

Copyright Board
Canada



Commission du droit d'auteur
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Citation *Re:Sound Tariff 6.A (2013–2018)*, 2020 CB 004

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Proposed Tariffs Re:Sound Tariff No. 6.A – Use of Recorded Music to Accompany Dance (2013-2015)

Considered Re:Sound Tariff No. 6.A – Use of Recorded Music to Accompany Dance (2016-2018)

Approval of Proposed Tariffs

As

Re:Sound Tariff 6.A - Use of Recorded Music to Accompany Dance (2013–2018)

REASONS FOR DECISION

I. INTRODUCITON

[1] Re:Sound filed the *Re:Sound Dance Tariff (Tariff No. 6.A)* for the use of recorded music to accompany dance for the years 2013-2015 on March 30, 2012 and for the years 2016-2018 on March 30, 2015.

[2] A number of parties objected to the proposed tariff for the years 2013-2015: The Hotel Association of Canada (HAC), the Canadian Restaurant and Foodservices Association (CRFA), the Sony Centre for the Performing Arts, the Corporation of Roy Thompson Hall and Massey Hall, the National Arts Centre, *Place des Arts*, the Royal Conservatory of Music (in respect of Koerner Hall of Toronto), the Professional Association of Canadian Theatres (PACT), and the Canadian Arts Presenting Association/*l'Association canadienne des organismes artistiques* (CAPACOA). PACT and CAPACOA withdrew their objections on January 29, 2015 and April 22, 2015 respectively. The Federation of Calgary Communities (the FCC) was the sole objector to the proposed tariff for the years 2016-2018.

[3] On December 7, 2018, Re:Sound filed, with the consent of the HAC, a settlement in the form of a tariff, covering the years 2013-2018 (the “Settlement Tariff”).

[4] For the following reasons, we find that a tariff based on the Settlement Tariff, with minor changes to the terms and conditions concerning the sharing of confidential information, is fair and equitable. As a result, we approve it.

II. OVERVIEW

[5] On March 30, 2012, Re:Sound filed a proposed tariff for the communication to the public by telecommunication of published sound recordings embodying musical works and performers’ performances of such works to accompany dance, for the years 2013 to 2015 (“Proposed Tariff 6.A, 2013-2015”), pursuant to section 67.1 of the *Copyright Act*¹, as it read at the time.

[6] The proposed tariff was published in the Canada Gazette on June 9, 2012, and prospective users and their representatives were given notice of their right to file objections to the proposed tariff. The HAC, the CRFA, the Sony Centre for the Performing Arts, the Corporation of Roy Thompson Hall and Massey Hall, the National Arts Centre, *Place des Arts*, the Royal Conservatory of Music (in respect of Koerner Hall of Toronto), the PACT, and the CAPACOA, filed timely objections to Proposed Tariff 6.A, 2013-2015. PACT and CAPACOA subsequently withdrew their objections on January 29, 2015 and April 22, 2015, respectively. The FCC also objected to Proposed Tariff 6.A, 2013-2015. However, the objection was filed on February 22, 2013, more than six months after the expiry of the statutory deadline. As such, the FCC was not considered an objector to the proposed tariff.

[7] On March 30, 2015, Re:Sound filed a similar tariff for the years 2016 to 2018 (“Proposed Tariff 6.A, 2016-2018”). The proposed tariff was published in the *Canada Gazette* on June 20, 2015. In this case, the FCC filed an objection in time. No other persons objected to Proposed Tariff 6.A, 2016-2018.

[8] On March 2, 2018, the Board informed the parties, namely Re:Sound and any person who filed an objection to either of the proposed tariffs, that it was ready to examine Proposed Tariff 6.A, 2013-2015 and Proposed Tariff 6.A, 2016-2018.

[9] On December 7, 2018, Re:Sound filed, with the consent of the HAC, a settlement in the form of a tariff covering the entire relevant period, namely for the years 2013 to 2018². In a document accompanying the Settlement Tariff, Re:Sound compared it to *Re:Sound Tariff 6.A (2008-2012)*³, and provided reasons for the differences in royalty rates and wording.

