

Copyright Board
Canada



Commission du droit d'auteur
Canada

[PN 2023-009]

Publication date: March 1, 2023

PRACTICE NOTICE ON THE FILING OF ECONOMIC EVIDENCE

General Statement

Economic evidence can take a wide variety of forms. It often includes economic reports, studies, and data to support their case that a specific tariff or royalty rate is fair and equitable. For example, parties may develop and submit formal economic models to support their position on the value of the rate. They can also use informal comparisons with other existing markets or develop and file surveys in support of a particular assumption or position. Parties have also submitted databases as supporting evidence.

Based on this experience, the Board has developed this practice notice to serve as advice to interested parties concerning their submission of economic evidence and inform them on the scope and calibre of evidence preferred by the Board. More specifically, this practice notice intends to:

- inform interested parties on the preferred standard and content of any economic evidence submitted to the Board, such as methodology, modelling, reporting and statistical databases to name only a few;
- facilitate the assessment and analysis by the Board of any submitted economic evidence, by ensuring that submissions provide sufficient explanations, details and clarifications concerning the matter under review; and
- support a timely and efficient Board deliberation process by ensuring that economic evidence reflects this practice notice at the time of evidence submission.

Parties engaged in a proceeding before the Board are strongly encouraged to follow the guidelines described below when they submit their economic evidence to support Board deliberations. Parties remain free to apply any economic evidence and methodology they believe is best suited to support their positions, and, where applicable, to develop new methodologies compatible with this practice notice.

This practice notice is to be interpreted as being consistent with the *Copyright Board Rules of Practice and Procedure*, and other Practice Notices. In the event of conflict, the previous take precedence.

Three Guideline Categories

Depending on the economic methodology selected, there are three different categories of guidelines that parties can adopt in preparing their economic evidence, including:

- I. General guidelines that apply to any type of economic methodology
- II. Specific guidelines that apply to specific economic methodologies and related reports
- III. Guidelines for evidence related to “jointly submitted texts”

I. General Guidelines

General guidelines arise either directly from the *Copyright Act* or from the Board’s knowledge and experience in analyzing economic evidence in support of its decision-making mandate. In preparing their evidence as part of their Case Record, Response to a Case Record, or Reply to a Response to a Case Record (Rule 35), parties are encouraged to pay particular attention to the guidance sourced from the statute as well as related regulations. Some additional considerations that the Board will take into account are also listed below.

A. Statutory considerations

The *Copyright Act* states at Section 66.501 that:

The Board shall fix royalty and levy rates and any related terms and conditions under this Act that are fair and equitable, in consideration of

- (a) what would have been agreed upon between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm’s length and free of external constraints;
- (b) the public interest;
- (c) any regulation made under subsection 66.91(1); and
- (d) any other criterion that the Board considers appropriate

When submitting their economic evidence, parties are strongly encouraged to file economic evidence that will assist the Board in its consideration of the elements of section 66.501 of the Act, including the public interest. On the public interest, parties should show how their submission is fair for all potential users targeted by the tariff, regardless of their size, geographical location, and any other relevant dimension of the targeted industry.

Parties should detail how the following economic components are addressed:

- how their chosen economic methodology can be representative of a market where both a buyer and a seller are willing to trade.
- how their methodology can be representative of a competitive market. For example, a market where buyers and sellers cannot exercise market power - they are considered as

“price-takers” in the sense that they do not have the capacity to influence the market price.

- how their methodology leads to a tariff or a price that can be considered to have been agreed upon by a willing buyer and a willing seller.
- how their methodology can be a reflection of a competitive market where the willing buyer and the willing seller have all the relevant information; and
- how a willing buyer and seller can be considered to be at arm’s length from one another and free of external constraints.

Parties should also indicate if and how they have taken into account the interest of “final consumers” that are indirectly affected by the proposed tariff. Examples of such final consumers would be patrons or clients in a retail store, or a restaurant targeted by a tariff, or users of music streaming services.

B. Additional Considerations

These additional considerations are also examined by the Board in its assessment of submitted economic evidence including impact analysis, exhaustive analysis of tariff rates, estimation of gross royalties, differences in party submissions, and the use of information arising from the interrogatory process.

i. Information from the Statement of Issues (sections 24-27 of the Regulations)

Parties are reminded to include economic issues in a Statement of Issues, whether filed jointly (Rule 24) or separately (Rule 26).

ii. Impact analysis and ability to pay

The economic evidence presented by the parties should include an assessment of the impact of the proposed tariff on the industry it targets, as well as of the ability of the targeted users to pay the proposed tariff. Such assessments are more useful when done both in the aggregate, and stratified by major users, by size of users and, by any other relevant types of users.

iii. Every rate included in a tariff to be addressed

Often, a tariff contains several parts corresponding to different situations for which a different rate will apply. In their evidence, parties are encouraged to address every rate included in a proposed tariff. For example, when a tariff structure includes both a regular rate and minimum fees, parties could address both rates. Similarly, when a proposed tariff includes a progression of the rate through several years, the progression could also be addressed in the party’s submission.

