Copyright Board Canada

Commission du droit d'auteur Canada

Date 2022-08-05

Citation *SOCAN Tariff 22.G (2007-2019)*, 2022 CB 7

Members The Honourable Luc Martineau
Katherine Braun
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Proposed Tariffs Considered
SOCAN Tariff 22.6 – Communications of Music Works via the Internet or Similar Transmission Facilities – Game Sites, 2007, 2008
SOCAN Tariff 22.F – Internet – Other Uses of Music – Game Sites, 2009, 2010, 2011, 2012
SOCAN Tariff 22.H – Internet – Other Uses of Music – Game Sites, 2013
SOCAN Tariff 22.G – Internet – Other Uses of Music – Game Sites, 2014, 2015, 2016, 2017, 2018, 2019

Approval of Proposed Tariffs
As
SOCAN Tariff 22.G – Game Sites (2007-2019)

REASONS FOR DECISION

I. INTRODUCTION

[1] This proceeding considers thirteen proposed tariffs filed with the Copyright Board of Canada ("the Board") by the Society of Composers, Authors, and Music Publishers of Canada ("SOCAN").

[2] The "Proposed Tariffs" cover the years 2007 to 2019 and address communications to the public by telecommunication of works in SOCAN's repertoire made over the Internet or similar transmission facilities, by a site ordinarily accessed to play games, including gambling. For 2014 on, the Proposed Tariffs include making works available to the public by telecommunication in a way that allows users to have access from a place and at a time, as desired.

[3] Two objectors are participating in this proceeding: Entertainment Software Association ("ESA") and Entertainment Software Association of Canada ("ESAC");[1] and Shaw Communications Inc. ("Shaw")(together "the Objectors").

[4] On August 11, 2020, SOCAN and the Objectors asked the Board to approve a tariff based on their jointly-submitted text (the "Text"). Based on our analysis, we find that the last approved tariff can serve as a proxy for what is a fair and equitable tariff in this proceeding. Because the submitted Text is substantially similar to the last approved tariff, we approve the Proposed Tariffs based on the language of the Text, with modifications. With these modifications, we approve the Proposed Tariffs as a single tariff under the title *SOCAN Tariff 22.G – Game Sites (2007-2019).*

II. OVERVIEW

A. THE PROPOSED TARIFFS

[5] SOCAN filed thirteen proposed tariffs for the use of music on game sites between 2007 and 2019. These proposed tariffs contain higher proposed royalty rates than those found in the last approved tariff and the Text. SOCAN proposed rates between 3 and 10 per cent of gross revenues or Internet-related revenues (depending on year proposed). Additionally, SOCAN either did not propose, or modified discounts to the rate base which were implemented in the last approved tariff.

B. THE LAST APPROVED TARIFF

[6] The last tariff approved by the Board was *Tariff No. 22.G (Game Sites)*, for the years 1996–2006, in *SOCAN - Tariffs 22.B to 22.G (Internet - Other Uses of Music), 1996-2006.*[2] In that decision, the Board set a royalty rate of 0.8 per cent of Internet-related revenues and provided users with the possibility to claim two discounts to the rate base. First, users could claim a discount for to account for the relative importance of audio content on a site as the Board found that certain pages of game sites had no audio content.[3] Second, users could obtain a discount for the use of music that occurred outside of Canada to account for the fact that Canadian communications represent only a share of the overall traffic to the average game site.[4]

C. PROCEDURAL HISTORY

[7] On February 28, 2019, SOCAN and the Objectors advised the Board that they had reached an agreement in regard to the Proposed Tariffs[5]. On August 11, 2020, the parties jointly requested

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[1] ESA and ESAC filed objections jointly and are considered a single objector.
[2] *SOCAN Tariffs 22.B to 22.G – Internet-Other Uses of Music 1996-2006* (25 October 2008), (tariff), online: CB <https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/item/366408/index.do>.
[3] *SOCAN Tariffs 22.B to 22.G – Internet-Other Uses of Music 1996-2006* (24 October 2008), (reasons), online: CB <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366634/index.do> at para 106 [*SOCAN 22.G (1996-2006)*].
[4] *Ibid* at para 107.
[5] Letter from Matthew Estabrooks to Registrar, Copyright Board (28 February 2019) "Re: SOCAN Tariff 22.G –

that the Board approve a tariff based on the submitted Text. The parties submit that they can represent the interests of all prospective users and that there are no outstanding issues raised in objections that have not been addressed by the submitted Text.

