Copyright Board Canada

Commission du droit d'auteur Canada

Date	2018-12-07
Citation	CB-CDA 2018-222
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 21 – Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations (2013-2020)

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

Reasons for decision

I. INTRODUCTION

[1] On March 30, 2012, April 2, 2013, March 31, 2014, and March 31, 2017, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed pursuant to section 67.1 of the *Copyright Act*,[1] proposed statements of royalties to be collected for the performance of musical works in its repertoire in recreational facilities operated by a municipality, school, college, university, agricultural society or similar community organizations for the years 2013 to 2020. The proposed statements were published in the *Canada Gazette*. On each occasion, prospective users or their representatives were given notice of their right to file objections to the proposed statements.

[2] Aldergrove Community League, Athlone/Dunvegan Community League, Avonmore Community League, Baturyn Community League, Calder Community League, Canora Community League, Delwood Community League, Dovercourt Community League, Edmonton Federation of Community Leagues, Goldbar Community League, Idylwylde Community League,

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

Jasper Park Community League, La Perle Community League, Leefield Community League, McQueen Community League, North Glenora Community League, Ogilvie Ridge Community League, Queen Mary Park Community League, Ridgewood Community League, Royal Gardens Community League, and West Meadowlark Community League filed objections.

[3] Objections were filed with the Board in relation to all years except for the years 2015, 2016 and 2017. The reasons for objecting were essentially twofold:

- It would be unfair to require not-for-profit organizations with limited resources such as community leagues to pay for such a tariff; and
- The reporting requirements placed on community operators of recreational facilities are too burdensome.

[4] On August 2, 2018, the Board notified the Parties that it was ready to examine Tariff 21 for the years 2013-2020, and that it intended to proceed with a paper-only hearing, based on the objections received and any complementary information the Parties may wish to add in writing. Accordingly, the above-mentioned Parties were asked to file with the Board by no later than Friday, August 24, 2018, any additional submissions they wished to provide in support of their positions. In addition, Parties were asked to provide by the same date answers to a series of questions pertaining to the tariff administration and reporting difficulties raised by the objectors. SOCAN was also asked to explain why the fixed fee and upper-limit in the proposed tariff for 2018-2020 were higher than in the last certified tariff, and not by the same percentage, as well as certain discrepancies and variations among and within its various tariff proposals.

[5] The Board received responses from The McQueen Community League, Edmonton Federation of Community Leagues, and SOCAN. No replies were subsequently filed.

II. BACKGROUND

[6] Tariff 21 was created in the 1990s to address the administrative burden associated with multiple tariffs applying to a single user. Tariff 21 allowed a consolidation of various tariffs (they now include: Tariff 5.A (Exhibitions and Fairs); Tariff 7 (Skating Rinks); Tariff 8 (Receptions, Conventions, Assemblies and Fashion Shows); Tariff 9 (Sports Events, including minor hockey, figure skating, roller skating, ice skating, youth figure skating, carnivals and amateur rodeos); Tariff 11.A (Circuses, Ice Shows, etc.), and Tariff 19 (Fitness Activities and Dance Instruction)) into one under certain conditions. Having a single tariff for all their activities would help not-for-profit communities as it reduced the administrative complexity of complying with various tariffs and reporting on repeated occasions under disparate terms and conditions.[2]

[2] SOCAN – Various Tariffs (1992-1994)(August 12, 1994) Copyright Board Decision at 3*ff*.

[7] This single tariff with multiple uses sets a maximum amount of gross revenues for all activities covered by the tariff. Beyond this upper-limit ($15,422.88, as last certified for the year 2012), the user can no longer obtain the Tariff 21 licence and must comply with the individual tariffs for each of its activities. Within the upper-limit, the tariff requires payment of an annual fixed fee ($185.07, as last certified).

[8] A single tariff with multiple uses eased the administrative burden in relation to reporting generally. However, the question of what constituted "gross revenues" raised additional issues that were later addressed during the SOCAN Tariff 21 proceedings for 2000-2004. At the time, rural communities argued that Tariff 21 was hard to administer since the definition of revenue (i.e. gross admission receipts for all activities covered by the tariff) used in computing the allowable maximum necessitated taking into account information about the revenues generated by those who lease the municipal recreational facilities. But only the lessees, and not the facility operator, had this information. Discussions with SOCAN resulted in an agreement in January 2002 on amendments to the terms and conditions of Tariff 21. Under this agreement, SOCAN agreed to add activities covered by Tariffs 8 and 19 to those covered in Tariff 21. SOCAN also agreed to redefine the revenues that determine whether one is eligible to be licensed under the tariff. SOCAN also proposed that the allowable maximum apply to the licensee's gross revenues (essentially composed of rental costs, according to SOCAN) instead of gross admission receipts for the activities held in the facilities.[3]

