

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Member René Côté
**Proposed
Tariff
Considered** SOCAN Tariff 13.A – Public Conveyances - Aircraft (2023-2025)

Approval of Proposed Tariff
As
SOCAN Tariff 13.A – Public Conveyances - Aircraft (2023-2025)

REASONS FOR DECISION

I. OVERVIEW

[1] The Society of Composers, Authors and Musical Publishers of Canada (SOCAN) is a collective society that manages public performing rights of musical works on behalf of Canadian and foreign songwriters, composers and music publishers. SOCAN filed a proposed tariff with the Copyright Board for the public performance or the communication to the public by telecommunication in an aircraft of recorded musical or dramatico-musical works from its repertoire, including music contained in audiovisual programs, for the years 2023-2025.

[2] For the following reasons, the Board finds that SOCAN's proposed tariff 13.A (2023-2025) (the "proposed tariff") is fair and equitable, subject to various modifications, particularly regarding the royalty rate adjusted for inflation, the definition of an "in service" aircraft and the music use reports. The Board makes these changes to the proposed tariff and approves it.

II. BACKGROUND

A. THE MOST RECENTLY APPROVED TARIFF

[3] The Board approved the most recent Tariff 13.A on August 8, 2020¹ (“*Tariff 13.A (2018-2022)*”).

[4] *Tariff 13.A (2018-2022)* provides that the annual royalty payable for each aircraft owned or operated by the user is calculated as follows. Where a royalty is paid under point 2, no royalty is payable under point 1.

1. Music while on the ground: \$2.32 per seat for each aircraft in service during the year, prorated to the number of days in which the aircraft is in service during the year.
2. Music as part of in-flight programming: \$5.49 per seat for each aircraft in service during the year, prorated to the number of days in which the aircraft is in service during the year.

[5] For the purpose of *Tariff 13.A (2018-2022)*, an aircraft is not “in service” if it is no longer owned, leased, or operated by the user or during any period of 15 consecutive days or more that it has not been used to carry passengers.

B. THE PROPOSED TARIFF

[6] SOCAN filed the proposed tariff on October 15, 2021, and it was published on the Copyright Board’s website.² On November 10, 2021, the Board issued an order³ asking SOCAN to submit a notice of grounds for the proposed tariff. SOCAN responded with its Notice of Grounds for Proposed Tariff of December 15, 2021, which was published on the Board’s website.⁴ The Board received no objections to this proposed tariff. On June 21, 2023, the Board indicated that it was ready to render its decision based on the reasons provided by SOCAN.

Description of the Proposed Tariff

[7] The royalty rate structure is identical to that of *Tariff 13.A (2018-2022)*, i.e., the royalties paid for the current year are based on an estimate of the maximum number of seats on aircraft owned or operated by the air carrier during the preceding year, and an adjustment is made the following year.

¹ *SOCAN Tariffs 13.A, 13.B and 13.C – Public Conveyances (2018-2022)*, 2020 CB 011-T (August 8, 2020), C Gaz Supplement, Vol. 154, No. 32. [*SOCAN Tariffs 13.A, 13.B and 13.C*]

² *SOCAN Tariff 13.A – Public Conveyances - Aircraft (2023-2025)* (Proposed Tariff) (January 10, 2022). [*SOCAN Proposed Tariff 13.A*]

³ Order of the Board CB-CDA 2021-053, 10 November 2021.

⁴ SOCAN, Notice of Grounds for Proposed for SOCAN Tariff 13.A – Public Conveyances - Aircraft (2023-2025), December 15, 2021.

[8] The royalties were increased as follows: for music in aircraft while on the ground, the rate would rise from \$2.32 per seat to \$2.75, and for in-flight music, it would rise from \$5.49 to \$6.51 per seat, prorated to the number of days in which the aircraft is in service during the year, which represents an increase of 18.53% for music on the ground and 18.58% for in-flight music.

