

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Regime Collective Administration of Performing Rights and of Communication Rights
Copyright Act, subsection 68(3)

Members Mr. Justice William J. Vancise
Mr. Claude Majeau
Mrs. Jacinthe Th  berge

**Proposed
Tariff(s)
Considered** Re:Sound Tariff No. 6.A – Use of Recorded Music to Accompany Dance, 2008-2012

Statement of Royalties to be collected for the performance in public 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] Recorded music is frequently played in fitness centres and dance venues. These establishments already pay royalties to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the use of its members' music. Until now, no royalties were paid by these establishments to the performers and makers of the sound recordings. This tariff is thus inaugural.

[2] On March 30, 2007, pursuant to section 67.1(2) of the *Copyright Act*,¹ Re:Sound Music Licensing Company (Re:Sound),² acting for these performers and makers, filed the first statement of royalties it proposes to collect for the use of recorded music to accompany dance and fitness for the years 2008 through 2012 (Tariff 6).

¹ R.S.C. 1985, c. C-42 (the "Act").

² Re:Sound was previously the Neighbouring Rights Collective of Canada (NRCC).

[3] The statement was published in the *Canada Gazette* on June 2, 2007. No objections were filed by August 1, 2007, the deadline for filing written objections with the Board.

[4] Some ten months later, *L'Aréna des Canadiens Inc.* and Gillett Entertainment Group (collectively, Gillett), the Fitness Industry Council of Canada (FIC), the Alliance of Beverage Licensees of BC (ABLE BC), the Canadian Restaurant and Foodservices Association (CRFA), the Vancouver Hospitality Association (VHA), the British Columbia Restaurants and Foodservices Association (BCRFA) and Goodlife Fitness Centres Inc. (Goodlife) sought leave to intervene in the proceedings.

[5] On February 2, 2009, the Board granted leave to these entities to intervene with full participatory rights. Re:Sound subsequently served interrogatories on these intervenors. Gillett, VHA, and BCRFA did not respond to the interrogatories. On November 25, 2009, the Board ruled that they be precluded from further participation in these proceedings unless they responded to the interrogatories. These parties did not respond and, as a result, did not participate in the proceedings.

[6] These reasons deal only with Re:Sound Tariff 6.A (Use of recorded music to accompany dance). Tariff 6.B (Use of recorded music to accompany fitness) will be addressed at a later date. Only ABLE BC and CRFA gave evidence in opposition to the proposed dance tariff. ABLE BC is a business trade association that represents British Columbia's pubs, bars, nightclubs and privately owned liquor stores. CRFA is Canada's largest hospitality association with over 30,000 members. Members include restaurants, bars, dance venues, hotels, caterers and foodservice suppliers. Some of the members of the two associations play recorded music for dancing.

II. POSITION OF THE PARTIES

A. RE:SOUND

[7] Initially, Re:Sound proposed a monthly fee of \$5 multiplied by the capacity of the dance venue. In its statement of case, Re:Sound reduced that amount to \$3.62. In its reply submissions, Re:Sound further offered to change the tariff to a daily rate of \$0.21 to be applied only on days when the venue played recorded music for dancing.

[8] Re:Sound justified the rate of \$3.62 by arguing that the value of recorded music to dance venues is substantially greater than for fitness centres and thus the rate cannot be less than the rate that would apply to fitness centres. The rate proposed is equivalent to the fitness rate after adjustments for repertoire use and for the different units of measurement (per member per month instead of per person of capacity per month).

[9] Re:Sound's proposed rate of \$0.21 per person per day was in response to a submission by ABLE BC. It converts the monthly rate to a daily rate using assumptions about the frequency of playing recorded music in dance venues.

B. ABLE BC AND CRFA

[10] ABLE BC argued that the proposed dance tariff is too high compared to the payments that the same establishments currently pay to SOCAN for playing the same recordings. It also argued that setting a monthly tariff as Re:Sound initially proposed does not recognize the diversity of the industry and, in particular, that most establishments do not play recorded music for dancing every evening. It proposed that the tariff be set at no more than 50 per cent of SOCAN Tariff 18 (Recorded music for dancing) and that tariff payments begin from the date of certification of the tariff, not from January 1, 2008.

[11] CRFA argued that the refusal of Re:Sound to publish its repertoire makes it impossible for its members to avoid paying the tariff. It supported ABLE BC's position that SOCAN Tariff 18, which is well understood by the restaurant industry, should serve as a benchmark for Re:Sound Tariff 6.