[9] The Parties did not agree on the effect of the new definition of revenues for the calculation of the allowable maximum. SOCAN considered that it implied lower revenues, while the objectors argued the opposite. For example, the Canadian Recreation Facilities Council argued that the new definition of revenues proposed by SOCAN was broader since it potentially included several new categories such as revenues from sponsorships and revenues from the sale of alcoholic beverages. It contented that this new broader definition could prevent a larger number of users from gaining access to this tariff. In the absence of additional evidence on this question, the Board certified the tariff for 2003 as proposed by SOCAN (including the new definition of revenues), while maintaining the allowable maximum at its 2002 level, i.e. $15,000.[4]

III. ANALYSIS

[10] Three issues arise from the information on file. First, we must address the question as to whether the fact that users are not-for-profit communities should exempt them from tariff payment. Second, we must address the issue pertaining to the administrative burden in terms of reporting requirements under the proposed tariffs. Third, we must address the variations in the

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[3] SOCAN – Various Tariffs (1998-2007) (June 18, 2004) Copyright Board Decisionat 8-9.
[4] *Ibid* at 26-27.

proposed tariffs for the 2013-2020 period in respect of the fixed fee, the upper-limit and the reporting obligations.

A. NOT-FOR-PROFIT COMMUNITIES EXEMPTION

[11] The issue of not-for-profit organizations having to pay tariffs is one that has arisen from time to time.[5] The Board has rejected the argument that the activities of not-for-profit communities should not attract royalties. While noting that SOCAN may choose to waive its fees for some such events under relatively strict conditions, the Board has rejected the view that not-for-profit communities should be entitled to use a collective's repertoire for free. We concur with this reasoning. A free licence would amount to indirectly creating a new exception outside the Parliamentary process.[6] It would in effect provide users with an unwarranted windfall and trigger a corresponding shortfall for SOCAN. Music ought to be viewed as any other expense contributing to the operations of a facility, such as electricity, maintenance costs and salaries.

B. ADMINISTRATIVE BURDEN

[12] In terms of the administrative burden that seems to be associated with the reporting requirements placed on community operators of recreational facilities, we note that all are in agreement that the reporting requirements would only apply to revenues of operators of the recreational facility. This is a much different obligation than one that would require such operators to monitor the revenues of third-parties, such as community members or associations that lease the facility. The only issue is whether the proposed tariff language should be clarified (i) to specify that the gross revenues are only those of the operator of the recreational facility, and (ii) to define "gross revenues" in terms of types of revenues included, such as rental, beverages, admissions, sponsorship, etc.

[13] SOCAN questions the need to include the proposed clarification that gross revenues are only those of the operator of the facility in that the tariff language is already to this effect. The objectors who filed comments are of the opinion that the language should be clarified. We see no harm in clarifying the tariff to ensure that recreational facility operators do not misinterpret their obligations. With the clarification, operators will be unequivocally required to report only on their own revenues when providing access to their recreational facilities to third parties.

[14] With respect to the definition of "gross revenues," the commenting Parties have somewhat different approaches. SOCAN does not believe a definition of "gross revenues" is required as

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[5] See SOCAN – Various Tariffs (2006- 2012) (June 29, 2012) Copyright Board Decision at para 7; See also NRCC TariffNo. 3 – Use and Supply of Background Music (2003-2009) (October 20, 2006) Copyright Board Decision at para 169.

[6] Subsections 32.2(2) and 32.2(3) of the *Copyright Act* provide some exceptions applying among others to fairs, exhibitionsand charitable organizations.

that expression is easily understood. However, if the Board decides to include a definition, SOCAN agrees that all of the constituent elements identified by the Board should be included and some additional potential sources of revenue be added so that it reads as follows: "gross revenue" means all revenues generated by the use and/or rental of the facility, including but not limited to rental charges, admission charges, ticket sales, food and beverage sales, advertising, product placement, promotion, or sponsorship.

[15] The McQueen Community League and Edmonton Federation of Community Leagues generally agree with the types of revenue identified for the purposes of calculating the admissibility to SOCAN's tariff. However, they submit that for efficiency and simplicity, the way that these types of revenues are tracked are through Facility Rental and Event Revenue. They also submit that using these categories on existing and future financial statements is a reasonable burden of reporting for their members.

