

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Citation *SOCAN 22.D.3 (2007-2013)*, 2023 CB 1

Members Nathalie Théberge
Katherine Braun
The Hon. Luc Martineau

Proposed Tariffs SOCAN Tariff No. 22.4 – Audiovisual Webcasts (2007, 2008) [as applicable to members of the CAB]

Considered SOCAN Tariff 22.D – Audiovisual Webcasts (2009, 2010, 2011, 2012, 2013) [as applicable to members of the CAB]
SOCAN Tariff 22.5 – Webcasts of Television Station Signals (2007, 2008)
SOCAN Tariff 22.E – Webcasts of Television Station Signals (2009, 2010, 2011, 2012)
SOCAN Tariff 22.F – Webcasts of Television Station Signals (2013)

Approval of Proposed Tariffs

As

*SOCAN 22.D.3 – Audiovisual Services Allied with Programming
and Distribution Undertakings (2007-2013)*

REASONS FOR DECISION

I. OVERVIEW

[1] In this decision, we consider two series of tariffs proposed by SOCAN for the years 2007-2013 (the “Proposed Tariffs”).

[2] The first series, which we refer to as the AV Webcasting Proposed Tariffs (numbered 22.4 for the years 2007-2008, and 22.D for the years 2009-2013), targets the communication of musical works contained in programs from sites or services whose content is similar to that of a conventional television station or a programming undertaking. As we will describe in detail below, only the portions of the AV Webcasting Proposed Tariffs that apply to members of the Canadian Association of Broadcasters (the “CAB”) are before us.

[3] The second series, which we refer to as the TV Webcasting Proposed Tariffs (numbered 22.5 for 2007-2008, 22.E for 2009-2012, and 22.F for 2013), targets the communication of musical works by Internet as part of the signal of a conventional television station or a programming undertaking.

[4] A jointly-submitted text by SOCAN, the Canadian Association of Broadcasters, and some Broadcast Distribution Undertakings (“BDUs”), covers activities in these Proposed Tariffs, which have an effective period of 2007-2013, as well as other proposed tariffs for the years 2014-2018.

[5] For the reasons that follow, we approve the Proposed Tariffs on the basis of that jointly-submitted text as a single tariff named *SOCAN 22.D.3 (2007-2013)*. This single tariff (the “Tariff”) applies only to users that were members of the CAB during the effective period of the tariff.

[6] The Tariff establishes a main royalty rate of 1.9% of relevant revenues, and a low-use royalty rate of 0.8% of relevant revenues. If the service charges per-program fees, it will pay at least 1.3¢ per program communicated. If the service sells subscriptions to end-users, it will pay at least 7.5¢ per subscriber. Finally, in the case that the service has no revenues whatsoever in a given year, the royalties are \$15.

[7] Since the proposed tariffs for 2014-2018 engaged by the jointly-submitted text would not be limited to members of the CAB, the Board’s analysis for those years may differ; it will consider the proposed tariffs for those years separately.

II. BACKGROUND

A. PROCEDURAL HISTORY

[8] In June 2018, SOCAN, the CAB, and a group of Canada’s largest broadcast distribution undertakings (appearing as the “BDUs”) filed a “settlement:” a text in the form of a tariff, entitled *SOCAN 22.D.3 (2007-2018)*. These parties asked the Board to use this text (the “Jointly-Submitted Text”) as a basis for approving certain proposed tariffs covering the period of 2007-2018.

[9] The Jointly-Submitted Text covers the acts targeted by the Proposed Tariffs, when performed in connection with the operation of an audiovisual service allied with a Broadcast Service or BDU Service already licensed under either SOCAN Tariff 2.A, or SOCAN Tariff 17, respectively.

[10] However, portions of the AV Webcasting Proposed Tariffs have already been considered, and approved, by the Board. Of note is *SOCAN Tariff 22.D.1 – Internet - Online Audiovisual Services (2007-2013)*¹, which was issued in 2014 and which—on its face—applies to the same uses covered by the Jointly-Submitted Text.