[9] In addition to the proposed change to the royalty rate, the proposed tariff modifies the definition of what constitutes an “in-service” aircraft. As such, an aircraft is not “in service” “if it is no longer owned, leased or under contract by the licensee or during any period of 15 consecutive days or more that it has not been used to carry the licensee’s passengers *due to maintenance necessary for regulatory compliance*”.⁵ [Emphasis added]

[10] The proposed tariff now covers communication to the public by telecommunication in addition to public performance, but this addition does not entail any increase in the royalties to be paid by tariff users.

[11] Finally, the proposed tariff introduces new reporting requirements regarding the use of music in aircraft. It must be noted that the proposed tariff provides that detailed information related to the audiovisual and audio files must be transmitted if available.

[12] Reporting requirements differ for audiovisual files and audio files. Tariff users are expected to produce quarterly reports on audiovisual files transmitted on board their aircraft, specifying the musical works included in the audiovisual files. They will also produce a report identifying all audio files available on their aircraft, as well as the number of plays for each audio file.

III. ISSUES

[13] We have identified six issues to consider in this proceeding:

1. Can the last tariff approved by the Board serve as a proxy to approve the proposed tariff?
2. Is the change to the definition of what constitutes an “in-service” aircraft justified?
3. Is the addition of reporting requirements regarding the use of music justified?
4. Is the addition of communication to the public by telecommunication justified?
5. What should the inflation adjustment be?
6. Are changes to the wording of the proposed tariff necessary?

IV. ANALYSIS

A. ISSUE 1: CAN THE LAST TARIFF APPROVED BY THE BOARD SERVE AS A PROXY TO APPROVE THE PROPOSED TARIFF?

[14] When a proposed tariff does not differ substantially from a previously approved tariff, the Board may rely on the last-approved tariff as an indication that the proposed tariff is fair and

⁵ *SOCAN Proposed Tariff 13.A, supra* note 2.

equitable, particularly if there has been no change in the relevant market. We are not aware of any changes in the market, partly because no objections have been filed.

[15] The proposed tariff does not differ substantially from *Tariff 13.A (2018-2022)*. The terms and conditions of the latter are similar to those of the proposed tariff. The same applies to the tariff structure and the structure of royalty payments. As for royalties, they have only been increased to reflect inflation, but the calculations of inflation adjustments will be corrected.

[16] As such, we conclude that the proposed tariff can be used as a proxy.

B. ISSUE 2: IS THE CHANGE TO THE DEFINITION OF WHAT CONSTITUTES AN “IN-SERVICE” AIRCRAFT JUSTIFIED?

[17] The change in the definition of what constitutes an “in-service” aircraft is not retained for the following reasons.

[18] A short summary of the evolution of this definition in recent years is needed. On May 20, 2017, the Board approved *SOCAN Tariff 13.A – Public Conveyances - Aircraft (2011-2017)* (“*Tariff 13.A (2011-2017)*”).⁶ In that proceeding, the parties, i.e., SOCAN and the National Airlines Council of Canada, had reached an agreement and asked the Board to approve a tariff based on a jointly submitted text. For the years 2015 to 2017, the parties had agreed that the royalties could be reduced if an aircraft was out of service for a period for maintenance.⁷ Prior to January 1, 2015, there was no exclusion period and therefore no definition of what constituted an “in-service” aircraft. The *Tariff 13.A (2011-2017)* provision that applied as of 2015 read as follows:

For the purpose of this Tariff, an aircraft is not “in service” if it is no longer owned, leased or under contract by the licensee or during any period of 15 consecutive days or more that it has not been used to carry the licensee’s passengers due to maintenance necessary for regulatory compliance.

[19] On August 8, 2020, in the midst of the COVID-19 pandemic, the Board approved *Tariff 13.A (2018-2022)*.⁸ Stingray was the only objector and later informed the Board that it would not participate in the proceeding.

[20] In its reasons, the Board wrote the following:

The Board is aware that the COVID-19 pandemic has had unexpected consequences for the transportation industry and that economic activity has been severely disrupted in 2020. In order to ensure tariff royalties remain fair and equitable, we amend Tariff 13.A to remove the

⁶ *SOCAN Tariff 13.A – Public Conveyances - Aircraft (2011-2017)* (approved tariff) (May 20, 2017), C Gaz Supplement Vol. 151, No. 20.

