

NOTICE OF GROUNDS FOR OBJECTION

Filed by the Canadian Broadcasting Corporation/Société Radio-Canada.

In relation to proposed tariff *Re:Sound Tariff 1.C – CBC Radio and Simulcasts (2025-2029)*.

Filed electronically with the Copyright Board on December 15, 2023, pursuant to Rule 18 of Copyright *Board Rules of Practice and Procedure*.

General

1. CBC reserves the right to rely upon new objections that arise from documents and information disclosed during the interrogatory process, whether by Re:Sound, by other users, or otherwise. CBC reserves the right to rely upon objections raised by objectors in other proceeding for related tariffs or by the Board itself.
2. Given the objections raised by CBC and the information contained in the Notice of Grounds for this tariff, CBC submits that the case will require the Board to hold an oral hearing.
3. As Canada's national public broadcaster, CBC will be participating in both official languages. CBC anticipates that its counsel will use both English and French, and that its witnesses and supporting documents will be in both official languages.

Grounds of Objection

4. CBC objects to Re:Sound's proposed royalty rates. This objection is based on at least the following reasons:
 - a. Re:Sound's Notice of Grounds states that the radio royalty rates are "based on the current Re:Sound Tariff 1.C (2012-2019) rates approved by the Copyright Board, adjusted to allow for a repertoire adjustment of up to 100%, inflation estimated to the end of 2029, and an increase to the value of music." Based on these three adjustments, Re:Sound proposes to increase the royalties from ~\$120,000 per month (which covered both radio and simulcasting) to \$300,000 per month for radio alone (i.e. roughly 2.5 times higher).
 - b. All three adjustments are questionable at best. First, the repertoire adjustment is overstated, and cannot possibly justify an increase on the magnitude that Re:Sound is seeking. Second, inflation cannot be claimed prospectively, and in any event fails to justify an increase of the magnitude that Re:Sound seeks. Third, no basis whatsoever is given for the claim that the value of music has increased. The latter is directly contrary to the requirement to provide sufficient detail in a Notice of Grounds to permit users to respond. For this reason alone, Re:Sound should be barred from advancing arguments based on an increase in the value of music. For completeness, CBC notes

that there has not been any such increase.

- c. The Board has historically applied discounts ranging from 10% to 25% for “infant industries.” In its recent Stingray Pay Audio and Ancillary Services Tariff (2007–2016), the Board generalized this approach and applied a 20% “declining industry” discount that reflected increased competition and declining profitability in the relevant sector. Those same factors are present here: radio is subject to competitive pressures, declining revenues/profits, fewer listeners relative to new media, and other economic forces that justify a decrease in royalties. CBC proposes a 20% declining industry discount to the royalties set by the Board for its over the air radio activity.
 - d. With respect to simulcasting, the use of “greater of” royalty structures has been repeatedly discouraged by the Board, and should not be used here.
 - e. Moreover, both components that are used as part of the “greater of” formula for simulcasting revenues are deeply flawed:
 - i. Re:Sound’s attempt to charge a \$45,000 monthly fee for simulcasting is unfair when the prior tariff charged no such fee, and when that fee is exorbitantly high, representing more than one-third of the entire amount payable under the prior tariff for both radio and simulcasting.
 - ii. Re:Sound’s attempt to charge a \$0.0017 per-play royalty is unjustified for at least the following reasons: US royalty rates are rarely fair and equitable; the increase is close to a ten-fold increase over prior per-play amounts used under other tariffs; this amount does not reflect the value of music to CBC; and it results in far higher royalties than CBC pays to other collective societies for comparable activities.
 - f. Section 66.501 now directs the Board to consider “the public interest” when deciding whether a tariff is fair and equitable. As Canada’s national public broadcaster, many of CBC’s activities are undertaken in the public interest rather than as part of a commercial or profit-seeking activity. Pursuant to s. 66.501, CBC deserves credit for its public-interest mission and activities, many of which contribute directly to the promotion of Canadian musical talent. Drawing inspiration from the infant-industry/declining-industry cases, CBC proposes a 10% discount for both radio and simulcasting.
 - g. This adjustment will apply to the entire tariff period.
5. CBC requests a downwards adjustment to the royalty rate to account for repertoire use, notably for the following reasons:
- a. Re:Sound does not administer all or substantially all of the relevant rights, and

- repertoire adjustments are an accepted part of its royalty rate-setting. Accordingly, CBC will be requesting a repertoire audit, especially since CBC anticipates that it uses less protected music than conventional broadcasters.
- b. A repertoire audit will also be required because Re:Sound claims that repertoire adjustments are part of the justification for the massive increase in royalties that it is seeking here.
 - c. This adjustment will apply to the entire tariff period.
6. CBC requests a downwards adjustment to the royalty rate to account for chain of title deficiencies, notably for the following reasons:
- a. CBC's most recent experience in Board arbitration revealed deficiency rates on the order of 38% (*SODRAC 2003 Inc v CBC (2012-2018)*, 2021 CB 1 ¶88). CBC will thus be requesting a chain of title audit of Re:Sound's works, and will seek a corresponding discount on Tariff 1.C royalties based on the results of that audit.
 - b. This adjustment will apply to the entire tariff period.
7. CBC requests a downwards adjustment to the royalty rate to account for fair dealing and users' rights, notably for the following reasons:
- a. Some of CBC's radio programming uses music in a manner that constitutes fair dealing. These include fair dealing for the purpose of research (in the context of shows whose purpose is to inform or educate the public about music), news reporting (where programs play a piece of music as part of a news report about that music or its creator), and parody/satire (where the music is a parody or satire of an existing work or genre, or is otherwise used for parody or satirical purposes).
 - b. CBC anticipates that a sampling approach will be the preferred method of making this adjustment.
 - c. This adjustment will apply to the entire tariff period.
8. CBC objects to Re:Sound's proposed modifications to the terms and conditions of the proposed tariff, notably for the following reasons:
- a. The reporting requirements of this tariff are overly onerous and require information beyond that which is reasonably necessary for tariff administration. This is the case regardless of which approach will be used for royalty calculation. In particular, the removal of "where possible" language will have far-reaching and unfair impacts on CBC. Given that this tariff is a flat-fee tariff, and is likely to remain so, there is no need for this information to be provided to Re:Sound.

