

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2019-12-11

Citation CB-CDA 2019-085

Regime Collective Administration in Relation to Rights under Sections 15 and 19 *Copyright Act*
Copyright Act, sections 68, 69 and 69.1

Members The Honourable Robert A. Blair
Ms. Nathalie Théberge
Ms. Adriane Porcin

Withdrawal of Proposed Tariffs

**Statements of proposed royalties to be collected from producers and record companies by
artisti for the fixation of performances and the reproduction and distribution of
performances fixed by performers in the form of phonograms for the years 2016 to 2018
and 2019 to 2021**

and

**Statements of proposed royalties to be collected by artisti for the making available to the
public, the communication to the public by telecommunication and the reproduction, of
performances fixed in a sound recording by online music services for the years 2016 to
2018 and 2019 to 2021**

Reasons for decision

I. DECISION

[1] The Board approves Artisti's application made under s. 69 of the *Act* to withdraw the Phonograms (2016-2021) and Online Music Services (OMS) (2016-2021) proposed tariffs.

II. BACKGROUND

[2] In April 2019, new provisions governing the collective administration of copyright came into force. Among these, section 69.1 of the *Copyright Act* (the "*Act*") mandates that the Board grant an application for tariff withdrawal made under section 69 of the *Act* if certain conditions are met:

69. A collective society may, before a proposed tariff filed by it has been approved by the Board, make an application to the Board requesting that

(a) the proposed tariff be withdrawn; or

(b) a reference to an act set out in the proposed tariff be excluded from the approved tariff for all of the proposed effective period or, despite subsection 68.1(2), for a portion of that period.

69.1 (1) The Board shall approve an application made under section 69 if it is satisfied that

(a) the collective society has provided sufficient public notice of its intention to make the application;

(b) every person who, in respect of the proposed effective period, has paid royalties that would not be payable if the application were approved has

(i) consented to the application,

(ii) received a refund of the royalties, or

(iii) entered into an agreement under subsection 67(3) that covers the act, repertoire or proposed effective period that is the subject of the application; and

(c) in the case of an application made under paragraph 69(b) with respect to a portion of the proposed effective period, the application is not made for the purpose of improperly circumventing the required minimum effective period.

[3] On June 28, 2019, Artisti with the consent of the Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ), Canadian Independent Music Association (CIMA) and Music Canada notified the Board that Artisti and ADISQ have come to an agreement regarding ongoing issues between them, which will result in Artisti making an application to the Board requesting that its proposed tariffs in the Artisti Phonograms proceedings [(2016-2018) and (2019-2021)] and in the OMS proceedings [(2016-2018) and (2019-2021)] be withdrawn.

[4] These tariff proposals had been published in the *Canada Gazette* prior to April 2019.

[5] In those circumstances, Artisti requested that, while preparing its application under section 69 of the *Act*, the current Schedule of Proceedings in the Phonograms proceedings (including the June 28, 2019, deadline mentioned in the Case Management Notification [CB-CDA 2019-040], dated June 14, 2019) be suspended *sine die*.

[6] On July 10, 2019, Artisti requested that the Board post on its website a notice that would serve the purpose of meeting the requirement set out in s. 69.1(1)(a) of the *Act*.

[7] In granting this request, the Board issued Notice [CB-CDA 2019-052] on July 26, 2019, which read as follows:

Notice of Intent to Withdraw Proposed Tariffs by ARTISTI

Please be advised that ARTISTI intends to make, on August 30, 2019, an application under section 69 of the Copyright Act to withdraw the following proposed tariffs:

- Statement of Proposed Royalties to be Collected by ARTISTI for the Fixation of Performances and the Reproduction and Distribution of Performances Fixed by Performers in the Form of Phonograms for the Years 2016 to 2018;
- Statement of Proposed Royalties to be Collected from Producers and Record Companies by ARTISTI for the Fixation of Performances and the Reproduction and Distribution of Performances Fixed by Performers in the Form of Phonograms for the Years 2019 to 2021;
- Statement of Proposed Royalties to be Collected by ARTISTI for Making Available to the Public and for the Reproduction, in Canada, of Performances Fixed in a Sound Recording by Online Music Services for the Years 2016 to 2018; and
- Proposed Statement of Royalties to be Collected by ARTISTI for the Making Available to the Public, the Communication to the Public by Telecommunication and the Reproduction, in Canada, of Performances Fixed in a Sound Recording by Online Music Services for the Years 2019 to 2021.

This constitutes a public notice under s. 69.1 of the *Copyright Act*.

[8] On August 30, 2019, Artisti filed its application to the Board under s. 69 of the *Act* requesting that the proposed Phonograms and OMS tariffs be withdrawn.

III. WITHDRAWAL APPLICATION

[9] In support of its application, Artisti stated that it notified the public of its intention to file an application for withdrawal by (a) informing directly the objectors and interveners; (b) publishing a notice on its website; and (c) publishing a further notice on the Board's website.

[10] More specifically, Artisti stated that it had informed the objectors and interveners in the **Phonograms** proceedings directly and that ADISQ, Music Canada and CIMA expressly consented to the tariff withdrawal.

