

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Member Katherine Braun
Proposed Tariff Considered SOCAN Tariff 21 – Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations (2023-2025)

Approval of Proposed Tariff

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SOCAN Tariff 21 – Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations (2023-2025)

REASONS FOR DECISION

I. OVERVIEW

[1] The Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed a Proposed Tariff with the Copyright Board of Canada (“the Board”) pertaining to the public performance of musical works in SOCAN’s repertoire, by recreational facilities operated by a municipality, school, college, university, agricultural society or similar community organizations, for the years 2023 to 2025 (the “Proposed Tariff”).

[2] Having reviewed the evidence on record, the Board finds that the last approved tariff can serve as a basis to approve a fair and equitable tariff in this proceeding, subject to some modifications.

[3] For the reasons that follow, the Board approves the Proposed Tariff, with modifications.

II. BACKGROUND

A. THE MOST RECENTLY APPROVED TARIFF

[4] The Board approved *SOCAN Tariff 21, 2021-2022* on August 8, 2020.¹ The tariff provides for an annual royalty of \$198.58 to be paid by a recreational facility, provided the facility's gross revenue from the activities targeted by SOCAN Tariffs 5.A, 7, 8, 9, 11.A, and 19, does not exceed \$17,500.

[5] Where a facility operates for less than 12 months in the year, the royalty is reduced by one-twelfth for each full month during the year in which no activity subject to the tariff occurred. Beyond this limit of \$17,500, Tariff 21 no longer applies, and the user must comply with other tariffs for each of its activities. This was a new provision.

B. THE PROPOSED TARIFF

[6] SOCAN filed its Proposed Tariff on October 15, 2021. It was published on the Board's website on January 10, 2022, informing prospective users of their right to file objections. No objections to the Proposed Tariff were received.

[7] The Proposed Tariff provides for an annual royalty of \$235.48 to be paid by a recreational facility, providing that the facility's gross revenue from the activities targeted by SOCAN Tariffs 5.A, 7, 8, 9, 11.A and 19, does not exceed \$20,752.21.

[8] SOCAN filed a Notice of Grounds for Proposed Tariff on December 15, 2021, noting that it made two changes to the last approved tariff. First, the annual royalty and the maximum gross revenue were increased to reflect inflation. Second, it removed the provision allowing for a reduction in royalties for facilities operating less than 12 months a year.

III. ISSUES

[9] Having reviewed the evidence, the Board identifies four issues for examination in this proceeding:

1. Is the previously approved tariff an appropriate proxy for the Proposed Tariff?
2. Is it appropriate to remove the provision allowing for a reduction of annual royalties for facilities operating less than 12 months in the year?
3. What should the inflationary adjustment be?
4. Are changes to the wording of the Proposed Tariff appropriate?

¹ *SOCAN Tariff 21 – Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations (2021-2022)* 2020 CB 012-T (August 8, 2020) C Gaz Supplement Vol. 154 No. 32. [*SOCAN Tariff 21(2021-2022)*]

IV. ANALYSIS

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

[10] The Board finds that the previously approved tariff can serve as an appropriate proxy in this proceeding.

[11] When a proposed tariff does not differ substantially from the last approved tariff, the Board has frequently held that it is appropriate - absent reasons to the contrary - to use the last approved tariff as a proxy for what could be fair.² In recent decisions, the Board identified changes in the relevant market as a potential indicator of whether adjustment to royalty rates is appropriate or necessary.³

[12] The last tariff was approved on August 8, 2020. There is no information on the record suggesting that a change in the market has occurred. The Proposed Tariff is very similar to the previously approved tariff, with modifications to include an inflation adjustment and removal of the royalty reduction provision. Therefore, the Board has no reason to question the appropriateness of the previously approved tariff serving as a proxy in this proceeding.

B. ISSUE 2: IS IT APPROPRIATE TO REMOVE THE PROVISION ALLOWING FOR A REDUCTION OF ANNUAL ROYALTIES FOR FACILITIES OPERATING LESS THAN 12 MONTHS IN THE YEAR?