¹ *SOCAN Tariff 22.D.1 – Internet - Online Audiovisual Services (2007-2013) & SOCAN Tariff 22.D.2 – Internet User-Generated Content (2007-2013)*, (Tariff) (29 November 2014) online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/item/366462/index.do>>.

[11] In its ruling of July 9, 2020, the Board held that the previously-approved tariff *SOCAN 22.D.1(2007-2013)* was not intended to apply to entities that were members of the CAB during the relevant period; indeed, those entities acted under that understanding.²

[12] As such, the AV Webcasting Proposed Tariffs had been approved only in part: while they had been approved with respect to users that were not members of the CAB, their consideration with respect to users who were members of the CAB remains.

[13] This decision considers that portion of the AV Webcasting Proposed Tariffs, along with the TV Webcasting Proposed Tariffs.

B. THE JOINTLY-SUBMITTED TEXT

[14] The Jointly-Submitted Text applies to “allied services.” This is defined as:

an Audiovisual Service analogous to, and operated in conjunction with, by or in support of, the operations of a Conventional Service or a BDU, the content of which is duplicative, complementary or adjunct to the content offered by the Conventional Service or BDU.

[15] Thus, the Audiovisual Service may be provided by a Conventional Service or a BDU, or by a closely-associated entity. In the latter case, the Jointly-Submitted Text explicitly permits the user to authorize the communication to the public by telecommunication for the purposes of the operation of an allied service.

[16] The Jointly-Submitted Text sets out a uniform royalty rate of 1.9% of the rate base, where the determination of the rate base depends on the business model of the user:

1. for a service that charges per-program fees to end-users, the rate base is the amounts paid by Canadian end users for plays;
2. for a service that offers subscriptions to end-users, the rate base is the amounts paid by Canadian subscribers; and
3. for a service that receives Internet-Related Revenue in connection with its communication of audiovisual works, the rate base is its Canadian revenue related to audiovisual internet activities.

[17] Services whose content is comprised of less than 20% of musical works in SOCAN’s repertoire pay a royalty rate of 0.8%, applied to the same rate bases as above.

[18] Our understanding is that the Jointly-Submitted Text seeks to ensure that revenues from these three groups are not double- or triple-counted where a user has revenues under more than one category.

² *SOCAN 22.D.3 (2007-2018)* [Jurisdictional Ruling], 2020 CB 003 (July 9 2020), online: CB<<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/482200/index.do>> at para. 20 [SOCAN 22.D.3].

III. ISSUES

[19] The Board’s approach to evaluating jointly-submitted agreements has usually been to consider two factors. First, it assesses whether the signatories represent the interests of, or share sufficient relevant characteristics with non-signing users. And second, it assesses whether there are nevertheless reasons to conclude a tariff based on the agreement would not be fair, or whether there are other reasons to deviate from the agreement when approving the tariff.

[20] Consistent with this approach, in assessing whether a tariff based on the Jointly-Submitted Text would be fair and equitable, we considered the five following issues:

1. Can the CAB represent the interests of the affected users?
2. Will users pay different rates depending on their membership in an industry association?
3. Are the higher rates in the Jointly-Submitted Text, as compared to *SOCAN 22.D.1 (2007-2013)*, justified?
4. Should the tariff include greater-of royalty rate structures?
5. Should adjustments to wording be made?

IV. ANALYSIS

A. ISSUE 1: CAN THE CAB REPRESENT THE INTERESTS OF THE AFFECTED USERS?

[21] In this case, the affected users are only those who were members of the CAB during 2007-2013. The CAB is a signatory to the Jointly-Submitted Text.

[22] Certain past decisions of the Board have spoken of whether an association is “representative” of affected users³ but instead considered the representativeness of the members of an association vis-à-vis all affected users—not of the association itself.⁴ While we believe this latter line of reasoning is generally appropriate in the case before us, we take this opportunity to elaborate and clarify this analysis.

[23] Since an association, like the CAB, is not typically an affected user itself, whether or not it shares relevant characteristics with all affected users is not at issue. Instead, the issue is whether the association represented the interests of such users when entering into the agreement with the collective society. This we evaluate in two steps.

