

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

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**Member** René Côté

**Proposed Tariffs Considered** *Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment (2019–2023)*

### **Approval of Proposed Tariff(s)**

**As**

***Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment (2019–2023)***

### **REASONS FOR DECISION**

#### **I. INTRODUCTION**

[1] Re:Sound is the collective society that administers the rights to perform in public and to communicate to the public by telecommunication published sound recordings for performers and makers of sound recordings. Re:Sound filed with the Copyright Board (the “Board”) a proposed tariff for the use of recorded music to accompany adult entertainment for the years 2019 to 2023 (“Proposed Tariff 6.C”).

[2] The Proposed Tariff covers both the public performance and communication to the public by telecommunication of published sound recordings. We note that no separate value has been attributed to the act of communication to the public by telecommunication.

[3] While adult entertainment clubs have been subject to a specific tariff since 1996 when *SOCAN Tariff 3.C – Adult Entertainment Club* (“SOCAN Tariff 3.C”) was certified by the Board,<sup>1</sup> this is a second proposed tariff by Re:Sound for the same category of users.

[4] Compared to *Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment (2013-2018)*<sup>2</sup> (“Tariff 6.C (2013-2018)”), Proposed Tariff 6.C includes a substantial increase in

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<sup>1</sup> *SOCAN - Various Tariffs, 1994-1997* (20 September 1996) Copyright Board, at pp. 4 et seq.

<sup>2</sup> *Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment (2013-2018)* (22 July 2017)

the royalty rate that led the Board to inquire about the reasons justifying this increase. In its response, Re:Sound revised its initial proposal (the “revised proposed tariff”).

[5] The rate of royalties proposed in the revised proposed tariff represented a small increase over the rates set out in Tariff 6.C (2013-2018) to account for inflation. Considering that the increase proposed in the published Proposed Tariff 6.C had not been objected to, the Board must decide whether the revised proposed tariff is fair and equitable for 2019-2023.

[6] Furthermore, during the Board’s decision-making process, Re:Sound submitted a request to amend its revised proposed tariff as a result of the amendment made by Canada to the *Statement Limiting the Right to Equitable Remuneration of Certain Rome Convention or WPPT Countries* (the “Amended Statement”) as part of the implementation of the *Canada-United States-Mexico Agreement* that came into force on July 1, 2020.

[7] In this second revision of Proposed Tariff 6.C, Re:Sound submits that the repertoire adjustment compared to SOCAN’s previous 50% repertoire adjustment should instead follow the model adopted in the decision approving the *AVLA/SOPROQ – Commercial Radio Tariff (2008-2011)*,<sup>3</sup> that is, an adjustment of 93.72% of the repertoire. For the reasons set out below, it is appropriate to grant the royalty rate increase to take into account the Amended Statement.

[8] For the reasons that follow, we set the royalty rate as follows:

- 2019: 2.70¢ per day;
- 2020: 3.88¢ per day;
- 2021-2023: 5.06¢ per day.

[9] These rates reflect the Amended Statement, which since its coming into force has conferred a right to equitable remuneration for the public performance of sound recordings connected to the United States. However, taking into account the substantial increase in the royalty rate, the upward adjustment requested to take into account inflation for the years 2017 to 2019 will not be granted this time.

## II. BACKGROUND

[10] The Board approved *Re:Sound Tariff 6.C (2013-2018)* on July 21, 2017<sup>4</sup>. In that decision, the Board used SOCAN Tariff 3.C as a reference and adjusted the rate based on Re:Sound’s repertoire.<sup>5</sup> Re:Sound’s rate was set at 50% of SOCAN’s repertoire. The royalties were also set based on the number of days of operation to be multiplied by the establishment’s capacity, that is, the number of persons the establishment can accommodate under the establishment’s liquor

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<sup>3</sup> *SOCAN, Re:Sound, CMRRA-SODRAC Inc., AVLA-SOPROQ, Artisti – Tariff for Commercial Radio, 2008-2012* (9 July 2010) Copyright Board.

<sup>4</sup> *Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment (2013-2018)* (21 July 2017) Copyright Board (CB-CDA 2017-076) [Re:Sound 6.C (2013-2018)].

<sup>5</sup> *Ibid.*, at para 25.

licence or any other document issued by a competent authority for this type of establishment (the “Rates”). The Rates were 2.6¢ for 2013-2014 and 2.7¢ for 2015-2018.

