licence agreements regarding royalties, licensed uses, and other terms and conditions in comparison to the proposed tariffs. CBRA was also asked to provide any other licence agreement, which had not yet been filed with the Board under section 70.5 of the *Act*.

B. COMPARISON OF THE TERMS OF THE AGREEMENTS WITH THE TERMS OF THE COMMERCIAL MEDIA MONITORING PROPOSED TARIFF

[7] Two of the ten licence agreements filed with the Board were directly negotiated by CBRA with commercial monitors. CBRA explained that both of these monitors are based in the United States. These monitors sought authorization from CBRA to monitor and use CBRA broadcaster materials both within Canada and outside Canada. As the proposed CBRA Commercial Media Monitoring Tariff for the years 2017 to 2019 does not apply outside Canada, the parties determined that they would enter into licence agreements as the agreements could then deal with the monitors' activities both within Canada and outside Canada.

[8] Other than the territory covered, the provisions of these licence agreements closely track the provisions of the proposed commercial monitors tariff. For instance, the 14 per cent rate to be paid by these monitors is the same as the rate in the tariff applicable to commercial monitors.

C. COMPARISON OF THE TERMS OF THE AGREEMENTS WITH THE TERMS OF THE NON-COMMERCIAL MEDIA MONITORING PROPOSED TARIFF

[9] Consistent with past licences, monitors within federal and provincial departments are willing to pay a higher royalty rate than the proposed tariff rate of 14 per cent for additional benefits that the proposed tariff would not afford. These additional benefits vary from monitor to monitor and include the following examples:

- The elimination of restrictions on the maximum number of excerpts per CBRA program;
- The use of higher quality excerpts of CBRA broadcaster television programs in terms of resolution and frame rate; and
- The retention of excerpts and CBRA works for a longer period of time than envisioned in

the tariff following their broadcast.

[10] The five federal government monitors agreed to pay royalty rates that are higher (16.5-17.0 per cent) than the rates paid by the 3 provincial government monitors (14-14.5 per cent). These higher rates are the result of the federal government monitors negotiating for and receiving some significant additional benefits under their licence agreements that the provincial monitors do not receive under their agreements, and that are not provided by the proposed non-commercial tariff. For example:

- The federal government monitors are relieved of the effort and expense associated with complying with the usual CBRA requirements that monitors keep track of details of their actual usage of each item of CBRA broadcaster material that is monitored. Instead, the federal government monitors are required only to conduct a two-week survey of their usage, once per year, and are entitled to use those survey results as the basis for calculating the royalties they are to pay to CBRA;
- In certain circumstances, the federal government monitors are authorized to retain copies of CBRA broadcaster materials indefinitely, rather than having to destroy such materials after a set period of time as the provincial monitors are obligated to do;
- In certain circumstances, some of the federal government monitors are authorized to exceed the resolution and frame rate maximums imposed on the quality of excerpts that may be used; and
- The federal government monitors are given the right to exhibit excerpts to audiences of government users.

D. COMPARISON OF THE TERMS OF THE COMMERCIAL AND NON-COMMERCIAL MEDIA MONITORING PROPOSED TARIFFS AND THE CERTIFIED 2011-2016 COMMERCIAL AND NON-COMMERCIAL MEDIA MONITORING TARIFFS

[11] Except for some minor stylistic or clerical changes, both commercial and non-commercial proposed tariffs for 2017-2019 are all but a carbon copy of the 2011-2016 certified commercial and non-commercial media monitoring tariffs.

III. CERTIFIED TARIFFS

A. NON-COMMERCIAL MEDIA MONITORING TARIFF

[12] Consistent with our analysis of licence agreements between CBRA and non-commercial media monitors undertaken in our August 8, 2014 decision on *Media Monitoring 2011-2016*,² the most recent agreements filed with the Board show again non-commercial media monitors' willingness to pay more than the proposed 14 per cent rate. Again, the agreed rates are consistent

² *CBRA Tariffs for Commercial and Non-Commercial Media Monitors, 2011-2016* (August 8, 2014) Copyright Board Decision.

with past practices and greater than the proposed tariff rate because of the additional rights included in the agreements such as reduced record-keeping requirements, fewer reporting requirements, longer retention periods and greater resolution and audiovisual format, which are not included in the proposed tariff. We continue to believe that the non-commercial media monitoring tariff is more the default option when no agreement can be reached, rather than the norm. As such, for this tariff term, the non-commercial tariff continues to play a benchmark role rather than being a perfect reflection of the industry practices. Because no objections were raised to the proposed tariff for 2017-2019 , it appears that non-commercial media monitors that have not entered into an agreement with CBRA are satisfied with the status quo.

[13] Based on the foregoing, we certify the non-commercial media monitoring tariff for the years 2017 to 2019 as proposed.

B. COMMERCIAL MEDIA MONITORING TARIFF

[14] We also certify the commercial media monitoring tariff for the years 2017 to 2019 as proposed by CBRA. First, as mentioned above the proposed tariff is essentially identical to the 2011 to 2016 certified tariff with tariff rates remaining at 14 per cent of the CBRA-related gross income. Second, there were no objections to this tariff. Third, in terms of the licence agreements that cover both the United States and Canada, we believe they would not be relevant proxies for the tariff because of the difference in market sizes.

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