⁷ *SOCAN Tariff 13.A – Public Conveyance- Aircraft 2011-2017*, CB-CDA 2017-050 (May 19, 2017) at para 9.

⁸ See *SOCAN Tariffs 13.A, 13.B and 13.C*, *supra* note 1.

reference to an aircraft not being in service “due to maintenance necessary for regulatory compliance” – so if an aircraft is not in service for a period of 15 consecutive days or more, fees will not be payable for that period. Using a minimum of 15 consecutive days of inactivity as the benchmark also takes into account the rights holders whose rights are being affected as well by the pandemic. The Board may reassess the matter during the process of the next proposed tariff to be filed for the same activities, if necessary.⁹

[21] In accordance with the reasons for the decision, the provision read as follows:

For the purpose of this Tariff, an aircraft is not “in service” if it is no longer owned, leased or under contract by the licensee or during any period of 15 consecutive days or more that it has not been used to carry the licensee’s passengers.

[22] The words “due to maintenance necessary for regulatory compliance” that were found in *Tariff 13.A (2011-2017)* had therefore been removed. Thus, a tariff user could obtain a discount in royalties payable in case of non-use of the aircraft for more than 15 consecutive days, not only for reasons of aircraft maintenance, but for any reason.

[23] In its tariff proposal, SOCAN returned to the wording contained in *Tariff 13.A (2011-2017)* in relation to the years 2015-2017. It has therefore added the words “due to maintenance necessary for regulatory compliance” that had been removed from *Tariff 13.A (2018-2022)*.

[24] In its Notice of Grounds for Proposed Tariff, SOCAN explained that the change made by the Board in 2020 for the years 2018 to 2022 was brought about due to the impact of the pandemic on the air transport industry, but that for the period of 2023 to 2025, it is fair and equitable to return to the previous wording whereby an aircraft can be considered not being in service only for reasons of maintenance necessary for regulatory compliance.

[25] We do not accept SOCAN’s proposal which consists of modifying the definition of an aircraft “in service” and retain the same wording as found in *Tariff 13.A (2018-2022)*. In fact, the formulation of *Tariff 13.A (2018-2022)* allows for a reduction of royalties, regardless of the reason why an aircraft may not be in service for 15 consecutive days or more. Although this change was brought about due to the impact of the pandemic, it allows some flexibility for the air carriers regarding any major unforeseen events that may arise. Even though the Board’s decision in 2020 referred directly to the COVID-19 pandemic, other circumstances could immobilize some aircraft for longer periods.

[26] In our opinion, it is advisable to keep this flexibility since an unforeseen event of sufficient magnitude to ground one or even several aircraft for more than 15 days would necessarily lead to a reduction in the use of music. In this context, we must allow royalties to be adjusted to periods when aircraft are actually in service, as this allows collective societies to derive income from plays of musical works by the passengers. Air carriers have no interest in grounding their aircraft

⁹ *SOCAN Tariffs 13.A, 13.B and 13.C (2018-2022)* 2020 CB 011 (August 8, 2020) at para 13.

for prolonged periods (15 consecutive days or more) and no gaming can result from maintaining this definition.

C. ISSUE 3: IS THE ADDITION OF REPORTING REQUIREMENTS REGARDING THE USE OF MUSIC JUSTIFIED?

[27] The addition of reporting requirements regarding the use of music in SOCAN's proposed tariff is denied.

Context

[28] Previous tariffs did not include music use reporting requirements on board aircraft. Under the proposed tariff, for audiovisual files transmitted, the user would have to report to SOCAN, if available, information such as the title of the program, the number of plays for each file and all files, the International Standard Audiovisual Number (ISAN) assigned to the file, the name of each author of the musical work and performer or group associated with the sound recording, as well as the length of the musical work.

[29] With regard to audio files transmitted, the user would provide, where available, information such as the number of plays for each file and all files, the title of the musical work or works it contained, the name of the artist or group to which the sound track contained in the file is attributed, and several other pieces of information.

