

Copyright Board
Canada



Commission du droit d'auteur
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Member Katherine Braun
Proposed Tariffs SOCAN Tariff 5.A – Exhibitions and Fairs (2018-2020)
SOCAN Tariff 5.A – Exhibitions and Fairs (2021)
Considered SOCAN Tariff 5.A – Exhibitions and Fairs (2022-2024)

Approval of Proposed Tariffs

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SOCAN Tariff 5.A – Exhibitions and Fairs (2018-2024)

REASONS FOR DECISION

I. INTRODUCTION

[1] This proceeding considers three proposed tariffs filed with the Copyright Board of Canada (“the Board”) by the Society of Composers, Authors, and Music Publishers of Canada (SOCAN) in respect of the royalties to be paid for the public performance of musical works in SOCAN’s repertoire, at an exhibition or fair (interchangeably referred to hereinafter as “event”) for the years 2018 to 2024 (the “Proposed Tariffs”).

[2] The Canadian Arts Presenting Association (CAPACOA) and the Canadian Live Music Association (CLMA) are participating in this proceeding, together (“the Objectors”).

[3] Having reviewed all evidence on the record, I find that the royalties and related terms and conditions set out in the Proposed Tariffs are fair and equitable. For the reasons that follow, I approve the Proposed Tariffs, with minor modifications, as a single tariff under the title *SOCAN Tariff 5.A – Exhibitions and Fairs (2018-2024)*.

II. OVERVIEW

[4] The Board last approved the SOCAN 5.A Tariff (2013-2017) on May 6, 2017.¹

[5] SOCAN filed Proposed Tariffs for the years 2018-2020 on March 31, 2017; for 2021 on March 28, 2019; and for 2022-2024 on October 15, 2020. The Proposed Tariffs were published in the *Canada Gazette* and on the Board’s website. The proposed rates remain unchanged from the last approved tariff and are:

- a. where the total attendance (excluding exhibitors and staff) for the duration of the exhibition or fair does not exceed 75,000 persons

Table 1: Proposed Royalties – Attendance does not exceed 75 000 persons

Total Attendance	Fee Payable per Day
Up to 25,000 persons	\$13.75
25 001 to 50 000 persons	\$27.66
50 001 to 75 000 persons	\$69.00

- b. where the total attendance (excluding exhibitors and staff) for the duration of the exhibition or fair exceeds 75,000 persons

Table 2: Proposed Royalties – Attendance exceeds 75 000 persons

Total Attendance	Fee Payable per Person
For the first 100,000 persons	1.15¢
For the next 100,000 persons	0.50¢
For the next 300,000 persons	0.38¢
All additional persons	0.28¢

III. PROCEDURAL HISTORY

[6] On January 28, 2020, the Board issued Notice CB-CDA 2020-007 indicating it was ready to proceed with a written examination of the Proposed Tariffs and asked the Objectors to file detailed grounds for their objections to the Proposed Tariffs.

[7] The Objectors jointly filed grounds for objection to the Proposed Tariffs for the years 2018-2021, claiming that the fee structure is unfair and creates a “compounding effect” and, that “the tariff structure makes it difficult to define a standard fair value for the use of music works in the context of an exhibition, fair or festival”. In its submissions, CAPACOA calls for greater

¹ *SOCAN Tariff 5.A – Exhibitions & Fairs Music (2013-2017)* (5 May 2017), CB-CDA 2017-038 (reasons), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366759/index.do>>.

harmonization between SOCAN and Re:Sound tariffs and claims that SOCAN 5.A and Re:Sound 5.D are equivalent tariffs, so the fee structure of SOCAN 5.A should be based on average daily attendance like Re:Sound 5.D. CAPACOA submits that all events would thus be treated the same under both tariffs, regardless of their scope and duration, resulting in greater fairness and improved reporting and compliance. CAPACOA also claims that efficiencies and lower administration costs owing to Entandem² should reduce the minimum fees payable under the tariff³.

[8] In Notice CB-CDA 2021-051 of November 1, 2021, parties were advised that the Board was including the proposed SOCAN 5.A (2022-2024) tariff as part of this proceeding. The rates and terms and conditions for this period remain the same as the other proposed tariffs. No objections were filed for this tariff period. The Notice also asked SOCAN to respond to the issues raised by the Objectors.