[24] First, we consider whether the association represents the interests of all of its members. This consideration also ensures that potential diverse interests among members were taken into consideration by the association when reaching the agreement.

[25] In the case before us, there is nothing on the record that would lead us to conclude that the CAB does not represent its own members, and so we accept that it does.

³ *Re: Sound Tariff 1.B.2 (2013-2019)*, 2020 CB 017 (4 December 2020) online: CB < <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/489263/index.do?q=2020+CDA+017> > at paras. 22-26.

⁴ *Ibid.*

[26] Second, we consider whether these member-users shared sufficient relevant characteristics with all other affected users—what the Board has often described as whether the association’s members “can represent” those other affected users. This is based on the reasoning that if the association adequately represented the interests of its members, and those members share sufficient relevant characteristics with affected non-member users, the association will have adequately represented the interests of those non-member users as well.

[27] In this proceeding, only members of the CAB are affected, and this evaluation is therefore simple: they are necessarily the same set of users.

[28] Therefore, the fact that the CAB reached an agreement permits us to infer that all affected users (this being members of the CAB in the present case) would have agreed to the same terms as those in the agreement. Accordingly, a tariff based on the Jointly-Submitted Text would tend to be fair and equitable.

B. ISSUE 2: WILL USERS PAY DIFFERENT RATES DEPENDING ON THEIR MEMBERSHIP IN AN INDUSTRY ASSOCIATION?

[29] As discussed above, whether it is *SOCAN 22.D.1 (2007-2013)* that would apply, or instead a tariff approved on the basis of Jointly-Submitted Text, would depend on whether or not a user was a member of the CAB during the relevant period. Approving a tariff on the basis of the Jointly-Submitted Text could therefore create the possibility of different allied services being subject to different tariff royalty rates for the very same activities—something the Board has attempted to avoid in the past, where there is no justifications for those different rates (See *e.g.*, *SOCAN - Various Tariffs, 1992-1994*⁵). For reason of public interest, we also aim to avoid such an outcome here.

[30] However, the Board has been informed by SOCAN that there does not appear to be any such non-CAB user that operated during that period.⁶

[31] As such, we conclude that this concern is not of practical relevance for approving the rate in the Jointly-Submitted Text, and does not weigh against using the Jointly-Submitted Text as a basis for an approved tariff that would be fair and equitable.

C. ISSUE 3: ARE THE HIGHER RATES IN THE JOINTLY-SUBMITTED TEXT JUSTIFIED?

[32] Broadly speaking, the Jointly-Submitted Text contains a royalty rate of 1.9% of revenues for each of the years from 2007 to 2018.

[33] As indicated earlier, *SOCAN 22.D.1 (2007-2013)* applies to the activities covered by the Jointly-Submitted Text, when these are carried out by users that are not members of the CAB. Its royalty rate structure permits for adjustments based on the proportion of page impressions that

⁵ *SOCAN - Various Tariffs, 1992-1994*, (Reasons) (12 August 1994), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366522/index.do>>.

⁶ Response from SOCAN to Board Notice CB-CDA 2021-047, November 26 2021.

have audiovisual content, as well as the proportion of page impressions that are “Canadian” as well as default values for both of these proportions.

[34] In cases where users who do not provide a music video service use the default values, they would pay a royalty rate of 1.275% of revenues for the years 2007-2010 and 1.425% of revenues for the years 2011-2013.

[35] As such, approving a tariff on the basis of the Jointly-Submitted Text may result in greater royalties during the 2007-2013 than approving it on the basis of *SOCAN 22.D.1 (2007-2013)*.

[36] To determine if higher rates significantly detract from the ability of the Jointly-Submitted Text to be the basis of a fair and equitable tariff, we consider whether the benefits of stable rates and the mitigation of potential disputes over revenue allocation provide adequate justification for the higher royalties.

i. Stable Rates

[37] The Jointly-Submitted Text applies to all years from 2007 to 2018. For years 2014 and later, the royalty rates in the Text are lower than those in the respective proposed tariffs for those later years.