III. EVIDENCE

A. RE:SOUND

[12] Re:Sound presented evidence from two experts, Dr. Adriana Bernardino, Executive Vice President, Research, Advanis Inc. and Dr. John McHale, Established Professor and Head of Economics at the J.E. Cairnes School of Business and Economics, National University of Ireland, suggesting that the fair tariff for fitness centres would be 8 per cent of revenues before adjusting for repertoire. Re:Sound argued that a fair tariff for dance venues was also 8 per cent of revenues, because music is inherently more valuable to dance venues than it is to fitness centres.

[13] No repertoire analysis was conducted with respect to the dance portion of the tariff. Re:Sound relied on the expertise of Dr. Robert Bowman, an ethnomusicologist from York University. Dr. Bowman's estimated "that 90% of all Canadian clubs program Top 40 recordings."³ The words "Top 40" means the 40 most sold sound recordings which are typically played on commercial radio stations. This is the basis Re:Sound used to apply the

³ Exhibit Re:Sound-2 at para. 42.

50 per cent repertoire discount factor from the Board's most recent decision relating to commercial radio.⁴ The proposed rate is thus reduced from 8 to 4 per cent.

[14] Mr. Barry Fong, an articling student at Osler, Hoskin and Harcourt, conducted an Internet search of dance venues in Canada. He sampled 257 venues and determined that their average capacity is 457 people. Re:Sound introduced evidence from Statistics Canada stating that the revenue of "drinking places" averaged \$41,344 per month. Multiplying that amount by the proposed tariff rate of 4 per cent and dividing by the average capacity produces Re:Sound's proposed monthly rate of \$3.62 per month.

[15] Re:Sound also proposed a daily rate in reply to some of ABLE BC's submissions. In this proposal, Re:Sound assumed that dance venues operate 4 days per week, 52 weeks per year, or a total of 208 days. To compute the daily tariff, Re:Sound used the annual revenue of drinking places as compiled by Statistics Canada. This figure, \$496,127, was multiplied by 4 per cent, and divided by 208 days per year and by the average capacity of 457 producing a rate of \$0.21 per day.

B. THE OBJECTORS

[16] Ms. Kim Haakstad, Executive Director of ABLE BC, introduced the results of an email-based survey she conducted of her members who are owners of bars and restaurants where recorded music is sometimes played. One hundred and thirty-nine members responded to the survey. Of these, 51 reported playing recorded music for dancing less often than once per week and 34 reported playing recorded music for dancing once per week. The survey also asked the members to report the capacity of their establishments. The most common response by 51 of those responding was that their licensed capacity was between 100 and 150 persons.

[17] Ms. Haakstad contended the evidence presented by Mr. Fong was not a representative sample, at least of the province of British Columbia's establishments. Mr. Fong focused on establishments that advertise themselves as nightclubs or are classified as cabarets with the British Columbia Liquor Control and Licensing Branch. In so doing, Ms. Haakstad argued, Mr. Fong omitted a large number of pubs that play recorded music for dancing infrequently but that would also be subject to the proposed tariff.

[18] Ms. Haakstad testified about the prevalence of Top 40 music in ABLE BC's member's establishments. Many of the establishments hire a live band and of those who play recorded music "Top 40" music was slightly more popular than "House" music. Ms. Haakstad explained

⁴ *SOCAN-NRCC Tariff 1.A (Commercial radio) for the years 2003 to 2007 [Re-determination]* (22 February 2008) [Copyright Board Decision](#) at para. 6.

the discrepancy between her evidence and that of Dr. Bowman by noting that Dr. Bowman focused on nightclubs, a small segment of the businesses that play recorded music for dancing.

[19] CRFA called two witnesses to describe their experience with the restaurant business – restaurant owners Andrew Taranovski and Liam Dolan. Both witnesses explained that paying an additional \$0.21 per person per day would cause them to reconsider whether or not they would play recorded music for dancing and that raising prices in other areas was unlikely to be successful.

IV. ANALYSIS

A. RE:SOUND'S PROPOSAL

[20] We make no comment on the expert reports submitted by Drs. Bernardino and McHale by reason that we are reserving those comments to our decision in Re:Sound Tariff 6.B. Our analysis of Re:Sound's proposal takes as a given Re:Sound's submission that the value of the equitable fitness tariff is 8 per cent of revenues and analyzes the appropriateness of using that value in the context of dance venues.