[16] In this regard, SOCAN contends that limiting the reporting obligation simply to "Facility Rental and Event Revenue" without an accompanying definition risks failing to capture all relevant revenues that should properly exclude a large revenue generating facility from the ambit of this tariff that grants preferential licence fee rates to small operators.

[17] We see no harm in clarifying that gross revenues include Facility Rental and Event Revenue, which include all revenues generated by the use and/or rental of the facility, including but not limited to rental charges, admission charges, ticket sales, food and beverage sales, advertising, product placement, promotion, or sponsorship. While the definition of "gross revenues" could raise fairness issues to the extent it may in effect indirectly lower the threshold for benefiting from the Tariff 21 multiple-use licence, we note that the tariff's upper-limit is not an issue raised by the Parties and is a separate issue from the definition of "gross revenues." Indeed, evidence on the appropriateness of the upper-limit should not depend on the definition of "gross revenues." Accordingly, a definition of "gross revenues" will be added for clarification purposes for 2013 to 2020.

C. TERMS AND CONDITIONS VARIATIONS

[18] The general provisions of the tariff proposals include a paragraph stipulating that each licence shall subsist according to the terms set out therein and that SOCAN shall have the right at any time to terminate a licence for breach of terms or conditions upon 30 days' notice in writing. As the Board recently did in relation to similar provisions,[7] we strike out this paragraph as it pertains to language of an individual contractual licence rather than a tariff. This also touches

[7] SODRAC Tariff 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition), [Redetermination (2009-2012); Determination (2013-2016)] (September 28, 2018) Copyright Board Decision at para 39.

upon copyright liability and provisions in the *Act* governing remedies against tariff users. As such, it is a compliance and enforcement issue rather than a tariff certification issue.

[19] The proposed tariffs for 2015-2017 and 2018-2020 included a higher fixed fee and upper-limit compared to the last certified tariff. SOCAN explained that it is seeking an increase of the annual fee, which goes from $185.07 to $198.58 to account for inflation. It also seeks an increase of the allowable maximum from $15,422.88 to $17,500, not to account for inflation but rather as a rounding increase to make it easier for the licensee's reporting.

[20] SOCAN applied an increase of 7.3 per cent using the formula the Board itself used in its 2004 decision on multiple SOCAN tariffs.[8] However, as explained in a more recent decision of the Board with respect to SOCAN multiple tariffs,[9] the formula was later revised by the Board. This new formula would have led to an inflation adjustment of 18.2 per cent as opposed to 7.3 per cent. We use this later increase however, as proposed by SOCAN, and certify an annual fee of $198.58 for 2015-2020.

[21] We also certify the upper-limit increase as proposed by SOCAN for 2015 to 2020. There is no prejudice to recreational facility operators when the upper-limit increases.

[22] For 2014, the proposed tariff does not include either an upper-limit for yearly gross revenues or a reporting obligation, but contains an audit right. SOCAN explains that its intention in removing the upper-limit for yearly gross revenues in 2014 was to accommodate certain licensees who had complained that they were unable to calculate their annual gross revenues. When SOCAN removed the upper-limit, SOCAN explains that through oversight it omitted to remove the accompanying audit provision. SOCAN recognizes that the upper-limit is a defining feature of the tariff and its omission changes the tariff's nature. Nonetheless, because the tariff's substance is so different without an upper-limit, reinstating it would have potentially grave consequences on those who governed their affairs according to the published tariff proposal. Accordingly, while the 2014 tariff will remain an anomaly, procedural fairness does not allow us to alter the proposed tariff in a way that would be consistent with the other proposed tariffs.

[23] Finally, we certify the tariff for 2013 as proposed by SOCAN (with the addition of a definition of "gross revenues" as discussed above). The 2013 proposal carries over the last certified fixed fee and upper-limit and no valid reasons were provided to modify the status quo.

[24] This tariff contains transitional provisions made necessary because it takes effect on January 1, 2013, although it is being certified much later.

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[8] *Supra* note 3 at 18-21.
[9] SOCAN – Various Tariffs (2007-2017) (May 5, 2017) Copyright Board Decisionat paras 6-7.

[25] In the past, the Board has often certified interest factors to apply on the amounts owed as a result of a retroactive certification of a tariff. In this instance however, in an email to the Board of October 19, 2018, SOCAN waived any claim to interest payable on any retroactive payment by a licensee. Thus, we do not certify any interest factors for this tariff.

Gilles McDougall
Secretary General