[30] In its Notice of Grounds for Proposed Tariff, SOCAN explained that the proposed tariff required users to provide information on the use of music, if available, but did not provide reasons why it had made this change. Hence, the Board asked SOCAN to explain the reasons for this change and to describe what parameters were used to distribute royalties collected under Tariff 13.A until now.¹⁰

[31] In its response,¹¹ SOCAN explained that the information collected through these reports would allow it to distribute royalties in a more precise manner, because their distribution would be tied to the actual use of music. It added that some air carriers remit voluntarily a list of content available on their in-flight entertainment platform. SOCAN uses this information to distribute royalties. However, this information would have limited use since the available content on a platform does not give any indication of the content that was actually used. SOCAN also maintains that the fact that the information described in the proposed tariff is only required if it is available reduces the burden on air carriers. It should be noted that, although asked, SOCAN did not explain the parameters that were used to distribute royalties under Tariff 13.A.

Considerations

¹⁰ Order of the Board CB-CDA 2022-064, November 7, 2022.

¹¹ Letter from SOCAN in response to Order CB-CDA 2022-064, November 25, 2022.

[32] The reporting requirements contained in the proposed tariff could be costly and time-consuming. Of course, some of the Board's tariffs include reporting requirements regarding the use of music similar to those included in the proposed tariff, but when this occurs, it is related to users whose main activity involves musical works or sound recordings.¹² To the best of our knowledge, there is no tariff that includes reporting requirements similar to those set out in the proposed tariff in relation to users whose main activity is not related to music transmission.

[33] It should also be noted that royalties do not depend in any way on the information that is the subject of these reporting requirements. It is rather a peripheral issue (the distribution of royalties) and is not directly linked to the operation of the tariff structure. The royalties payable are the same whether SOCAN has this information or not. By contrast, the following reporting requirements are needed for the operation of the tariff structure: the number of aircraft operated by the user during the previous year; for each aircraft, the total number of seats and the dates of periods of 15 consecutive days or more during which the aircraft did not transport the user's passengers.

[34] In short, the reporting requirements on the use of music are neither appropriate nor necessary for the operation of the tariff in question. This may be different for other tariffs.

[35] Consequently, reporting requirements on the use of music are not included in the approved tariff.

D. ISSUE 4: IS THE ADDITION OF COMMUNICATION TO THE PUBLIC BY TELECOMMUNICATION JUSTIFIED?

[36] In view of changes to the way music is used on board aircraft, we believe it is justified to explicitly add communication to the public by telecommunication to the mode of making music available.

[37] Since SOCAN did not explain this change in its Notice of Grounds for Proposed Tariff, the Board asked it to do so in its Order on November 7, 2022.¹³ SOCAN explained that this addition reflects changes in the way music is used on board aircraft, including the way on-demand content is delivered to customers' personal devices via on board entertainment systems. SOCAN asserts that no increase in royalties is associated with this addition. Indeed, royalties were increased only to reflect inflation.

[38] To our knowledge, the way in which musical content is delivered has evolved in recent years, and this use may involve communication to the public by telecommunication. This change therefore appears fair and equitable to us, and we approve it.

¹² See e.g. *Commercial Radio Reproduction Tariff (2020-2023)* 2020 CB 018-T (December 12, 2020), C Gaz Supplement Vol. 154, No. 50; *Tariff for Online Music Services (2010-2013)* (approved tariff) (August 26, 2017) C Gaz Supplement, Vol. 151, No. 34.

¹³ Order of the Board CB-CDA 2022-064, November 7, 2022.

ISSUE 5: WHAT SHOULD THE ADJUSTMENT FOR INFLATION BE?

Summary

[39] The proposed tariff seeks an increase in royalties to account for inflation of 18.53% and 18.58%.

[40] In order not to exceed the amounts requested in the proposed tariff, while maintaining its usual method of calculating inflation, we at the inflation adjustment at 15.85%. This amount corresponds to actual inflation for the period beginning January 1, 2015 and ending December 31, 2021.