[21] Re:Sound's submission for using the fitness calculations for the purposes of determining a rate for dance venues consists of a single paragraph, which we reproduce here in its entirety.⁵

With respect to dance venues, NRCC submits that the tariff rate for fitness centres is an appropriate benchmark for two reasons. First, the tariff rate for fitness centres is grounded in sound economics as to the value of the use of recorded music in fitness centres. Second, there can be little doubt that the value of recorded music to dance venues is no less than the value to fitness centres, and likely is more. As is stated by Dr. Bowman, "[W]ithout recorded music there would be no dance clubs". The NRCC share of the equitable royalties payable to rights holders for the public performance of recorded music by a dance venue is therefore 8 per cent of the dance venue's total revenue. The rate must, however, be discounted by NRCC's repertoire of sound recordings used by dance venues.

[22] Re:Sound argues that the tariff rate for fitness centres is an appropriate benchmark for the rate for dance venues. We disagree. The Board explained the process of using benchmarks in the *Satellite Radio Services Tariff* decision:

Once a tariff has been established by the benchmark, it is not a simple reflection of the initial proxy, but rather a tariff arrived at as the result of an independent analysis of the specific sector to which the tariff applies.⁶

⁵ Exhibit Re:Sound-1 at para. 98

⁶ *Satellite Radio Services Tariff* (SOCAN: 2005-2009; NRCC: 2007-2010; CSI: 2006-2009) (8 April 2009)

[23] An independent analysis of the specific sector to which the tariff applies requires, among other things, the consideration of the similarity of the sector to which the tariff applies to the sector from which the benchmark is drawn.

[24] By inviting the Board to use the fitness tariff as a benchmark, Re:Sound has implicitly advanced three arguments: first, the Board should use a benchmark approach for the dance tariff; second, the Board should use the best benchmark; and, third, the fitness tariff is the best benchmark. We agree with the first two and disagree with the third, for the following reasons.

[25] Re:Sound implicitly claims a substantial similarity between the dance and fitness sectors. In our opinion, there are several key differences. First, the business models are different. In the fitness sector, the largest portion of revenue comes from monthly membership and (where these are charged separately) class fees. In the dance sector, the largest portion of revenue comes from admission fees and food and beverage sales. Fitness clubs have *members* whereas dance clubs have *patrons*.

[26] Second, the use of music is different. In a dance venue, the use of music is both ubiquitous and necessary. In a fitness centre, the use of music is partial and optional. It is partial since there may be some rooms in which music is not played, such as the class room when a yoga class is given, or the change rooms. It is optional by reason that if the fitness centre does not offer any classes and has a workout area, it could satisfy the demands of some members by having television screens or docking stations for personal music players.

[27] Re:Sound also claims that the fitness tariff is a good benchmark by reason that it is based on sound economic analysis. Assuming, without deciding, that the fitness benchmark is based on sound economic analysis, it does not follow for that reason that it is appropriate for determining the tariff for another use of protected works. The usual arguments linking the two markets have not been made convincingly, for the reasons stated above.

[28] The argument that the value of music to dance venues is greater than it is to fitness clubs is undoubtedly true. It is also unhelpful, for two reasons. First, the statement is just as true of other music uses, including supermarkets playing background music. Yet no one is proposing that any of those other music uses serve as benchmark. Second, knowing that music is more valuable to dance venues than to fitness centres does not tell us that the rate should be the same or higher; the nature and size of the rate base may be such that the rate for one use is lower than for the other even though the value is greater.

B. THE OBJECTORS' PROPOSAL

[29] Both ABLE BC and CRFA propose using SOCAN Tariff 18 as a proxy and applying a 50 discount for repertoire. We examine these two proposals separately.

[30] SOCAN Tariff 18 deals with the same uses of music in the same industry. It more specifically covers recorded music played for dancing in all the dance venues targeted by the Re:Sound tariff except adult entertainment clubs, which are covered by SOCAN Tariff 3.C. Since the proposed Re:Sound tariff is to cover both of these uses, it is reasonable to use SOCAN Tariff 18 as the benchmark. On balance, adult entertainment clubs probably constitute a small portion of the venues covered by Re:Sound's proposed tariff. Tariff 18 is thus a more appropriate benchmark than SOCAN Tariff 3.C.