[8] Following its review of the submitted Text, the Board issued Order CB-CDA 2021-045 on August 25, 2021, informing the parties that it intended to commence a written hearing, and asked the parties to respond to questions on whether the Text can act as evidence of what is fair and equitable.

[9] The parties jointly responded on October 6, 2021,[6] to some of the questions in the Order, but not all. They provided submissions on the definition of "user", the meaning and use of page impression ratios, the purpose of the term "in connection with a site", the meaning of "games" and "gambling", and the effects of the making available provision. Three economic reports on the videogame market in Canada and the USA were provided, along with a list of ESA/ESAC members and a description of their mandates in support of the parties' claim that they can represent the interests of all users.

D. MARKET OVERVIEW

[10] The economic reports submitted by ESA/ESAC provide useful context. Videogame companies can be divided into a number of market segments, the main ones being; developers, publishers, console makers, and game sites. The majority of Canadian firms, mainly located in Quebec, Ontario, and British Columbia are micro/small businesses, complemented by the market presence of a few global companies such as Microsoft, among others. The reports show that in 2019, the last year of the tariff term, Canada's video game industry included 692 companies, employing 28,000 people, and contributing $2.6 billion to Canada's Gross Domestic Product (GDP) in that year.[7] However, the submitted reports did not contain any data related specifically to the size or trends of the Canadian video game sites market segment, nor to the use of music on these sites.

III. ISSUES

[11] Under section 66.501 of the *Copyright Act* (the "Act"), the Board is required to "fix royalty and levy rates and any related terms and conditions that are fair and equitable." Our analysis considered the following four issues:

1. Is the previously approved tariff an appropriate proxy?;
2. Is it appropriate to approve a base-rate calculated using page impressions?;
3. On what date should the 'making works available' component be implemented? And;

Proposed schedule of proceedings".

[6] Letter from Parties (ESA/ESAC, Shaw Communications Inc. and SOCAN) to Registrar, Copyright Board (6 October 2021), "Joint submissions in response to the Board's Notice CB-CDA 2021-045" [*Joint Response*].

[7] Nordicity, *The Canadian Video Game Industry 2019*, (Ajax Entertainment Software Association of Canada, 2019).

4. Should the scope of the approved tariff include the wording “in connection with”?.

IV. ANALYSIS

A. ISSUE 1 : IS THE PREVIOUSLY APPROVED TARIFF AN APPROPRIATE PROXY?

[12] Based on our analysis, we conclude that the last approved tariff can serve as a proxy for what is fair and equitable in this proceeding. Approved tariffs are presumed to be fair for the period and subject-matter for which they are approved. It is reasonable to rely on the last approved tariff as a proxy for what is fair, if there have been no changes in the use of the subject-matter in a manner that would affect price. In this case, the last approved tariff is substantially comparable to the submitted Text, having a similar scope, and the same royalty rate, base-rate formula, and reporting requirements.[8]

[13] When the Board approved the royalty rate in the last approved tariff, *SOCAN 22.G (1996-2006)*, it agreed with ESA/ESAC that music was not the main feature in game software or game sites – but rather, it was used in the background.[9] While the videogame market has changed significantly since that decision from the Board, we have no reason to believe that the use of music as a background accompaniment has changed in a way that would affect price, or the appropriateness of using the last approved tariff as a proxy. In Order CB-CDA 2021-045, the Board asked parties whether there were changes in the market that affected the ability of the Text to cover the 2007-2019 period. In their response, the parties stated that “between 2007 and 2019, the video game industry has grown significantly in Canada, however the industry’s use of the tariff has not changed.”[10]

[14] The agreement between SOCAN, ESA/ESAC and Shaw also supports our conclusion that the use of music has not changed, as the submitted Text is substantially similar to the last approved tariff. Based on this, we can infer from their agreement that the parties believe the use of music has not changed in a way that would affect price. Therefore, we conclude that the use of music has not changed for non-represented users, and that a “site ordinarily accessed to download or play games, including gambling” is, by its very nature, much more likely than not, to use music as background accompaniment. This increases our confidence in the fairness of a tariff that is based on the language of the submitted Text.

