

NOTICE OF GROUNDS FOR OBJECTION

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

In relation to proposed tariff *Re:Sound Tariff 8 – Non-Interactive and Semi-Interactive Streaming (2025-2027)*.

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 other objectors in this proceeding 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 royalty rates are "based on international best practices, primarily the rates which apply to non-interactive and semi-interactive music streaming services in the United States under SoundExchange's 2023 Non-Subscription Commercial Webcaster rates." As the Board has repeatedly ruled, it is trite law that importing of rates from other countries will rarely yield fair and equitable results in the public interest. That continues to be the case here.
 - b. Indeed, the rate sought by Re:Sound here (\$0.0021 per play) is more than an order of magnitude larger than the rate approved for this same tariff during the 2013-2018 period (\$0.000208). An increase of such magnitude requires precise and compelling justification, which is absent from Re:Sound's Notice of Grounds. A ten-fold increase in royalties is neither fair nor equitable, nor in the public interest.
 - c. Even the \$0.000208 number was derived from a settlement agreement to which CBC was not a party, and which does not properly reflect the value of music to CBC for the

- activities covered by this tariff. CBC was very surprised by these rates, which represented more than 50% increases over its prior rates. CBC notes that the Board did not conduct a *Netflix* analysis during the course of its approval of the settlement rates (*Netflix v SOCAN*, 2015 FCA 289).
- d. The claim for 21.75% of gross royalties is exorbitant and vastly exceeds any amount previously awarded by the Board for any similar activity. The comparable rate provided to SOCAN under the *Online Music Services (2010-2013)* tariff is 5.3%. No economic support has been provided for this request.
 - e. The use of “greater of” royalty structures has been repeatedly discouraged by the Board, and should not be used here.
 - f. The minimum royalties proposed by Re:Sound are predatory and absurd. Minimum royalties of \$100 per year were recently approved by the Board for the 2013-2018 period for this very tariff. In their place, Re:Sound seeks a minimum of \$1,000 (i.e. ten times higher) per channel, and defines “channel” expansively such that a streaming service could easily have hundreds of channels. To combat this problem of its own creation, Re:Sound caps its minimum royalties at a mere \$100,000 per year. This entire structure is abusive and illustrates why the Copyright Board was created to police collective societies in the first place.
 - g. In contrast to other Re:Sound tariffs filed at the same time, CBC notes that no inflationary increase has been sought by Re:Sound in its Notice of Grounds here. As a result, none can be awarded.
 - h. 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.
 - i. 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. 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 8 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 streaming 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 available" language will have far-reaching and unfair impacts on users.
 - b. Clauses 8-9 (adjustments) are drafted in a confusing manner. CBC's statutory set-off provision should be used instead (see below at paragraph 9.d).
 - c. 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.

- d. 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.
 - e. Clause 10 (audits) should be amended to remove the requirement that CBC pay audit costs, which is not standard. Additionally, clause 10 should also be amended to remove the reference to audits being circulated among collective societies. This is a breach of the confidentiality provisions and is not necessary for administration of the tariff. No other collectives have asked for similar provisions.
 - f. The changes to the clause 11 (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.
 - g. Clause 12(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 disclose, let alone attempt to justify, such a surprising provision.
 - h. Clause 12(2) includes an escalating per-day penalty if documents are delivered late. Such provisions are not standard, deal with enforcement, and are inappropriate here. Once again, Re:Sound's Notice of Grounds does not even attempt to justify them. They should be removed.
 - i. The change for reporting and payment deadlines from 45 days to 14 days is unjustified and unreasonable. The payment deadline should remain unaltered. Comparable tariffs have much longer reporting and payment period, including notably the recently-approved 2013-2018 version of this very tariff.
9. CBC proposes the following modifications to the terms and conditions of the proposed tariff:
- a. A free trial provision should be added, similar to the one adopted for the 2013-2018 tariff.
 - b. The audit provisions of clause 10 (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.

- c. Clause 12(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.
- d. Clause 12(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.
- e. 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 a service 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 8.

(2) For clarity, set-off under this provision shall be deducted from future royalty payments under Tariff 8 as necessary until no money remains owing. In the event that there are no future royalty payments under Tariff 8, set-off may be made against future royalty payments under other Re:Sound tariffs.

(1) Sous réserve du paragraphe (2), les ajustements du montant des redevances dues par une service 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 8.

(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 8, jusqu'à concurrence du le montant dû. Au cas où il n'y a pas de paiements futurs en vertu du tarif 8, 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