[13] The Board is of the view that it is appropriate to remove the provision allowing for a reduction of annual royalties.

[14] *SOCAN Tariff 21, 2021-2022* was approved in the midst of the COVID-19 pandemic.⁴ In its Notice of Grounds for Proposed Tariff, SOCAN explains that the Proposed Tariff was amended to remove the pandemic adjustment implemented in the last approved tariff. Payable royalties are no longer reduced by one-twelfth for each full month during the year in which no activity subject to this tariff occurs.

[15] Adjustment provisions for pandemic-related closures are no longer required, given that COVID-19 restrictions have been lifted. Therefore, approving a pandemic-related adjustment for the years 2023-2025 would not be fair. This is consistent with recent Board decisions to limit reduction of royalties or minimum fees due to the pandemic to the years 2020 and 2021.⁵

² See e.g. *SOCAN Tariff 9 – Sports Events (2018-2023)* 2021 CB 9 (October 1, 2021), at para 22 [*SOCAN 9 (2018-2023)*].

³ See e.g. *Ibid.*; *22.G – Game Sites (2007-2019)* 2022 CB 7 (August 5, 2022) .

⁴ *SOCAN 21(2021-2022)*, *supra* note 1.

⁵ See e.g. *SOCAN Tariff 20 – Karaoke Bars and Similar Establishments (2018-2022)* 2022 CB 11 (August 26 2022), at para 32; *SOCAN Tariff 3.A – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns, and Similar Establishments - Live Music (2018-2024)* 2022 CB 5 (August 5, 2022), at para21; *SOCAN Tariff 3.B – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns and Similar Establishments - Recorded Music Accompanying Live Entertainment (2018-2025)*(2022 CB 17 (November 4, 2022), at para 31.

C. ISSUE 3: WHAT SHOULD THE INFLATIONARY ADJUSTMENT BE?

[16] The Board fixes an inflationary adjustment of 18.58% to the last approved royalty and maximum revenue threshold. This adjustment results in an annual royalty of \$235.48 and a maximum revenue threshold of \$20,725.21, which are the amounts proposed by SOCAN in its Proposed Tariff.

[17] In its Notice of Grounds for Proposed Tariff, SOCAN submits that its proposed rates are in line with the Tariff 21 rates that have remained unchanged since 2015. SOCAN notes that its proposed inflation adjustment of 18.58% was calculated according to the Board's established methodology for inflationary adjustment. However, SOCAN does not indicate for which months or years, nor which data series it used to carry out its calculations.

[18] Inflationary adjustments are appropriate because they preserve the purchasing power of right holders. The absence of such adjustments would lead to an erosion in the value of royalties levied by collective societies through tariffs.

[19] The Board's recent approach has been to calculate the inflation rate as the percentage change in the CPI (Consumer Price Index) between January of the first year requiring an adjustment and December of the last full year of available data. In general, the calculation begins after the last period for which an inflationary adjustment was made. In our opinion, this approach continues to be the simplest and most direct method of calculating the rate of inflation. Also, this method remains a familiar approach for parties and the general public. It also complies with the principle of using known values to adjust for inflation, rather than expected values.

[20] Although SOCAN did not establish an adjustment period, the Board concludes that it should start in January 2014 and finish in December 2022. The Board last adjusted SOCAN 21 in 2018, increasing the annual royalty for 2015-2020 to reflect inflation during the period 2005-2013.⁶ As such, the inflation calculation should start January 1, 2014. Furthermore, 2022 is the last full year of data available.

[21] The cumulative inflation rate for the period between January 2014 and December 2022 is 24.37%. While higher than SOCAN's proposed adjustment, the Board approves the 18.58% inflation adjustment proposed by SOCAN, for the following reasons.