[15] Accordingly, we approve a rate of 0.8 per cent of Internet-related revenues, as found in the last approved tariff and submitted Text. Having found that the last approved tariff is an appropriate

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[8] *SOCAN 22.G 1996-2006*, *supra* note 3.
[9] *Ibid* at para 104.
[10] *Joint Response*, *supra* note 6 at p 2 (while the “use of a tariff” may not be the same as the use of music, this assertion supports such an inference because we would expect the use of the tariff to change if the use of music had changed).

proxy, we do not need to rule on whether the fact of the parties' agreement provides evidence of what is fair and equitable.

B. ISSUE 2 : IS IT APPROPRIATE TO APPROVE A BASE-RATE CALCULATED USING PAGE IMPRESSIONS?

[16] We approve the tariff with a formula that includes page impressions, which we find to be in the public interest, given the retroactive nature of this tariff. Users can continue to claim discounts for their use of music and for non-Canadian traffic to their websites.

[17] When the Board approved *SOCAN 22.G* in 2008, it allowed users to obtain a discount by reporting their use of music. In response to Order CB-CDA 2021-045, the parties submit that it was common at the time for websites to consist of distinct webpages with distinct content.[11] Some of these pages had audiovisual content that required a SOCAN licence, while other pages contained text or static images which did not require a licence. By reporting the ratio of audio page impressions to all page impressions, users could adjust their royalties in accordance with the proportion of pages that required a licence.[12] Users could also obtain a discount for non-Canadian page impressions.

[18] This model of providing content on distinct webpages is less relevant today, as online services often provide all content in an app or single page. The Board has recognized that page impressions have become less appropriate for measuring music use and has declined to include them in certain approved tariffs.[13] Despite this, the Board has included page impressions in some approved tariffs that were wholly retroactive, most recently in its 2017 approval of *SOCAN 22.E (2007-2013)*, noting that the appropriateness of doing so would be re-assessed for future tariffs.[14]

[19] The current Proposed Tariffs are wholly retroactive. The parties submit that, while the page impression ratio has progressively become less relevant, it is likely there were still games being offered on mixed-use websites up to 2019, supporting application of the ratio. They also submit that the terms used in administering any discount adjustment are generally understood by users and potential users. We have no reason to question these submissions. It is also likely that some users have been claiming an adjustment under the continuation of rights provision. Accepting page impressions will simplify the retroactive administration of this tariff.

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[11] *Ibid* at p 2.
[12] *SOCAN 22.G 1996-2006, supra* note 3 at para 106.
[13] See e.g. *Re:Sound Tariff 8 – Non-Interactive and Semi-Interactive Webcasts 2009-2012* (16 May 2014), (reasons), at para 112 [*Re:Sound 8 (2009-2012)*]; See also *SOCAN Tariff 22.D.1 – Audiovisual Webcasts 2007-2013* (18 July 2014), (reasons), at para 55.
[14] *SOCAN Tariff 1.C – CBC Radio 2012-2014; Tariff 22.E – CBC Internet 2007-2013*, CB-CDA 2017-49 (reasons), at paras 14-16.

C. ISSUE 3 : ON WHAT DATE SHOULD THE 'MAKING WORKS AVAILABLE' COMPONENT BE IMPLEMENTED?

[20] We approve the tariff with the making available component ("MA") effective as of November 7, 2012. Although the Text includes MA as of January 1, 2012, this date is not appropriate as MA was not in the *Copyright Act* at that time. Subsection 2.4(1.1), which provides that "communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication…" came into force on November 7, 2012,[15]. Because the Act did not include MA prior to that date, it would not be appropriate to approve the tariff with a MA component before then.