[11] In that same decision, the Board decided to use the actual inflation rate to adjust the rates rather than making assumptions about inflation in future years. It therefore established the same rate based on actual inflation for the years 2013 to 2016. For the years 2017 and 2018, it was decided to keep the 2016 rate since the inflation rates for 2017 and 2018 were not yet known.<sup>6</sup> The Board also noted that Re:Sound could request adjustments to the inflation rate for 2017 and 2018 in a subsequent tariff application.

[12] Proposed Tariff 6.C was filed on March 28, 2018, and published in the *Canada Gazette* on May 5, 2018. No objections were filed with the Board for this proposed tariff.

[13] In Proposed Tariff 6.C, Re:Sound had proposed a royalty based on a rate of 6.6¢ per day for the period from 2019 to 2023. However, in response to Notice CB-CDA 2020-015 seeking explanations regarding the significant proposed rate increase, Re:Sound reduced its request to 2.8¢ per day for the period from 2019 to 2023. Re:Sound justified this rate increase with the inflation rate adjustment for the period from 2017 to 2019. Re:Sound also proposed amendments to other sections of Proposed Tariff 6.C.<sup>7</sup>

[14] On May 22, 2020, Re:Sound contacted the Board to reamend its Proposed Tariff 6.C so as to take into account the Amended Statement.<sup>8</sup> The effect of the Amended Statement is to abolish any existing limitations on the right to equitable remuneration for makers of sound recordings who, at the date of the sound recordings’ first fixation, were nationals or permanent residents of the United States or a corporation that had its headquarters in the United States for the performance in public of sounds recordings. The rates proposed by Re:Sound are as follows:

<b>Years</b>	<b>Royalty rate</b>	<b>Repertoire adjustment compared to that of SOCAN</b>
<b>2019</b>	2.8¢ per day	50%
<b>2020</b>	4¢ per day	71.86% <sup>9</sup>
<b>2021-2023</b>	5.2¢ per day	93.72%

### III. ISSUES

[15] There are two main issues raised by Re:Sound’s request for Proposed Tariff 6.C as amended. First, the request for a repertoire adjustment and its impact on royalty rates must be considered. Second, the fairness and equity of the proposed changes to the terms of Tariff 6.C, including the inflation adjustment, must be determined.

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<sup>6</sup> *Ibid.* at para 20.

<sup>7</sup> Re:Sound’s response to Notice CB-CDA 2020-015, March 5, 2020 [Re:Sound’s response to CB-CDA 2020-015]

<sup>8</sup> SOR/2014-181.

<sup>9</sup> Since the tariff is payable on an annual basis and that the change in repertoire is effective as of mid-2020, the rate for 2020 corresponds exactly to the 50% adjustment for the first six months and to the 93.72% adjustment for the last six months.

## IV. ANALYSIS

### A. RE:SOUND'S REPERTOIRE ADJUSTMENT

[16] With respect to the consequences of the Amended Statement, the analysis is multi-pronged.

[17] First, in light of the Amended Statement, on May 22, 2020, Re:Sound requested a review of SOCAN's 50% repertoire adjustment established on par with *Re:Sound Tariff 1.A – Commercial Radio* in 2005.<sup>10</sup> Re:Sound rather proposes to follow the model set out in the 2010 decision on *AVLA-SOPROQ Tariff – Commercial Radio (2008-2011)* which set the repertoire adjustment at 93.72% and fully considered the share of eligible repertoire consisting of sound recordings connected to the United States.<sup>11</sup>

[18] Second, to be entitled to this repertoire adjustment, Re:Sound must demonstrate that it was authorized to represent rights holders in eligible recordings connected to the United States. In its Notice CB-CDA 2020-050, the Board asked Re:Sound to explain in what capacity it represented rights holders in sound recordings connected to the United States. Re:Sound argued that it represented the repertoire of two members, Connect (formerly AVLA) and SOPROQ, which formed the basis of the 2010 decision on *AVLA-SOPROQ Tariff – Commercial Radio (2008-2011)*, in addition to the agreements signed by Re:Sound with the three major U.S. record companies (the "Majors": Sony, Warner and Universal), agreements signed with smaller U.S. record companies, pursuant to agreements with four performers' collectives, namely Artisti, ACTRA RACS, AFM and MROC, and international agreements with, among others, Sound Exchange. The Board is satisfied with Re:Sound's demonstration of its authority to represent rights holders in sound recordings connected to the United States.