[9] In its January 24, 2022⁴ response, SOCAN submits that SOCAN 5.A has functioned well for over forty years since first approved by the Board in 1986, and notes that fees in the Proposed Tariffs are unchanged from the last approved tariff. SOCAN claims that structural changes to this long-standing tariff will result in higher tariff administration costs.

[10] SOCAN argues that issues concerning administration of SOCAN and Re:Sound tariffs are beyond the scope of this proceeding. SOCAN rejects harmonization of its tariffs with Re:Sound's, arguing that a fee structure based on average daily attendance like Re:Sound 5.D is not fair or equitable and fails to recognize the "value of music" to event-goers. SOCAN also disputes CAPACOA's claim that SOCAN 5.A and Re:Sound 5.D are comparable, saying that the two tariffs are not comparable, given that (1) Re:Sound 5.D applies to festivals while SOCAN 5.A does not and only applies to exhibitions and fairs; (2) SOCAN 5.A includes performance of both recorded and live music, unlike Re:Sound 5.D which only covers performance of recorded music; and (3) Re:Sound 5.D was approved based on a jointly submitted text, unlike SOCAN 5.A.

[11] In Notice CB-CDA 2022-009 of February 17, 2022, the Board invited the Objectors to respond to SOCAN's response. The Objectors did not file a reply. In Notice CB-CDA 2022-027 of May 9, 2022, the Board advised parties that it had sufficient information to proceed with making a decision on the Proposed Tariffs and invited parties to file submissions if they disagreed with this approach by May 31. Parties did not file any submissions.

² Entandem is a joint venture between SOCAN and Re:Sound that seeks to provide a single invoice for users who pay a SOCAN tariff and a corresponding Re:Sound tariff.

³ Letter from CAPACOA, February 29 2020, at p 2. And in an earlier letter, "Objection to SOCAN tariffs gazetted May 18th, 2019", July 17, 2017, at p 2.

⁴ Letter from SOCAN, January 24, 2022.

IV. ISSUES

[12] In approving tariffs, the Board must determine what is fair and equitable.⁵ My analysis considers the following four issues raised in the submissions on record concerning the Proposed Tariffs:

- a. are different royalty rates based on event duration fair?;
- b. are different royalty rates based on total event attendance fair?;
- c. is a “compounding effect” created by the proposed tariff structure?; and
- d. should efficiencies due to Entandem affect minimum fees?

V. ANALYSIS

A. ARE DIFFERENT ROYALTY RATES BASED ON EVENT DURATION FAIR?

[13] CAPACOA submits that the same royalty rate should prevail regardless of an event’s duration. It cites an example of a 9-day event with 50,000 attendees that pays three times more royalties than a 3-day event with the same number of attendees.⁶ While both events have the same total attendance, the longer duration event would pay more under SOCAN 5.A owing to more use of music over the six additional days. CAPACOA claims that the value attendees receive from music played at events is the same, so royalties should be the same regardless of event duration.

[14] Results from SOCAN’s 2017-2019 survey of its licensees’ data⁷ show that it received about \$85,000 in annual royalties from almost 650 events. Large events have the highest use of music: about 4% of SOCAN licensees paid nearly 60% of annual royalties. Smaller events pay lower royalties commensurate with their lower use of music: over 90% of its licensees pay royalties under the lowest fee schedule. The majority of these smaller events lasted 4 days or less and were usually in smaller communities, while the larger events were 7 days or longer, in major population centres, and provided more music of a wider variety. Relying on the data it filed, SOCAN submits that more fees are paid over a longer event under SOCAN 5.A, because the tariff is responsive to event duration and the resulting higher number of hours in which music is played.

[15] The Board has previously approved tariffs where an increase in the duration of music played resulted in an increase in the royalties payable. In *SOCAN Tariff 14 – Performance of an Individual Work (2018-2024)*⁸, the royalties payable for the performance of a single musical work from

⁵ *Copyright Act*, RSC 1985, c C-42, s 66.501 [*Copyright Act*].

⁶ Letter from CAPACOA, July 17, 2017, at p 2.

⁷ Letter from SOCAN, January 24, 2022, at p 2-3.

⁸ *SOCAN Tariff 14 - Performance of an Individual Work (2018-2024)* (17 April 2021), 2021 CB 3-T (tariff), *Gaz Supplement* Vol. 155, No. 16, online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/item/495652/index.do>>.