¹ *Copyright Act*, RSC 1985, c C-42 [the Act].

² Letter from Melanie Hubbard to Secretary General, Copyright Board (7 December 2018) re: Request for Certification of Re:Sound Tariff 6.A – Use of Recorded Music to Accompany Dance, 2013-2018.

³ *Re:Sound Tariff 6.A – Use of Recorded Music to Accompany Dance, 2008-2012* (15 July 2011) Copyright Board

[10] On February 4, 2019, the Board provided a copy of the Settlement Tariff and the accompanying explanation to the remaining parties⁴ to the proceeding for comments.⁵ The Board further indicated that a party will be deemed to have withdrawn its objection to the proposed tariffs in question if it fails to file and serve its detailed grounds of objection to the Settlement Tariff by February 11, 2019. Only Restaurants Canada (formerly CRFA) responded by confirming the withdrawal of its objection and its support for the Settlement Tariff.⁶

[11] On March 24, 2020, the Board sought additional information for the purpose of evaluating the representativeness of the HAC and Restaurants Canada in respect of all users affected by the Settlement Tariff.⁷

[12] On May 13, 2020, Re:Sound, the HAC, and Restaurants Canada (jointly, the “Parties”) filed a response⁸, submitting that they represent a significant portion of the hotel, restaurant and bar industries in Canada. However, the Parties do not claim that the HAC and Restaurants Canada are representative of entities that are neither hotels, nor bars, nor restaurants.

III. ISSUE

[13] Whether the Settlement Tariff filed by Re:Sound on December 7, 2018 with the consent of the HAC, is fair and equitable and as such, the Proposed Tariff 6.A, 2013-2015 and the Proposed Tariff 6.A, 2016-2018 should be approved in the form of the Settlement Tariff?

IV. ANALYSIS

[14] Under the *Copyright Act*, the Board is required to “fix royalty and levy rates and any related terms and conditions under this Act that are fair and equitable.”⁹ As such, the Board is required to approve a tariff where the royalties (and terms and conditions) are *fair and equitable*.

[15] When a settlement tariff is filed by one or more parties, it represents one piece of evidence adduced by one or more Parties as part of the Board’s tariff-approval process; it does not replace

Tariff [*Re:Sound 6.A (2008-2012)*]; an application to vary the certified tariff was dismissed in *Application to Vary – Re:Sound Tariff 6.A – Use of Recorded Music to Accompany Dance, 2008-2012* (30 January 2012) Copyright Board Decision.

⁴ The remaining parties were Restaurants Canada (formerly CRFA), Sony Centre for the Performing Arts, the Corporation of Roy Thompson Hall and Massey Hall, the National Arts Centre, la Place des Arts, the Royal Conservatory of Music (in respect of Koerner Hall of Toronto), and the Federation of Calgary Communities.

⁵ *Re:Sound Tariff 6.A – Use of Recorded Music to Accompany Dance (2013-2018)* (4 February 2019) CB-CDA 2019-006 (order).

⁶ Letter from David B. Lefebvre to Secretary General, Copyright Board (7 February 2019) Re: Re:Sound Tariff 6.A – Dance (2013-2018) – Order [CB-CDA 2019-006].

⁷ *Re:Sound Tariff 6.A – Use of Recorded Music to Accompany Dance (2013-2018)* (24 March 2020) CB-CDA 2020-024 (order).

⁸ Joint response from Re:Sound, Hotel Association of Canada, and Restaurants Canada to Secretary General (13 May 2020) Re: Re:Sound Tariff 6.A – Use of Recorded Music to Accompany Dance (2013-2018) Order of the Board of March 24, 2020 [CB-CDA 2020-024] [*Joint Response to CB-CDA 2020-024*].