It is also common that a proposed tariff application provides for a number of different uses to be authorized under the terms of the tariff. Parties are encouraged to address all the uses that the proposed tariff covers in their submissions. This analysis does not necessarily imply that every right needs to be priced separately where commonalities exist among uses.

Parties may choose not to file an economic justification for a particular part of a tariff. In such a case, if other parties address that part explicitly, the Board can weigh the evidence accordingly. If a particular tariff part is not explicitly addressed by any party, the Board may either decide, as it did in the *SOCAN 22.B-G, 2008* decision,¹ that it will not approve a tariff for the related use, or that it will use its own methodology to derive a different rate than that proposed by the parties.

iv. Provide an estimate of the total royalties expected to be generated by the proposed tariff

To the extent feasible, parties should provide an estimate of the total royalties that a proposed tariff is expected to generate, ideally for each of the years for which the tariff is proposed. Along with the estimate, parties may provide an explanation of the methodology used to derive such an estimate. If an estimate cannot be provided, parties should provide reasons for not doing so.

v. Differences between parties' proposals to be addressed

In a proceeding, if objecting parties propose a tariff structure² different than what was originally proposed, the objectors are encouraged to address each rate in that tariff structure, while the party submitting the proposed tariff would address each of these rates in reply.

In addressing any differences, parties are encouraged to include a comparison of the total royalties generated by each tariff proposal. Parties may also provide an analysis of the differences of each proposal impact users or groups of users.

vi. Basic economic information to be provided

Regardless of the methodology chosen, parties should aim to provide basic economic information that is determinative of the tariff, which may include the following, where applicable:

- current and expected supply and demand conditions of the market being examined;
- changes in the collective's repertoire;
- significant technological changes in the processes of the users that would tend to alter the way protected works are being used, or the value to the user of these protected works;
- changes in the availability and/or use of substitutes to the protected works. And, if relevant, changes in the availability and/or use of complementary goods or services should also be described and quantified to the extent possible; and
- changes in licensing practices in the relevant market.

¹ *SOCAN 22.B-G, 2008*, at paras 108-117.

² A tariff structure can be either a fixed price, e.g., \$100, or a rate of some sort applied to a rate base, e.g., \$2 per member, \$0.10 per copy, 3% of revenues.

II. Specific Guidelines

These specific guidelines set out considerations that parties are encouraged to address as part of their Case Record, Response to a Case Record, or Reply to a Response to a Case Record (Rule 35), in addition to the general guidelines discussed earlier. There are two types of specific guidelines: (a) those applying to economic methodologies and (b) those applying to specific types of reports submitted to the Board by the parties.

A. Economic methodologies

There are three broad categories of economic methodologies typically used by parties to provide supporting economic evidence for a specific tariff proposal:

- formal models;
- proxies; and
- intervals.

When the Board finds that the economic evidence submitted by parties is either insufficient, unusable or needs to be further adapted and adjusted to the specificities of the case, the Board's use of economic methodologies also falls under these same three broad categories.

i. Formal Models

When using a formal model of any type in an expert report, the following elements should be included in the report:

- a clear description of the model;
- an explanation of the academic pedigree of the model (e.g., is it brand-new, has it been published somewhere?);
- a list of all assumptions in the model, whether or not those assumptions are favourable to the expert's client;
- an explanation of how the model applies to the task of setting a price;
- all results obtained from the application of the model;
- measures of uncertainty in the model (e.g., confidence intervals in the empirical model, stability measures in calibrated, theoretical models); and
- the complete data set used in the application of the model, in a form allowing for reproduction of such application.

ii. Proxies

When using a market as a proxy for the tariff under examination whether the market is Canadian or foreign, an expert report should provide at a minimum, the following:

- a detailed description of the proxy market, including market structure if prices are set privately, and a description of the regulatory price-setting process if prices are set by a

regulator;

- a detailed description of the target market, that is - the market to which the Board's proceeding applies;
- information on the behaviour of the existing, as well as potential, buyers and sellers in both the proxy market and the target markets. This includes information on both purchasing and marketing behaviour;
- a comparison of the specific uses of rights in the proxy market and the target market;
- a list of the key market characteristics of the proxy and target markets, identifying similarities and differences;
- reasons why the similarities validate, and the differences do not undermine, the use of the proxy to set the target tariff; and
- a detailed description of any required adjustments to be applied to the proxy price, to obtain a target price that takes into account any differences between the two markets.

iii. Intervals

Parties proposing to use an interval methodology are encouraged to provide justification for their interval approach and choice of the upper and lower limits. Such a justification, for example, could consist of proxies for which parties are not able to identify precise, quantifiable adjustments to make them reflect the market being examined. Where only the direction of the needed adjustment is known, this could make the proxy acceptable as a lower or upper limit.

