

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

Proposed Tariffs Considered SOCAN Tariff 22 – Internet – Other uses of Music – Other Sites (2007-2013)

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

Reasons for decision

I. INTRODUCTION

[1] In accordance with section 67.1 of the *Copyright Act*¹ (the “*Act*”), the Society of Authors, Composers and Music Publishers of Canada (SOCAN) filed with the Board its proposed statements of royalties to be collected for the communication to the public by telecommunication of musical works in its repertoire on the Internet (Tariff 22) in March of 2006 through 2012. The statements were published in the *Canada Gazette* on May 20, 2006, June 23, 2007, June 14, 2008, July 4, 2009, July 31, 2010, May 28, 2011, and June 2, 2012. Prospective users or their representatives were informed of their right to object to the statements.

[2] These reasons deal with Tariff 22.7 – Communications of Musical Works via the Internet or Similar Transmission Facilities – Other Sites (2007, 2008), Tariff 22.G – Internet – Other Sites (2009), Tariff 22.G – Internet – Other Uses of Music – Other Sites (2010), Tariff 22.H – Internet – Other Uses of Music – Other Sites (2011, 2012) and Tariff 22.I – Internet – Other Uses of Music – Other Sites (2013) (collectively the “Proposed Tariffs”). The Proposed Tariffs are

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

designed to capture the online use of music by any sites or services that do not fall under any other parts of Tariff 22 (the “Other Sites”).

[3] On July 27, 2018, the Board asked SOCAN to clarify the activities to which the Proposed Tariffs would apply. In its response of July 30, 2018, SOCAN informed the Board that with the certification of the SOCAN portion of the Online Music Services Tariff (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013), of Tariff 22.D.1 – Internet – Online Audiovisual Services (2007-2013), and of Tariff 22.D.2 – Internet – User-Generated Content (2007-2013), as well as the ongoing examination of other components of Tariff 22, it was not aware of any online audio or audiovisual uses that are not already captured by other Internet tariffs. As such, SOCAN indicated that it was prepared to withdraw the Proposed Tariffs.

[4] On August 2, 2018, the Board issued Notice 2018-177 stating that, barring any objections, it intended not to certify the Proposed Tariffs as the scope of application cannot be readily ascertained. The Notice was sent to parties who had filed objections to the Proposed Tariffs. These parties are identified in the Annex.

[5] The Board did not receive any submissions in response to the Notice.

II. ANALYSIS

[6] For each of the years in question, SOCAN proposed a rate of 10 per cent of the greater of the gross revenues earned and the gross operating expenses of the site or service, with a minimum monthly fee of \$200.

[7] The Board had previously considered a similar catch-all tariff proposed by SOCAN in its 2008 decision relating to the use of music on the Internet, other than online music services, for the years 1996 to 2006.² In that case, SOCAN submitted that the tariff was designed to capture music used on sites for which the main activity was not related to the use of music. Examples of such use included music on websites for businesses, amateur podcasts, as well as social networking sites. Little evidence was provided in support of the tariff.

[8] In that decision, the Board stated that it would be highly disruptive and unfair to blindly set a tariff with such a broad scope and retroactive application in the absence of proper and reliable evidence. The Board further noted that, in the absence of evidence, it could not provide adequate

² *Tariffs Nos. 22.B to 22.G (Internet – Other Uses of Music) 1996-2006* (October 24, 2008) Copyright Board Decision at paras 108-117.

reasons explaining how it would have arrived at the rate of the tariff, in accordance with the principles set out in the Federal Court of Appeal's decision in *CAB v. SOCAN and NRCC*.³

[9] The Board's refusal to certify a tariff for these "other sites" was the subject of judicial review by the Federal Court of Appeal in *SOCAN v. Bell Canada*⁴ where the Court concluded that the Board was justified to exclude that item from the certification process:

[26] In my view, it would have been unreasonable for the Board to certify this impugned Item of the proposed Tariff 22 in the absence of the necessary probative evidence, on mere guesses, speculations and approximations [...]

[27] In addition, to proceed to a determination of the kind sought by SOCAN, in the absence of that evidence, would be acting arbitrarily and unreasonably. However, to act arbitrarily and unreasonably when required by law to act fairly and reasonably is wrong at law. The resulting decision of the Board would have been both wrong and unreasonable.

[10] In the present case, the main concern lies with the undefined scope of application of the tariff for the Other Sites. The Board agrees with SOCAN that there does not appear to be any online audio or audiovisual use of music that is not already captured by another previously proposed or certified SOCAN tariff. Without any meaningful way of positively identifying or clearly defining the scope of application of the subject tariff, it would not be possible to determine the necessary probative evidence for the Board to certify a fair and reasonable tariff for the use of SOCAN's repertoire in relation to the Other Sites. In other words, the Board would be acting arbitrarily and unreasonably if it proceeded with certifying a tariff the application for which remains uncertain.

III. CONCLUSION

[11] In view of the foregoing, the Board will not set a tariff for communications of musical works from the Other Sites for the years 2007 to 2013.

[12] As for SOCAN's request to withdraw the Proposed Tariffs, it will not be necessary for the Board to address it as the issue is now moot.



³ *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada and Neighboring Rights Collective of Canada*, 2006 FCA 337.

⁴ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2010 FCA 139 at paras 26, 27.

Gilles McDougall
Secretary General

Annex

The Board issued Notice 2018-177 to the following parties on August 2, 2018:

- Apple Canada Inc. and Apple Inc.
- Bell Canada
- Canadian Association of Broadcasters
- Canadian Broadcasting Corporation
- Cineplex Entertainment LP
- CKUA Radio Network
- Computer and Communications Industry Association
- Entertainment Software Association / Entertainment Software Association of Canada
- Music Canada
- Pandora Media Inc.
- Pelmorex Media Inc.
- Quebecor Media Inc.
- Restaurants Canada
- Retail Council of Canada
- Rogers Communications Inc. / Rogers Communications Partnership
- SaskTel Inc.
- Shaw Communications Inc.
- Sirius Canada Inc.
- Stingray Digital Group Inc.
- Telus Communications Company
- Videotron GP
- Yahoo! Canada Co.