[19] Finally, it is arguable whether the commercial radio tariff can really serve as a model for adult entertainment establishments. Indeed, while commercial radio stations have Canadian content obligations, establishments offering adult entertainment do not.<sup>12</sup> However, since these establishments have no obligation to list the sound recordings they use, it is strictly impossible to conduct a study of the repertoire actually used. Such a study could be conducted by Re:Sound in the future and could justify a different rate depending on the results that would be obtained at that time.

[20] Under these circumstances, we choose the 93.72% repertoire adjustment over SOCAN's repertoire.

### B. RATES AND ADMINISTRATIVE TERMS

#### i. Royalty Rate and Pandemic

[21] In determining whether a tariff is fair and equitable, it is appropriate to ensure that establishments especially impacted by the COVID-19 pandemic are not doubly affected by a

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<sup>10</sup> *SOCAN-NRCC Tariff 1.A – Commercial Radio (2003-2007)* (14 October 2005) Copyright Board at p 30.

<sup>11</sup> *SOCAN (2008-2010), Re:Sound (2008-2011), CSI (2008-2012), AVLA/SOPROQ (2008-2011), ARTISTI (2009-2011) Tariff 1.A – Commercial Radio* (9 July 2010) Copyright Board at para 255.

<sup>12</sup> See *Copyright Act*, RSC 1985, c C-42, s. 70(2)(b).

significant increase in royalties to be paid to a collective. The revised proposed tariff does not present any issues in this respect. Indeed, section 5 of Re:Sound Tariff 6.C provides that the royalty is set based on the number of days the establishment is actually open for business. Since the number of days of operation was significantly reduced throughout 2020 and will likely continue to be significantly reduced well into 2021 as a result of provincial government decisions to close such establishments because of the pandemic, the royalty payable will not increase for the year 2020; quite the opposite. The type of provision found in Re:Sound's Proposed Tariff 6.C does not pose any particular problem in this regard.

[22] Moreover, the revised proposed tariff is very similar to that approved in July 2017. It is proposed to increase the royalty rate by 2.7¢, amounting to 2.8¢ per day for the entire term of the tariff, that is, from 2019 to 2023. This increase is intended to account for inflation for the period from January 2017 to December 2019. This request for an inflation-related increase is in keeping with the evolving “time-to-time” adjustments recommended by the Board.<sup>13</sup> While this request would undoubtedly be perfectly admissible under normal circumstances, we believe that the accrued repertoire adjustment in addition to the inflation adjustment is not reasonable at this time owing to the economic slowdown caused by COVID-19. For this reason, we refuse the increase in the royalty rate based on inflation for the duration of the tariff. It will therefore remain at 2.7¢ per day for 2019. The royalty rate will increase to 3.88¢ for 2020 and to 5.06¢ for the years 2021 to 2023.

[23] Re:Sound may argue, however, that future rates should be adjusted for inflation that will have occurred for the years in which there were no inflation adjustments.

## **ii. Definition of “Service Provider”**

[24] Re:Sound also requests that the definition of “service provider” be removed from the tariff to allow for the flexibility needed to operate it. Re:Sound submits that the definition of “service provider” must be removed because it unnecessarily restricts the types of service providers with which Re:Sound may exchange confidential information under the confidentiality provisions (section 7(2)(a)) to only those companies that assist in the conduct of an audit or in the distribution of royalties to rights holders. This definition excludes, for example, information technology companies that may be called upon to work on Re:Sound databases or service providers acting as inspectors to ensure tariff enforcement. It is not possible to anticipate all types of service providers that may need to access data held by Re:Sound in its computer systems. In addition, the nature of the information provided by users under section 5 of Tariff 6.C is limited to contact information, the date the establishment first opened and capacity only. It does not include any financial data that is sufficiently sensitive to require the limits imposed by section 7 of Tariff 6.C.

[25] We recognize that the definition of “service provider” included in the proposed tariff may not be sufficiently flexible and we accept the removal of this definition from section 2 of the approved tariff.

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<sup>13</sup> Re:Sound 6.C (2013-2018), *supra* note 4, at para 21.

### iii. Sharing of Audit Reports

[26] Re:Sound proposes an amendment to subsection 6(3) of the Tariff to allow the sharing of audit reports in an effort to increase efficiency and reduce the burden on users by allowing cooperation between Canadian collectives working in the same industry sector. For instance, this would make it possible to carry out an audit jointly with SOCAN.

[27] As we do not see any other collective whose repertoire is used by adult entertainment establishments, we prefer to specify that the sharing of audit reports can be done with SOCAN. We consider that this will indeed facilitate cooperation between these two collectives and reduce the administrative burden on users.