[21] We approve the tariff with MA for the remainder of 2012 and 2013, although SOCAN first included the words "making available" in the proposed tariff for 2014. This is appropriate because the communication right, for which SOCAN has filed these proposed tariffs, includes MA for these years pursuant to s. 2.4(1.1) of the Act, and because the agreement does not provide for any additional royalties.

[22] We note that interpretation of s. 2.4(1.1) was the subject of a recent Supreme Court of Canada decision.[16] We are of the view that the scope and royalty rate structure of the Text, which does not contain additional royalties for MA, is in line with the Court's reasons in that decision.

D. ISSUE 4 : SHOULD THE SCOPE OF THE APPROVED TARIFF INCLUDE THE WORDING "IN CONNECTION WITH"?

[23] We have included the phrase "in connection with" in the scope of the approved tariff, as this language better reflects modern gaming technologies and business practices. The parties request this in the submitted Text, which is a change in wording compared to the last approved tariff that applied to communication of musical works "by a site." Instead, the approved tariff will apply to communication of music works "in connection with a site" (or rather, for reasons described below, "in connection with a service"). The parties submit this standard addresses the fact that gaming does not necessarily occur directly on a website, but rather, takes place on dedicated platforms that are not websites. For example, gaming that can be done through a mobile app that is connected to a website, but the user does not access the game through the website.[17] As we have no reason to question these submissions, we find the "in connection with" language to be suitable, as it captures the many different ways authorization may be required for communicating music.

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[15] *Copyright Modernization Act*, SC 2012 c 20, proclaimed in force 7 November 2012, SI/2012-85 (2012) C Gaz II, 2011.

[16] *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 aff'g 2020 FCA 100, rev'g *SOCAN, CSI, SODRAC - Tariff for Online Music Services, 2010-2013 - Scope of section 2.4(1.1) of the Copyright Act – Making Available*, CB-CDA 2017-058 (decision).

[17] See *Joint Response, supra* note 6 at p 2 (for example, where the app operator also operates a website that is related to the app).

V. TARIFF WORDING

[24] We find it appropriate to modify the submitted Text in two ways. First, we update the definitions and replace the terms "user" and "site" with the term "service". The Text defines a user as "anyone who is subject to this tariff". We do not find this language helpful because it is a circular reference. The Text defines "site" as a "collection of pages assessable via a common root URL". This definition is too vague, as it depends on the meaning of "pages" which is not defined. We asked the parties to clarify both definitions. They provided a definition for "user" that they submit is more complete. They also suggest replacing "site" with "service" but did not provide a corresponding definition. We accept these suggestions. Therefore, we adopt the definition for a "user" as an effective definition for a "service". This change removes the distinction between a user and a site, which we find confusing. It also places the focus on the entity doing the communication instead of on how the entity implements a specific technology, such as through "pages accessible via a common root URL". In making this change, we include examples of 'user' provided by the parties in the approved tariff. We identified no issues or modification to the effect of the approved tariff from these changes.

[25] Second, in keeping with the Board's mandate to fix royalty rates and related terms and conditions,[18] we have removed references to "licences". This does not change the scope of the application of the tariff. *SOCAN Tariff 21 – Recreational Facilities (2013-2020)* includes similar reasoning, which we believe is also appropriate in the present proceeding:

> 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, we strike out this paragraph as it pertains to language of an individual contractual licence rather than a tariff. This also touches 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]

VI. DECISION

[26] Having conducted a thorough review of the evidence, we find the evidence is insufficient to support a conclusion that the parties to the agreement can represent the interests of all prospective users. However, we find that the submitted Text is substantially similar to the last approved tariff, which can serve as a proxy for what is a fair and equitable tariff in this proceeding.

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[18] See *Copyright Act*, RSC 1985 c C-42, s 66.501 [the *Act*].

[19] *SOCAN - Tariff 21 (Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations) 2013-2020* (7 December 2018), CB-CDA 2018-222 (reasons), online: CB <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/367464/index.do>, at para 18.

[27] We are satisfied that the royalty rates and related terms and conditions of the tariff we are approving are fair and equitable. We therefore approve the Proposed Tariffs with modifications, as a single tariff under the title *SOCAN Tariff 22.G – Game Sites (2007-2019).*