[31] Next, we must next consider whether the 50 per cent repertoire adjustment is appropriate. There is no particular reason to expect that dance venues (as Re:Sound defines them) play music similar to commercial radio. However, since both Re:Sound and the Objectors agree on the 50 per cent repertoire adjustment for dance venues and that no repertoire study was conducted to suggest that 50 per cent is either too high or too low, we will use a 50 per cent repertoire discount.

C. THE TARIFF

[32] SOCAN Tariff 18 was last certified for the years 2005 through 2010 at the same rate as in 2004. We employ the same methodology as in the *SOCAN-Re:Sound CBC Radio Tariff, 2006-2011*,⁷ and adjust for inflation since 2004. This is necessary because SOCAN Tariff 18 is stated in dollar terms and does not preserve the purchasing power of SOCAN members.

[33] Our starting point is the royalty paid to SOCAN for dance venues open six or fewer months per year, three or fewer days per week, that is, \$267.33. We first adjust this figure by 50 per cent to account for the size of Re:Sound's repertoire, obtaining \$133.67. For each of the five years of the tariff, we adjust this figure for inflation accumulated since the last time the SOCAN tariff was modified, for 2004. We use the Consumer Price Index without subtraction and we assume that inflation for future periods equals the midpoint of the Bank of Canada's target range, i.e. 2 per cent. The amount obtained is \$151.19, implying an inflation adjustment of 13.1 per cent. Figures for dance venues that operate more than three days per week or more than six months per year are computed in a similar manner. Finally, we use the same rule as in the SOCAN tariff for capacity exceeding 100 persons. We thus certify the tariff as follows:

⁷ *SOCAN-Re:Sound CBC Radio Tariff, 2006-2011* (8 July 2011) [Copyright Board Decision](#) at paras. 82 to 91. [*CBC Radio, 2011*]

(a) Establishments whose capacity is less than 100 patrons will pay annually the amounts showed in the following table:

	Days of Operation Jours d'ouverture	
Months of Operation Mois d'opération	1 – 3 days 1 à 3 jours	4 – 7 jours 4 à 7 jours
6 months or less 6 mois ou moins	\$151.19	\$302.38
More than 6 months Plus de 6 mois	\$302.38	\$604.76

(b) For establishments whose capacity is greater than 100 patrons, 10 per cent additional payment per each 20 persons of capacity.

[34] In 2007, the last year for which the Board has data, SOCAN collected \$1,564,928 under Tariff 18. Half of this amount is \$782,464. Adjusting this amount for 9.2 per cent inflation yields \$854,451. We estimate at this amount the annual royalties that tariff 6.A would generate.

D. TARIFF WORDING

[35] The wording of the tariff, though largely based on that of SOCAN Tariff 18, has been modified to make it clearer. For example, “venue” is used instead of “premises”, to emphasize that the tariff also applies to outdoor dancing. Subsection 2(2) is simpler than the SOCAN equivalent. Section 3 specifies how to calculate the number of patrons a venue can accommodate. Administrative provisions that have become common in all tariffs have been added.

[36] At the request of Re:Sound, the tariff expressly provides that it does not apply to any venue operated by a not-for-profit, religious or educational institution, if the dancing is primarily made available to participants under the age of 19. Some of the activities mentioned may already be the subject of exceptions under the *Act*; others are not. The provision has the benefit of making clear that, in some cases, Re:Sound does not intend to collect royalties even though it may be entitled to do so. It does not impose royalties where none are payable under the *Act*, since a tariff cannot override the statute.

[37] As once before, Re:Sound requested that the period during which it can claim unpaid royalties be longer than that during which a user can ask for a refund of excess payments. We denied that request for the reasons set out in an earlier decision.⁸

⁸ *Commercial Radio Tariff (SOCAN: 2008-2010; Re:Sound: 2008-2011; CSI: 2008-2012; AVLA/SOPROQ: 2008-2011; ArtistI: 2009-2011)* (9 July 2010) [Copyright Board Decision](#) at para. 332.

[38] Finally, the tariff contains transitional provisions made necessary because the tariff takes effect on January 1, 2008, while it is being certified much later. For the reasons set out in *CBC Radio, 2011*,⁹ we intend to follow this practice to all instances where a tariff is certified after it takes effect. A table setting out interest factors to be used on sums owed, derived using the previous month-end Bank Rate, is included in the Tariff. Interest is not compounded. The amount owed for a reporting period is the amount of the approved tariff multiplied by the factor set out for that period.

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

Gilles McDougall
Secretary General

⁹ *Supra* note 7 at paras. 82-91.