⁹ Act, *supra* note **Erreur ! Signet non défini.** s 66.501.

the proposed tariff originally filed by a collective society. For this reason, in determining whether or not the settlement tariff is fair and equitable, the Board must consider it in the context of the overall process initiated on the basis of the original proposed tariff, including any of the objections originally filed by the Parties prior to the filing of the settlement tariff.

[16] In evaluating whether a tariff is fair and equitable, in the context of a proposed settlement, the Board typically considers, amongst others:

- a. Whether parties to the settlement agreement are representative: if parties are representative of the industry affected by the tariff, then it is possible to use it as a proxy for an agreement acceptable to third-parties —or at least a significant percentage of them. Such an agreement may then be indicative of some form of “market agreement”, which may suggest that the market believes the rate is fair and equitable;
- b. Whether the settlement addresses all objections, including objections made to the proposed tariff, and is indicative of whether or not non-parties would agree to the settlement; and
- c. Whether there are significant deviations between the settlement tariff and a previously-approved tariff (where one exists): in circumstances where a tariff has previously been approved, and where there are no changes in the settlement tariff, or where those changes have been explained (either by the Parties or the Board), then the Board may use that as indication of the substantive fairness of the settlement.

A. REPRESENTATIVENESS OF THE SETTLING PARTIES

[17] In their May 13, 2020, response¹⁰ to the Board, Re:Sound, the HAC, and Restaurants Canada submitted that “[a]s can be noted from the updated member list available on the HAC website, HAC represents a very significant portion of the hotel industry in Canada”; and that “Restaurants Canada is the largest membership organization of its kind representing 30,000 businesses in every segment of the industry including restaurants, bars, caterers, institutions and their suppliers.” We conclude that the settling parties are representative of the affected hotel, restaurant, and bar industries and that this is evidence of fairness of the Settlement Tariff with respect to those industries.

[18] However, the Settlement Tariff also applies to entities other than hotels, bars and restaurants, such as nightclubs, dance clubs, halls, clubs, schools, and campuses, for the purposes of dancing or any similar activity, other than venues operated by not-for-profit educational/religious entities for dancing by minors.

[19] The Board does not have sufficient evidence or institutional knowledge to be able to determine whether the relevant characteristics of these entities are sufficiently similar to hotels,

¹⁰ *Joint Response to CB-CDA 2020-024, supra* note 8.

bars and restaurants. As a result, we are unable to conclude with certainty that the HAC and Restaurants Canada are representative of all affected entities in this proceeding.

[20] However, we are of the view that this element alone is insufficient for us to conclude that the Settlement Tariff is unfair, even in respect of entities of which the HAC and Restaurants Canada are not representative.

B. STATUS OF OBJECTIONS

[21] We find that all objections have been addressed in a satisfactory manner in the context of the current proceeding, for the following reasons: every prospective user has had an opportunity to object during the objection period following the publication of the proposed tariffs; former objectors to Proposed Tariff 6.A, 2013-2015 and Proposed Tariff 6.A, 2016-2018 either have provided their support for the Settlement Tariff or are deemed to have withdrawn their objections; and, the Board did not receive any comments from non-parties to the Settlement Tariff. We therefore conclude that all objections have been addressed.

C. COMPARISON OF SETTLEMENT TARIFF WITH PREVIOUSLY-APPROVED TARIFF

[22] In regard to the scope of the proposal, the Settlement Tariff is substantially similar to the previously-approved *Re:Sound Tariff 6.A (2008-2012)*¹¹. However, unlike its predecessor, the Settlement Tariff does not apply to the use of recorded music to accompany adult entertainment as the latter is now subject to a separate tariff, namely *Re:Sound Tariff 6.C (2013-2018)*¹². We are of the view that this does not affect the evaluation of the fair and equitable character of the royalties for those users to whom *Re:Sound Tariff 6.A* continues to apply.

[23] When compared with *Re:Sound Tariff 6.A (2008-2012)*, the royalty rates in the Settlement Tariff, when viewed in their entirety, amount to an increase of approximately 1.25 per cent per annum, which does not exceed the rate of inflation. In the absence of evidence that there has been a substantive change in the market since the certification of the previous tariff, this is sufficient for us to conclude that the royalty rates in the Settlement Tariff are fair and equitable.