[38] The parties to the Jointly-Submitted Text were aware of the royalty rates approved by the Board in *SOCAN 22.D.1 (2007-2013)* when the Jointly-Submitted Text was filed. Their agreement extends beyond the effective period of *SOCAN 22.D.1 (2007-2013)*: all the way through 2018.

[39] We interpret from their long-term agreement the parties’ desire to have a stable royalty rate. The higher royalty rates for 2007-2013 are—at least partially—attributable to the value of this stability.

ii. Mitigating Difficulties of Revenue Allocation

[40] Generally, only those revenues attributable to an activity covered by a tariff should be used in determining the royalties to be paid under the tariff.⁷ However, determining the portion of a user’s revenues attributable to a particular activity can be very difficult.

[41] Where more than one tariff from one collective management society applies to a user's activities, and these tariffs together cover the entirety of that user’s activities, a single revenue-based royalty rate helps mitigate the difficulties associated with revenue allocation.

[42] At worst, the collective management society and the user may disagree as to under which tariff a payment should be made, but not on the total amount that should be paid under all of the collective societies’ applicable tariffs.

⁷ *Pay Audio Tariff (2007-2016)*, 2021 CB 5 (29 May 2021), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/497808/index.do>> at paras. 62-79.

[43] The fact that, for the years 2007-2013, the Jointly-Submitted Text uses the same royalty rate as the other SOCAN tariffs that could be applicable to the affected users (these being Tariff 2.A and Tariff 17 series of tariffs) reduces the likelihood of this dispute.

iii. Conclusion

[44] We thus conclude that higher rates do not significantly detract from the ability of the Jointly-Submitted Text to be the basis of a fair and equitable tariff.

D. ISSUE 4: SHOULD THE TARIFF INCLUDE GREATER-OF ROYALTY RATE STRUCTURES?

[45] The Jointly-Submitted Texts establishes a greater-of royalty structure for services that charge per-program fees to end-users or offer subscriptions to end-users. They are the same as those in *SOCAN 22.D.1 (2007-2013)*.

[46] We note that this greater-of structure is quite different from the minimum fee for services that do not have revenues in a given year. Under the Jointly-Submitted Text, such services would pay a \$15 fee. This appears to us to be fair: it is clearly directed at covering the cost associated with administering such a non-revenue-generating entity.

[47] There are two greater-of structures in the Jointly Submitted Text. For services that charge per-program fees, the user would pay the greater of 1.9% of revenues and 1.3¢ per program communicated. For services that sell subscriptions to end-users, it would be the greater of 1.9% of revenues and 7.5¢ per subscriber.

[48] The fixed amounts would be triggered when the average per-program fee is less than 69¢, or the average monthly subscription fee is less than \$3.95. We have no evidence on the extent to which these alternative rates will apply to past activities.

[49] While the Board has approved a number of tariffs with greater-of royalty structures, in cases where the Board has explicitly considered such rate structures in its reasons, it has expressed reservations.⁸

[50] In *Re:Sound – Tariff 3 (Background Music), 2010-2015*⁹ the Board recognized that there may be situations where the use of such structures may be appropriate, in particular where there is a risk of a user pricing their product or service so low such that they are no longer engaging in profit-maximization vis-à-vis the activity on which the royalties are based.¹⁰ Such risks, the Board opined, may warrant a royalty rate structure that takes this into account.¹¹

⁸ *Re:Sound Tariff 8 – Non-Interactive and Semi-Interactive Webcasts, 2009-2012 (Tariff)* (17 May 2014), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/fr/item/367406/index.do>>.

⁹ *Re:Sound Tariff 3 – Background Music, 2010-2015*, CB-CDA 2017-091 (1 September 2017), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366487/index.do>>.

¹⁰ *Ibid.* at para. 127.

¹¹ *Ibid.*

[51] In this proceeding, we do not have evidence of such risk. Furthermore, since the period of the Tariff we approve today is entirely in the past, those pricing practices cannot be in response to the form of the tariff.

[52] Nevertheless, given our conclusion (above at para **Erreur ! Source du renvoi introuvable.**) that it is probable that all affected users would have agreed to the same terms as those in the Jointly-Submitted Text, we conclude that this greater-of structure is acceptable for the Proposed Tariffs under consideration.