[22] The Board generally refrains from approving rates that are much higher than those proposed, on the grounds that this could constitute a breach of procedural fairness for those affected by a proposed tariff, where such a potential breach could not be cured by additional notice and consideration of further submissions by affected parties..

[23] The purpose of publishing a proposed tariff is to:

- inform users that a collective society filed such a proposal;
- provide notice to the users of the proposed rates and terms; and

⁶ *SOCAN – Various Tariffs 2007-2017*, CB-CDA 2017-038 (May 5, 2017) at paras 5-8.

- permit them to object, if necessary, within the prescribed timeframe.⁷

[24] The decision to object or not is based, in part, on the published rates and terms of the proposed tariff. The Board cannot assume that a user who decided not to object would have made the same decision had the user known that rates higher than those published would ultimately be approved. However, a clear indication that inflationary increases are sought may alleviate this concern.

[25] In the decision *Tariff for the Retransmission of Distant Television Signals, 2014-2018*,⁸ the collective societies asked during the proceeding, in relation to some of the years of the applicable period, for the approval of significantly higher royalties than those provided for in the proposed tariff published in the *Canada Gazette*. The Board refused to approve higher rates than those provided in the proposed tariff, on the grounds that this could result in prejudice to affected persons and thus, undermine procedural fairness.⁹ On judicial review of that decision, the Federal Court of Appeal concluded that the approval of rates higher than those proposed, did raise procedural fairness issues and that the Board did not err in capping the royalties at the proposed rates.¹⁰ It is noteworthy that the increase in that proceeding was not based on inflation.

[26] Based on similar considerations of procedural fairness, the Board caps the royalties at the amounts proposed by SOCAN, and, using an inflationary increase of 18.58%, approves an annual royalty of \$235.48 and a maximum revenue threshold of \$20,725.21.

[27] The Board recognizes that these amounts do not reflect the full inflation rate for the applicable inflation calculation period. Therefore, the Board notes that when SOCAN files its next proposed tariff for these activities, it may take this into account. In particular, SOCAN may include the difference between the inflation adjustment used in this decision and the actual inflation rate during the January 2014 - December 2022 period in its future inflation calculation.

D. ISSUE 4: ARE CHANGES TO THE WORDING OF THE PROPOSED TARIFF APPROPRIATE?

[28] In approving the Proposed Tariff, the Board makes the following modifications. These changes do not alter the scope of the application of the tariff:

[29] The Board removes references to licences and licensees. Under the *Copyright Act*, when seized of proposed tariffs, the Board's mandate is to fix royalty rates and related terms and conditions.¹¹ The Board's mandate in approving tariffs does not include the issuance of licences. This role belongs to collective management societies.¹²

⁷ *Copyright Act*, RSC 1985, c. C-42, ss 68.2 and 68.3.[Act]

⁸ *Tariff for the Retransmission of Distant Television Signals, 2014-2018*, CB-CDA 2019-056 (August 2, 2019).

⁹ *Ibid* at para 234.

¹⁰ *Bell Canada v Copyright Collective of Canada*, 2021 FCA 148, at paras 88 and 95.

¹¹ *Act*, *supra* note 7, s. 66.501.

¹² See *Access Copyright v York University*, 2021 SCC 32 : for a discussion of the distinct role of the Board to approve tariffs and collective management societies to grant licences.

[30] Reflective of the Board's Practice Notice on Filing of Proposed Tariffs,¹³ the Board removes references to other tariffs, which is unnecessary and may introduce confusion in understanding of the tariff.

V. DECISION

[31] Having reviewed the evidence on record, the Board finds that the Proposed Tariff can serve as a basis to approve a fair and equitable tariff, subject to modifications.

[32] The Board therefore approves the Proposed Tariff, with the modifications noted above, under the title *SOCAN Tariff 21 – Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations, 2023-2025*.

¹³ *Practice Notice in the Filing of Proposed Tariffs PN 2019-004 rev. 3* (March 1, 2023).