The Board's Approach to Inflation

[41] The Board has long held the view that fixed royalties should be adjusted for inflation. Indeed, we believe that inflationary adjustments are justified because they preserve the purchasing power of rights holders, and that the absence of such adjustments would erode the value of royalties collected by collective societies through tariffs.

[42] The Board's recent approach to determining the inflationary adjustment has been to calculate the percentage change in the CPI between January of the first year requiring an adjustment and December of the last full year of data available. In general, the start of the calculation period begins the day after the end of the period used by the Board for its last inflation calculation.

[43] In our opinion, this approach continues to be the simplest and most direct way of calculating the inflation rate. Moreover, it is an approach known to the parties. It is also consistent with the principle of using known values rather than future values.

[44] Using the usual calculation method, the calculation period would begin on January 1, 2015, and would end on December 31, 2022. We believe that the period should begin in January 2015 because the structure of Tariff 13.A was changed on January 1, 2015, and no inflationary adjustment has been applied since. December 31, 2022, is the end of the last full year for which data is available.

[45] This approach would lead to an adjustment of 23.17%, which is more than the adjustment requested by SOCAN.

Procedural fairness

[46] In the present case, this approach must be tempered by the fact that the Board generally refrains from approving tariffs higher than those proposed, on the grounds that this could constitute a breach of procedural fairness for those affected by a proposed tariff.¹⁴

[47] For ease of administration and calculation, the increase we are setting to account for inflation uses data from the most recent full year that does not exceed the amounts in the proposed tariff.

Conclusion on inflationary adjustment

[48] Consequently, the calculation period used by the Board begins on January 1, 2015, and ends on December 31, 2021. This results in an inflationary adjustment of 15.85%. The Board therefore sets the annual royalty at \$2.69 per seat for music while the aircraft is on the ground and \$6.36 per seat for music as part of in-flight programming.

F. ISSUE 6: ARE CHANGES TO THE WORDING OF THE PROPOSED TARIFF NECESSARY?

[49] We have already seen that we deny the addition of reporting on the use of music on board aircraft voluntarily, as well as the proposed change to what constitutes an “in-service” aircraft. Two other minor changes also need to be made to the proposed tariff, one eliminating references to the notion of licence and the other relating to general provisions. These two changes have no practical impact on the operation of the tariff.

[50] First, under the *Act*, the Board’s mandate is to set royalty rates and related terms and conditions. The Board’s tariff-approval mandate does not include licensing. Licensing of collectively administered rights is the responsibility of collective societies, as the Supreme Court of Canada pointed out in *Access Copyright v York University*.¹⁵ As a result, we are removing references to the words “licence” and “licensee” from the proposed tariff, including the paragraph found in the general provisions stating that SOCAN may terminate any licence at any time upon 30-days’ notice. This change in no way alters the scope of the tariff.

[51] Since proposed tariffs must be filed in a separate, stand-alone document containing all applicable terms and conditions, the section entitled “General Provisions”, which covered tariff proposals filed in bulk, is no longer required.¹⁶ Paragraphs of this section that are still relevant have been moved to the end of the tariff, while those referring to the licensing concept have been deleted for the reasons mentioned in the previous paragraph.

¹⁴ See *Bell Canada v Copyright Collective of Canada*, 2021 FCA 148.

¹⁵ *York University v Canadian Copyright Licensing Agency*, 2021 SCC 32.

¹⁶ See *Practice Notice on Filing of Proposed Tariffs PN 2019-004 Rev. 3* (March 1, 2023).

V. CONCLUSION

[52] For the aforementioned reasons, we approve the proposed tariff with some changes. The royalty rate is adjusted for inflation, rising from \$2.32 to \$2.69 per seat for music played while on the ground and from \$5.49 to \$6.36 for music as part of in-flight programming. In the terms and conditions section of the tariff, we refuse to incorporate changes related to reporting requirements for users of the tariff. We also refuse to change the definition of what is considered an “in-service” aircraft. Finally, we integrate what were previously the “General Provisions” common to several tariff proposals, while eliminating references to licences and licensees.