E. ISSUE 5: SHOULD ADJUSTMENTS TO WORDING BE MADE?

[53] In Notice 2022-058 of September 27, 2022, the Board provided the Parties with a draft Tariff, permitting them to comment thereon.

[54] Only SOCAN provided comments, filing them on November 21, 2022.

i. Clarification of Scope of Application

[55] We clarify that the Tariff applies to acts carried out in connection with the operation of an Allied Audiovisual Service (Section 2.1).

[56] Given the Board's jurisdictional Ruling,¹² we limit the application of the Tariff to services that are allied with undertakings that are members of the CAB (Section 2.1 and Subsection 3.1(15)).

[57] In its comments of November 21, 2022, SOCAN requested that the Board expand the scope of the Tariff to be approved to the years 2007-2018. However, as we noted above at para. **Erreur ! Source du renvoi introuvable.**, these reasons only consider whether the Jointly Submitted Text can act as a fair and equitable basis for an approved tariff for the years 2007-2013.

[58] Lastly, in line with the Board's Practice Notice on Filing of Proposed Tariff [PN 2019-004 rev. 1] (5 October 2021), we remove references to other tariffs.

[59] In our view, the scope of this Tariff is sufficiently well defined. Including references to other tariffs is likely to deter from—not contribute to—the comprehension of the Tariff. According to Practice Notice 2019-004, “the Board may decide to address references to other documents by, for example, removing such references in the approved tariff removing such references in the approved tariff, ” and we have done so here.

[60] SOCAN did not comment on these changes.

ii. Clarification for Low Use Rates

[61] We clarify (Section 4.2) that a service that benefits from the Low Use Rate—that is, a service where the SOCAN content amount to less than 20 percent of the streamed content—pays

¹² SOCAN 22.D.3, *supra* note 2.

a 0.8% royalty rate, but is still subject to the same minimum royalties as a service that does not benefit from the Low Use Rate.

[62] We clarify (Section 5.2) that certain reporting requirements still apply to services even if they benefit from the Low Use Rate.

[63] SOCAN did not comment on this change.

iii. SOCAN permission

[64] In recent decisions, the Board has removed references to “licences” to avoid a potential implication that the Tariff is a licence. Similarly, the draft provided to the Parties with Notice 2022-058 replaced references to “licences” with “permission.”

[65] For example,

“Non-SOCAN AV Usage” means AV Usage that allows a person to hear an audiovisual work containing musical works for which SOCAN’s permission a SOCAN licence is not required [...]

[66] SOCAN addresses this modification in its comments, arguing that this change may have unforeseen consequences. It submits that SOCAN is the owner or the exclusive licensor of the rights in the musical works at issue, and that a licence is required to use those rights, regardless of the nature of the mechanism for obtaining that licence. Moreover, SOCAN points to the fact that the *Copyright Act* uses the term “licence” quite frequently, and submits that this term—unlike the term “permission”—is well defined in law.

[67] Just as is the case in the example above, the term “licence” is used in the Jointly-Submitted Text when aiming to describe a use for which authorization from SOCAN would be required in order for that use not to be an infringement of copyright. This is distinguishable from recent Board decisions, where the term “licence” was removed primarily to avoid implying that the tariff in which it was used was itself as licence.

[68] As such, we accept SOCAN’s submissions on this issue, and retain the relevant language using the term “licence,” from the Jointly-Submitted Text.

V. DECISION

[69] Given our conclusions on the capacity of the CAB to represent the interests of affected users—namely, its members—and given our conclusion that the differences in the rates between the Jointly-Submitted Text and *SOCAN 22.D.1(2007-2013)* are justified, we conclude that the Jointly-Submitted Text can serve as the basis of a tariff that is fair and equitable.

[70] As such, we approve the Proposed Tariffs on the basis of the Jointly-Submitted Text, with alterations to the text being made to ensure correct scope, and to address issues with the wording of the Tariff, as *SOCAN 22.D.3 – Audiovisual Services Allied with Programming and Distribution Undertakings (2007-2013)*.