SOCAN's repertoire increases as the duration of a performance increases. For example, royalty rates increase by 75% when a performance lasts over three minutes up to seven minutes, and rates gradually increase with more time that music is played, to a maximum increase in royalty rates of 500% where a performance lasts more than 90 and not more than 120 minutes.

[16] I adopt a similar approach and conclude that the amount of music used over the duration of an event (e.g., the number of hours of music played or the percentage of time music is played during an event) can be a valid component of a tariff. I agree that different fees based on event duration are fair, given that more music is played during longer events, which may also include a wider variety of music.

B. ARE DIFFERENT ROYALTY RATES BASED ON TOTAL EVENT ATTENDANCE FAIR?

[17] In its submissions, CAPACOA argues that SOCAN 5.A and Re:Sound 5.D are equivalent tariffs, so the SOCAN 5.A fee structure should be based on average daily attendance like Re:Sound 5.D, instead of total event attendance.

[18] The rates in SOCAN 5.A reflect total event attendance: daily rates rise as attendance nears 75,000 attendees, while a fee-per-person is payable at larger events. When attendance exceeds 75,000, the "value of music" under SOCAN 5.A shifts from hours played to "ears listening", which is the basis of Re:Sound 5.D. This is a common approach used by the Board to value music for subscription-based online services. For such services, subscription fees measure value to the end-user; a fraction of such value goes to the rights holder as royalties.

[19] SOCAN offers two justifications for using different practices to value music – the hours-played methodology for smaller events and the ears-listening approach for larger ones. First, it notes that higher royalties for larger events that play more music, is consistent with the basic principle that greater use of music should pay more fees. Second, SOCAN submits there is also a qualitative difference, insofar as larger events "attract higher-profile music acts, present a wider variety of music, and establish areas or stages on the premises designated for music performances in addition to ambient music throughout the events, which enables licensees to attract higher attendance at their events."⁹

[20] Having reviewed the submissions, I find that SOCAN 5.A and Re:Sound 5.D are two distinct tariffs in scope of application. Calls for SOCAN 5.A to adopt an average daily attendance approach in its tariff fee structure may result in more equal treatment of all events, but not necessarily in a fair and equitable tariff.

[21] In my view, total attendance is an appropriate consideration in setting royalty rates. Higher attendance at larger events likely increases the use and variety of music played, as event-goers

⁹Letter from SOCAN, *supra* note 7, at p 3.

demand more musical performances. As noted earlier, I also find that applying different fees based on event duration is fair. Such fairness is not diminished by the use of a second criterion for royalties, such as the number of people attending these events.

C. IS A “COMPOUNDING EFFECT” CREATED BY THE PROPOSED TARIFF STRUCTURE?

[22] CAPACOA claims that “a compounding effect” is created by the SOCAN 5.A tariff structure, because it comprises both event attendance and event duration. CAPACOA submits that this is unfair, as longer events can pay higher fees (total attendance of 75,000 or less) compared to shorter events with the same total attendance.¹⁰

[23] SOCAN submits that SOCAN 5.A applies fairly and equitably and does not create unequal treatment among tariff users. SOCAN claims that its tariff reflects the different “value of music” to event-goers, as well as the different characteristics of attendees at various events.

[24] With respect to the claim that the SOCAN 5.A tariff structure does not treat all events equally, two points are relevant.

[25] First, as noted by SOCAN, a better-attended event may offer music that appeals to a broader public and, given the higher demand for music by a greater number of event-goers, a higher admission fee per person may be charged compared to a lower-attended event. The tariff structure is responsive in this way: as attendance increases from 25,000 to 75,000, rates increase from \$13.75 to \$69 per day. One may also conclude that a greater enjoyment of music would lead to higher royalties, which would be the case under the proposed tariffs: larger events with over 300,000 attendees pay more than twice the total royalties paid by smaller events with 75,001-100,000 attendees.

[26] Second, failing to treat all users and all events equally is not inherently unfair. A general principle frequently present in Board decisions is that unequal treatment does not necessarily imply unfair treatment. Several approved SOCAN tariffs include two or more rates, such as SOCAN 23¹¹ that addresses mature audience films and SOCAN 17¹² which sets a small-cable-system payment, to mention only two. The Board reasoned in SOCAN 17 that a \$10 payment by smaller cable systems was fair and, while they were not treated equally compared to other cable systems, failing to treat these smaller cable systems on a preferential basis might, in fact, be considered unfair.