[24] In our view, the terms and conditions included in the Settlement Tariff are generally appropriate, as they are similar to the previously-approved *Re:Sound Tariff 6.A (2008-2012)*. We note that the Settlement Tariff provides that the unpaid royalties owed pursuant to an audit are to be paid at the same time as the cost of the audit, which is within 30 days of the demand. Similar provisions are set out in a number of recently certified *Re:Sound* tariffs.¹³ In *Re:Sound Tariff 5 (2008-2012)*, the Board noted that generally, payment adjustments following the discovery of an

¹¹ *Re:Sound Tariff 6.A (2008-2012)*, *supra* note 3 (tariff).

¹² *Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment (2013-2018)* (21 July 2017) CB-CDA 2017-076 (decision) [*Re:Sound Tariff 6.C (2013-2018)*].

¹³ See e.g. *Re:Sound Tariff 6.C (2013-2018)*, *supra* note 13; *Re:Sound Tariff 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) - Use of Music to Accompany Live Events* (1 September 2017) CB-CDA 2017-092 (decision).

error are made at the same time as the next payment. However, given that royalties in question are only payable once a year, this would entail long delays.¹⁴ We believe that the same reasoning applies in the present case.

[25] However, we find that the confidentiality provisions in the Settlement Tariff require some modification. The Settlement Tariff provides that Re:Sound may share aggregated information, as well as confidential information with its “agents and service providers”; and may share confidential information with SOCAN “in connection with the collection of royalties or enforcement of a tariff”.

[26] Consistent with the recently-approved *Re:Sound Tariff 6.C (2013-2018)* where the Panel noted that any sharing of confidential information with service providers shall be only “to the extent required by the service providers for the service they are contracted to provide”, with a signed confidentiality agreement as a safeguard¹⁵; and other approved Re:Sound tariffs where the Board explained that “sharing information among collectives dealing with the same clients [...] is both efficient and desirable”¹⁶, we modify these provisions so that sharing of information with service providers shall be only “to the extent required by the service providers the service they are contracted to provide.” The information authorized to be shared under the approved tariff will also have to be treated as confidential.

V. DECISION

[27] Upon reviewing all the evidence in this proceeding, we find that a tariff based on the Settlement Tariff, with some minor modifications to the terms and conditions regarding the safeguard of confidential information, to be fair and equitable, and approve it as *Re:Sound Tariff 6.A – Use of Recorded Music to Accompany Dance (2013–2018)*.

[28] Finally, we note that one of the objectors (the Federation of Calgary Communities) raised the impact that having to deal with a multitude of proposed tariffs has on small community organisations. Given the nature of these objectors, and the limited resources they typically have, we suggest that Re:Sound consider proposing a tariff similar to SOCAN Tariff 21 for activities covering such entities—to the extent this would be consistent with the principle enunciated in Practice Notice 2019-004 that all covered activities could be considered in a single proceeding.

¹⁴ *Re:Sound Tariff 5 – Use of Music to Accompany Live Events (Parts A to G) (2008-2012)* (25 May 2012) Copyright Board Decision at para 60 [*Re:Sound Tariff 5 (2008-2012)*].

¹⁵ See *Re:Sound Tariff 6.C (2013-2018)*, *supra* note 13 at para 27, citing *Commercial Radio [SOCAN (2011-2013); Re:Sound (2012-2014); CSI (2012-2013); Connect/SOPROQ (2012-2017); Artisti (2012-2014)]* (21 April 2016) CB-CDA 2016-036 at para 406 (decision).

¹⁶ See e.g. *Re:Sound Tariff 3.A – Background Music Suppliers (2010-2013); Re:Sound Tariff 3.B – Background Music (2010-2015)* (1 September 2017) CB-CDA 2017-091 at paras 80–83 (decision), citing *Re:Sound Tariff 5 (2008-2012)*, *supra* note 15 at para 41.