- b. The change for reporting and payment deadlines from 45 days to 14 days is unjustified and unreasonable. The payment deadline should remain unaltered, particularly if this tariff remains a flat-fee tariff.
 - c. Clause 6 (audits) should be amended to remove the requirement that CBC pay audit costs, which is not standard. Additionally, clause 6(4) should also be amended to remove the reference to audits being circulated to any collective society that has any tariff whatsoever with CBC (whether or not that tariff has any relationship to the activities covered by Re:Sound Tariff 1.C). This is a breach of the confidentiality provisions and is not necessary for administration of the tariff.
 - d. Clause 9 (adjustments) are drafted in a confusing manner. CBC's statutory set-off provision should be used instead (see below at paragraph 9.d).
 - e. Clause 7(1) is problematic because it states that interest is triggered, not only by late payments, but by late delivery of information required under the tariff. This makes a mockery of the notion of "interest." This is not standard and is inappropriate here. Re:Sound's Notice of Grounds does not even attempt to justify, such a surprising provision.
 - f. Clause 7(2) includes an escalating per-day penalty if documents are delivered late. Such provisions are not standard, deal with enforcement, and are inappropriate here. They should be removed.
 - g. The changes to the clause 8 (confidentiality) are unnecessary and unjustified in Re:Sound's Notice of Grounds. They expand the number of exceptions to confidentiality in broad and ambiguous ways, including by allowing Re:Sound to contact with unspecified "agents" and thereby transmit unlimited amounts of confidential information in order to accomplish whatever service Re:Sound chooses to include in their contract. No changes should be made to this provision, since Re:Sound has identified no difficulties in its application, and CBC is not aware of any.
 - h. Clause 9 purports to prevent users from recovering overpayments under a "time bar" provision. This is a harsh and unnecessary provision that has not been included in other tariffs. It should not be included here.
 - i. Clause 9 also purports to remove interest payment liability from Re:Sound for overpayments. The Board has said many times that it is unfair and inequitable for collectives to request interest on underpayments, but refuse interest on overpayments. Users and collectives should be treated equally with respect to the interest provisions of tariffs.
9. CBC proposes the following modifications to the terms and conditions of the proposed tariff:

- a. The audit provisions of clause 6 (whether or not modified as proposed by Re:Sound) should be made symmetric. If an audit reveals an overpayment, then Re:Sound should immediately refund the amounts in question. Additionally, all auditors must be independent of the parties, and not working on a contingency basis.
- b. Clause 7(1) (interest) should be symmetric with respect to overpayments and underpayments. As mentioned above, the Board's position is that users and collectives should be treated equally with respect to the interest provisions of tariffs.
- c. Clause 7(1) should state that interest should be calculated on a monthly basis, and not a daily basis. This is to allow the statutory set-off provision (below) to be applied in an efficient manner. By making interest payable monthly, a \$100 overpayment can be offset by simply deducting \$100 from the next month's payment. By contrast, if interest is payable daily, then the \$100 overpayment must be offset by more than \$100 on the next month's royalty payment to account for interest accrued in the meantime. This requires excessive calculation and is likely to lead to confusion or disputes in administration. By contrast, monthly interest payments allow one month's overpayment or underpayment to be easily deducted or added to the next month's payment without further adjustment, while allowing interest to accrue if such prompt correction is not made.
- d. A statutory set-off provision should also be added to this tariff to allow users to set off overpayments made in a given month against future payments under this tariff, or against other tariffs if no further payments remain. Indeed, a great many certified tariffs include such mechanisms already. CBC proposes the following language, which is modelled on existing tariffs:

(1) Subject to subsection (2), adjustments in the amount of royalties owed by CBC/Radio-Canada under this tariff (including adjustments as a result of excess payments), whether as a result of the discovery of an error or otherwise, may be made via set-off against future royalties owing under this Tariff 1.C.

(2) For clarity, set-off under this provision shall be deducted from future royalty payments under Tariff 1.C as necessary until no money remains owing. In the event that there are no future royalty payments under Tariff

(1) Sous réserve du paragraphe (2), les ajustements du montant des redevances dues par CBC/Radio-Canada en vertu du présent tarif (y compris les ajustements résultant de paiements excédentaires), que ce soit à la suite de la découverte d'une erreur ou autrement, peuvent être effectués par compensation avec les futures redevances dues en vertu du présent tarif 1.C.

(2) Il est entendu que la compensation opérée en vertu de cette disposition sera déduite d'abord des paiements futurs de redevances en vertu du tarif 1.C, jusqu'à

1.C, set-off may be made against future royalty payments under other Re:Sound tariffs.

concurrency du le montant dû. Au cas où il n'y a pas de paiements futurs en vertu du tarif 1.C, la compensation peut être effectuée sur les paiements de redevances dues en vertu d'autres tarifs de la Ré:Sonne.

ALL OF WHICH IS RESPECTFULLY SUBMITTED in Montréal, on 15 December 2023



FASKEN MARTINEAU DuMOULIN, LLP

800 Victoria Square, Suite 3500

Montréal, Québec H4Z 1E9

Michael Shortt (mshortt@fasken.com)

Paolina Tosheva (ptosheva@fasken.com)

Tel: 514.397.7400

Fax: 514.397.7600