¹⁰ Letter from CAPACOA, February 29, 2020, at p 2.

¹¹ *SOCAN Tariff 23 – Hotel and Motel In-Room Services (2013-2017)* (5 May 2017), CB-CDA 2017-038 (reasons), Gaz Supplement Vol. 151, No. 18, online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/366481/1/document.do>>.

¹² *SOCAN Tariff 17 – Pay and Specialty Television Services (2009-2013)* (6 May 2017), CB-CDA 2017-038-T (tariff), Gaz Supplement Vol. 151, No. 18, online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/366481/1/document.do>>.

[27] Finally, any “compounding effect” as argued by the Objectors exists only in the first tier of the tariff structure (up to 75,000 attendees) and appears to be relatively small when calculated as a factor of revenue. CAPACOA illustrates the “compounding effect” by comparing total royalties paid for a 3-day event and a 9-day event, assuming both events have a total of 75,000 attendees over their duration. Applying the daily rate of \$69 for this number of attendees, the total royalty payable for a 3-day event is \$207 and increases to \$621 for a 9-day event. The difference in royalties owing between the two events amounts to \$414 for the additional six days. Adopting a hypothetical ticket price of \$5 per attendee and 75,000 attendees, total ticket revenue is \$375,000 for both events. The ratio of the difference in royalties payable to total ticket revenue in this example, is 0.11% (i.e., \$414 / \$375,000), meaning that as a factor of revenue, the 9-day event would pay less than 1% more in royalties compared to the 3-day event.

[28] Similar calculations for other tariff attendance levels confirms that the maximum percentage difference between shorter and longer events remains less than 1%. Higher ticket prices would even further reduce the percentage difference as a factor of revenue. In my view, this is not significant enough to warrant changing the structure of this tariff at this time, noting SOCAN’s contention that a change would entail higher administration costs.

D. SHOULD EFFICIENCIES DUE TO ENTANDEM AFFECT MINIMUM FEES?

[29] In their submission, CAPACOA claims that lower administration costs owing to Entandem invoicing efficiencies should reduce the minimum fees payable under SOCAN 5.A. SOCAN 5.A does not have a minimum fee, *per se*. Rather, the tariff has a “smallest category” (total attendance under 25,000 over all days of an event), which, in effect, functions as a *de facto* minimum fee. Given that this fee is proposed at \$13.75 per day, it is in my view, low enough that it need not be changed in response to any presumed efficiencies.

VI. CHANGES TO TARIFF WORDING

[30] In approving the Proposed Tariffs, I make the following modifications. These changes do not alter the scope of the application of the tariff.

[31] The Proposed Tariffs include references to “licence” and “licensee”. I am removing these references because, under the *Copyright Act*, when seized of proposed tariffs, the Board’s mandate is to fix royalty rates and related terms and conditions in approved tariffs¹³. The Board’s mandate in approving tariffs does not include the issuance of licences. As decided by the Supreme Court in *York v Access Copyright*¹⁴, it is the role of collective societies to issue licences.

[32] I have deleted the clause in the Proposed Tariffs stating that SOCAN may terminate any licence at any time upon 30 days written notice for breach of the licence terms and conditions. I

¹³ *Copyright Act*, *supra* note 5, s 66.501, s 70(1).

¹⁴ *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32

am striking out this clause entirely, as it touches on the area of liability and the provisions of the *Copyright Act* applicable to remedies against users governed by a tariff. Therefore, it is a question of compliance and enforcement of a tariff rather than a question of approval¹⁵.

VII. DECISION

[33] Having duly considered all submissions on the record, for the reasons set out above, I find that the Proposed Tariffs can serve as a basis for establishing a fair and equitable tariff in this proceeding. As rates only apply if an exhibition or fair takes place, no modification to rates is indicated to account for the COVID-19 pandemic.

[34] As such, I am satisfied that the royalties and related terms and conditions set out in the Proposed Tariffs are fair and equitable. I therefore approve the Proposed Tariffs, with minor modifications, as a single tariff under the title *SOCAN Tariff 5.A – Exhibitions & Fairs (2018-2024)*.

¹⁵ See *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>>, para 18.