[11] Regarding the **OMS** proceedings, ADISQ, Music Canada and CIMA expressly consented to the tariff withdrawal. Counsel for the other objectors and interveners in the OMS proceedings (Canadian Association of Broadcasters, Sirius XM, Apple, Goodlife Fitness Centres and

Stingray) were informed as well as counsel for the objectors who have withdrawn from the proceedings (i.e., Bell Canada, Google, Quebecor,¹ Rogers, Shaw and Yahoo).

[12] Furthermore, in compliance with Notice [CB-CDA 2018-195] (which requires that, until Parties reach a settlement, or until the Board suspends this ruling, Artisti file a status report every month on the last business day of that month), Artisti notified counsel for all parties involved in the consolidated OMS proceedings on July 4, 2019, of its intention to withdraw. In a second report filed on July 31, 2019, in accordance with Notice [CB-CDA 2018-195], Artisti reiterated its intention to withdraw the proposed tariffs and to file its formal application on August 30, 2019.

[13] Artisti argues that because all interested parties have been notified directly or through their counsel, and that this group represents most of the relevant industry, sufficient public notice has been provided. Furthermore, no objections to the withdrawal have been communicated since the various notices were issued, including after they were published on Artisti's and the Board's websites, on July 12 (amended on July 29) and 26, respectively.

[14] Finally, Artisti underscores that (i) no payments were received under the proposed tariffs and (ii) its withdrawal application does not request that a reference to an act set out in the proposed tariff be excluded from the approved tariff. Accordingly, the only statutory condition that the Board needs to verify is that Artisti has provided *sufficient public notice of its intention to make the application to withdraw*, pursuant to paragraph 69.1(1)(a) of the *Act*.

IV. REASONS

[15] The *Act* does not stipulate what constitutes “sufficient public notice” of a collective's intention to make the application to withdraw a proposed tariff under s. 69. It does, however, provide some helpful benchmarks.

[16] Under s. 68.2 of the *Act*, the Board can publish or distribute a notice related to a proposed tariff and objections thereto in the manner it sees fit. This constitutes a shift from the notice publication requirements in the *Canada Gazette* under the *Act* prior to the April 2019 changes. As explained in a government explanatory note on Copyright Board reform, these changes are meant to “[...] empower the Board to publish proposed tariffs by any means it sees fit rather than mandatorily in the *Canada Gazette*, as at present. This flexibility in publication could reduce the length of proceedings by a few months.”²

¹ Quebecor is, however, continuing its participation in the OMS proceedings through ADISQ. (Artisti August 30, 2019, Withdrawal Application)

² Innovation, Science and Economic Development Canada, *Fact Sheet: Copyright Board Reform*, available at: <http://www.ic.gc.ca/eic/site/693.nsf/eng/00168.html>

[17] There is no reason why these considerations should not apply equally to circumstances involving a notice of withdrawal of a proposed tariff in our view. There is nothing in the *Act* that would require a different approach to be taken. In the circumstances here, we are satisfied that publication of the withdrawal notice on both the Collective's and the Board's website constitutes adequate public notice of the proposed withdrawal.³

[18] We also note that the notice of intent to withdraw was posted online for more than 30 days. We believe that the above reasoning may be applied to the duration of a proposed tariff withdrawal notice, as well: if 30 days (or 60 days before April 2019) is adequate time for objecting to a tariff proposal under subsection 68.3(2), the same minimum notice period is adequate and sufficient for notifying an intention to withdraw it. That minimum is more than met here.

[19] In addition, as Artisti points out, no payments have been received under the proposed tariffs. Accordingly, the provisions of s. 69.1(1) (b) do not apply. In any event, we believe that anyone potentially affected, but who did not object to the proposed tariffs, would not be any more concerned by the withdrawal than they were by the original tariff proposals particularly since no payments have been made under them.

[20] Finally, with respect to the subsection 69.1(c) condition, we agree that it does not apply since the withdrawal application is not one that falls under subsection 69(b) of the *Act*.

[21] For the foregoing reasons, we conclude that the public notice, in its various forms as outlined above, satisfies subsection 69.1(a) of the *Act* and, accordingly, we approve its application made under s. 69 of the *Act* to withdraw the Phonograms (2016-2021) and OMS (2016-2021) proposed tariffs.

[22] For the benefit of potential users, we note that s. 73.4 of the *Act* provides them with limited protection from proceedings as follows:

73.4 If the Board approves an application made under section 69, no proceedings may be brought against a person for the infringement of a right with respect to an act referred to in section 3, 15, 18 or 21 if

(a) the proposed tariff, if approved, will not apply to the act as a result of the Board's approval of the application; and

³ While Artisti claims that it has directly or indirectly notified current or former participants in the proceedings, the fact that it may not have directly or indirectly contacted all such participants via counsel would not invalidate the public notice in the form of publications on Artisti's and CB's websites.

(b) the act occurs during the effective period set out in the proposed tariff and before the first anniversary of the day on which the collective society made its application under section 69 or, if a day has been established by regulations made under subsection 66.91(2), before that day.

A handwritten signature in black ink, appearing to be 'Lara Taylor', written in a cursive style.

Reasons certified by the Secretary General,
Lara Taylor