Once the upper and lower limits are established, the precise rate remains to be determined by identifying factors that would tend to push the rate towards the upper limit of the interval, and factors that would tend to push it towards the lower limit. Justifications, including appropriate evidence, are to be provided for these adjustments away from the limits.

There are several factors parties may consider in determining where to situate their proposed rate within an interval. Parties could consider elements of the basic economic information as described earlier: for example, if there was a significant shift in the supply or demand in the relevant market, that would tend to push the rate up or down within the interval. They could also consider whether there was a significant technological change in the industry that impacted the value of the contemplated use of the protected rights. Best efforts should be made by parties to provide quantitative estimates of the effect of these factors.

Rates proposed by parties do not generally constitute credible limits for the interval. For example, proposed rates could be derived from very different models and incorporate a set of considerations and assumptions that are very different, so as to contradict each other. Moreover, proposed rates can sometimes reflect strategic considerations (such as negotiating positions) that would reduce their value as a useful indicator.

B. Economic Reports

As part of their evidence, parties will often file survey reports and databases. When doing so,

parties are encouraged to provide their information as described below.

i. Surveys

When presenting an economic report based on a survey, submissions should include:

- a list of every question posed in the survey, including any rotations of question wording or ordering, and the way the question was read to the respondent or the way it appeared on the respondent's screen;
- a detailed description of the sample, including the sampling frame, the method of sampling (e.g., random or non-random, stratified or non-stratified), and demographic characteristics of the sample, including those that could be used to re-weight the results; and
- in the case of data generated by a non-commissioned party, such as Statistics Canada for example, detailed information about the way the data were collected, including the caveats as published by the collecting agency.

Any economic report containing econometric analysis should include a full set of diagnostic data, including goodness of fit and other related tests. In addition, all regressions performed, whether or not favourable to the client, should be reported.

A submitted economic report should also be precise about the methods used where data are "treated" statistically. For example: when outliers are being identified and removed; where partially complete records are being dealt with; where measurement errors are being addressed; or where some data is weighted.

ii. Databases

There are different types of databases that can be filed as evidence in the Board's deliberation process. Where a collective submits a database as evidence, the database can include a list of works that form part of the repertoire of the collective. On the user side, a database can include a list of the works that are part of a repertoire of a collective and that are being used by such users. A database may also include a set of financial data.

When presenting a database as part of their evidence, parties are encouraged to ensure that the following information is included.

Example 1: Database containing works in the repertoire of a Collective

- list of all the data fields collected;
- frequency of collected data;
- extent of auditing being done on the database; and
- identification and description of the software used to manage the database.

Example 2: Database containing works made use of by the parties

- same information as in 1 above;
- a description of how the uses are being tracked; and
- some measure of intensity of use.

Example 3: Financial database

- list of financial data fields being collected;
- frequency of data collection;
- basic consolidated financial data such as balance sheets, income statements and cash- flow statements; and
- audited or data filed with a regulator, where it exists.

III. Guidelines relating to “jointly submitted texts”

Parties sometimes reach an agreement with each other on activities covered by a proposed tariff, including the rates and the terms and conditions. When they do, parties may file a “jointly-submitted text” and request that the Board approve the proposed tariff of general application based on those terms and conditions. In such cases, should the tariff be approved by the Board, it could apply not only to the users that are party to the agreement, but also to all other users covered by the scope of the approved tariff.

When requesting that a “jointly-submitted text” be considered by the Board, parties must follow Rule 33, as well as the Board’s *Practice Notice on Filing Jointly-Submitted Text in a Proceeding* [PN 2022-005], which establishes what parties must, or are encouraged to, file. In particular, in terms of economic evidence, parties are encouraged to provide the following information:

- a description of the extent to which objectors that are party to the “jointly-submitted text” can represent the interests of all users affected by the tariff; and
- a description of the extent to which the “jointly-submitted text” addresses any objections made on economic grounds to the proposed tariff.