### iv. Confidentiality

[28] Section 7 of Proposed Tariff 6.C deals with confidentiality. Re:Sound wants to amend subsection 7(2) to include the sharing of information with its “agents”. Re:Sound identifies Entandem, a joint venture between Re:Sound and SOCAN, as its agent. Entandem’s objective is to increase efficiency and reduce the burden in the administration of the tariff. This will provide establishments with a single point of contact. In order for Entandem to operate effectively, Re:Sound must be able to share information obtained under its tariffs with Entandem. We agree with this change, which allows for a single point of contact for users.

[29] However, we amend subsection 7(2) to limit the sharing of information with agents and service providers “to the extent required by the tasks, which the agents and service providers were contracted to provide”.

[30] Re:Sound is proposing a further amendment to its tariff by asking that the last clause of subsection 7(1) be removed. Re:Sound makes the following argument: “The provision creates an overly onerous and unworkable requirement that Re:Sound share a copy of the confidentiality agreement with each of its service providers with every establishment whose information will be shared with the service provider”<sup>14</sup> Under the most recent approved tariff, the “service providers shall sign a confidentiality agreement which shall be shared with the affected establishment *prior to the release of the information*. (Emphasis added.)” We believe that the repeal of this subsection goes too far. The sharing of confidentiality agreements with all establishments prior to the release of information is, in our opinion, an excessive burden on Re:Sound. We are therefore amending this section 7 to remove the last clause of subsection 7(1) but also to provide that Re:Sound will require its service providers to sign confidentiality agreements, but without requiring Re:Sound to notify all establishments before disclosing their information.

## V. OTHER ALTERATIONS

[31] We consider that two other alterations to the Proposed Tariff 6.C are appropriate.

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<sup>14</sup> Re:Sound’s response to CB-CDA 2020-015, *supra* note 7.

### **i. Interest on Overpayment and Underpayments**

[32] Proposed Tariff 6.C provides for interest on certain payments only. Its subsection 5.(3) reads, in part: “[N]o interest is payable with respect to overpayments.” In our view, this asymmetric provision is not appropriate. Recent Board decisions, including that relating to Re:Sound Tariff 6.B, have explained the rationale for the symmetric treatment of overpayments and underpayments. It is an issue of fundamental fairness. In Re:Sound 6.B, however, the remedy was to add interest payments for overpayments. In the present matter however, it is logical to remove interest payments for underpayments. This is because of the operation of Tariff 6.C, which provides for an initial payment in the year of the tariff and an adjustment in the following year. Accordingly, we rewrite the last sentence of subsection 5.(3) as: “No interest is payable with respect to overpayments or underpayments.” For the same reasons, we add the same sentence at the end of section 8.

### **ii. Reference to Another Tariff**

[33] Paragraph 3.(2) of Proposed Tariff 6.C provides that “[T]his tariff does not apply to a performance in public or a communication to the public by telecommunication that is subject to another Re:Sound tariff.”

[34] To facilitate comprehension and meaningful consideration of a proposed tariff, the scope, terms, and conditions of a tariff should be clearly defined and readily ascertainable from the proposed tariff itself. Since, in our opinion, it is the case, there is no need to refer to another Re:Sound tariff. Moreover, the reference to a hypothetical tariff may make the scope, terms, or conditions of a tariff undeterminable. Consequently, as per the Board’s *Practice Notice on Filing of Proposed Tariffs* [PN 2019-004], we remove such reference from Tariff 6.C.

## **VI. CONCLUSION**

[35] We conclude that Proposed Tariff 6.C as revised by Re:Sound, subject to a few changes with respect to both the definitions and terms and conditions for the protection of the confidentiality of information, is fair and equitable, and we approve it as *Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment (2019-2023)*.

[36] We also conclude that the applicable rates must be adjusted to reflect, in Re:Sound’s repertoire, equitable remuneration for the public performance of sound recordings connected to the United States as of July 1, 2020. To this end, we refer to the SOCAN Tariff 3.C rate. Consequently, we find that Re:Sound is authorized to represent the same repertoire as Connect (formerly AVLA) and SOPROQ and that their eligible repertoire accounts for 93.72% of SOCAN’s repertoire. We therefore set the royalty rate at 93.72% of the benchmark rate as of July 1, 2020. Finally, we conclude that the request for an inflation adjustment should not be granted for the duration of the tariff.