

## MAY 2012

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### Using Music Online - Paying the Piper in Canada

By Margot Patterson

The digital market for music has never been so competitive. Online music services such as Pandora and Slacker are quickly gaining users and – less quickly – expanding into new markets worldwide. Part of the reason for the gradual expansion of such services is the need to clear copyright jurisdiction by jurisdiction.

In Canada, the Copyright Board of Canada sets certain licences, known as tariffs, for online music services. Various Canadian copyright collective societies have filed tariff proposals with the Board to revise these licences for 2012 and 2013. They seek significant royalty increases: in some cases, more than doubling the current rates.

The following is an overview of key proposed changes to the existing tariffs.

Operators of online music services who intend to file objections to the following tariff proposals with the Copyright Board should note the deadlines (see “Next Steps” for each tariff, below). Full versions of the tariffs are available at <http://www.cb-cda.gc.ca/home-accueil-e.html>.

Generally speaking, online music services must clear the “communication” or “performance” right and the “reproduction” right. These rights are administered by different collectives. The following tariffs set out proposed royalties for various music uses (streams, downloads, etc.) payable to various rightsholders, however, even taken together, the proposals do not purport to clear all rights for every use of music by online music services. It is recommended that service operators obtain legal advice from a copyright specialist to discuss all clearances required to launch a service in Canada.

## A. AUTHORS/COMPOSERS/PUBLISHERS

### 1. The Communication Right: SOCAN Tariff 22.A (Online Music Services)

#### a) Tariff proposal

The following points compare the current tariff proposals (2012 and 2013) to the currently applicable, certified tariff (1996-2006).

#### Definitions and scope of licence – SOCAN proposes to:

- extend the licence to video clips;
- extend the revenue base on which the rates are calculated to include additional forms of revenue;
- clarify/extend “online music service” to include cloud-based services;
- clarify/extend the service to include “recommended streams”; and
- clarify that a “subscriber” includes all users, even those who use the service for free.

#### Rates – SOCAN proposes to:

- increase the rates for on-demand streams from 6.8% to **15.2%**<sup>1</sup> of gross revenue, with a minimum fee of 96.2¢ per subscriber;
- increase the rates for limited downloads: from 5.7% to **12.6%** of gross revenue, with a minimum fee of \$1.22 per subscriber if “portable limited downloads” are allowed; **79.8¢** if not;
- increase the rates for permanent downloads: from 3.1% to **6.8%** of gross revenue, with a minimum fee of **3.4¢** per permanent download in a “bundle”, and **4.6¢** per permanent download in all other cases; and
- set a rate of **4.6¢** per streamed file for free streams.

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<sup>1</sup> The SOCAN proposed rates are based on a formula of  $A \times B \div C$ , where “A” is the % of gross revenue; “B” is the number of plays/downloads requiring a SOCAN licence; and “C” is the total number of plays/downloads.

#### Administrative terms – SOCAN proposes to:

- significantly expand the information to be reported by the service; and
- shorten the delay for payments and reporting.

#### b) Next steps

Objections to the 2013 tariff proposal may be filed with the Copyright Board by **August 1, 2012**

The tariff was last certified for the years 1996-2006. The Copyright Board’s decision on the 2007-2010 tariff proposals is under advisement. These proposals were heard together with the CSI Online Music Services proposals for 2008-2010.

### 2. The Reproduction Right: CMRRA-SODRAC Inc. (“CSI”) Online Music Services

#### c) Tariff proposal

The following points compare the current tariff proposals (2012 and 2013) to the currently applicable, certified tariff (2005-2007).

#### Definitions and scope of licence – CSI proposes to:

- extend the application of the tariff to webcasting.

#### Rates – CSI proposes to:

- set a new rate for webcasting of up to **4.5%**<sup>2</sup> of gross revenues, with a minimum fee of up to **0.065¢** per play.
- increase the rates for on-demand streams from 4.1% to **6.8%** or greater<sup>3</sup> of gross revenue, subject to minimum fees;

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<sup>2</sup> Like the SOCAN proposed rates, CSI proposed rates are based on a formula of  $A \times B \div C$ , where “A” is the % of gross revenue; “B” is the number of plays/downloads requiring a SOCAN licence; and “C” is the total number of plays/downloads.

<sup>3</sup> CSI is seeking the greater of 6.8% and the equivalent rate payable to SOCAN.

- increase the rates for limited downloads: from 5.3% to **9.9%** or greater<sup>4</sup> of gross revenue, subject to minimum fees; and
- increase the rates for permanent downloads: from 7.9% to **9.9%** or greater<sup>5</sup> of gross revenue, subject to minimum fees.

**Administrative terms – CSI proposes to:**

- expand and restructure the information to be reported by the service.

**d) Next steps**

Objections to the 2013 tariff proposal may be filed with the Copyright Board by **July 11, 2012**.

The tariff was last certified for the years 2005-2007. The Copyright Board’s decision on the 2008-2010 tariff proposals is under advisement. These proposals were heard together with the SOCAN Tariff 22.A proposals for 2007-2010.

**3. Reproduction Right: SODRAC Tariff 6 (Online Music Services – Music Videos)**

While a large part of SODRAC’s repertoire is French-language, it also includes a large number of popular English-language (and other foreign-language) musical works.

**e) Tariff proposal**

This new tariff would apply to permanent downloads of music videos, at a rate of **9.9%** of the consumer payment, subject to minimum flat rates per work.

**f) Next steps**

Objections to the 2013 tariff proposal may be filed with the Copyright Board by **June 27, 2012**.

This tariff proposal was first filed for 2010, and has not yet been heard by the Copyright Board.

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<sup>4</sup> CSI is seeking the greater of 9.9% and twice the equivalent rate payable to SOCAN.

<sup>5</sup> *Ibid.*

**B. RECORD LABELS/PERFORMERS**

**Performance of Sound Recordings: Re:Sound (Simulcasting and Webcasting)**

**a) Tariff proposal**

Re:Sound’s tariff proposal for 2013 has not yet been published by the Copyright Board.

For 2012, Re:Sound sought rates of up to **45%** of gross revenues for semi-interactive webcasting, subject to a minimum annual fee of **\$720**.

**b) Next steps**

The 2013 proposal will be published in the coming weeks. The Copyright Board hearing for the 2009-2012 proposals will begin in Ottawa on September 24, 2012.

Objections to the 2013 tariff proposal may be filed with the Copyright Board **within 60 days of the date the proposal is published** (to be determined).

**Contact Us**

[Margot Patterson](#) is certified by the Law Society of Upper Canada as a Specialist in Intellectual Property: Copyright, and represents music users in proceedings before the Copyright Board.

For further information on Intellectual Property matters, please contact a member of our [National Intellectual Property](#) Team.