

Online Music Video Services (2014-2018)

SOCAN's Response to the Interveners' Proposed Additional Issues

Filed April 29, 2024 in accordance with Board Ruling CB-CDA 2024-024

This is SOCAN's response to the additional issues proposed by the interveners, Apple and SiriusXM Canada Inc. ("SiriusXM"). If allowed, the proposed issues would unfairly and disproportionately expand the scope of the proceeding and impair efficiency.¹ In addition, SiriusXM proposes issues that exceed the scope of its intervention and reflect a misinterpretation of the Board's definition of "music video".

1. Issues Would Unfairly Expand the Scope of the Proceeding

The interveners' proposals would unfairly expand the scope, number, and complexity of the issues in the proceeding. Many of the proposed issues are fact-dependent and would therefore call for a proper evidentiary record. That includes SiriusXM's proposal to consider "fair dealing for talk and music clips," and the proposal by both interveners to consider the application of the proposed tariffs to their various business models and offerings, to name a few. However, by participating as limited interveners, Apple and SiriusXM presumptively avoid the obligation to provide evidence relevant to their proposed issues, and for such evidence to be tested through cross-examination. Further, SOCAN understands that most if not all of the issues are not relevant to Stingray, which is the only objector in the proceeding, and therefore the only user that is presumptively required to provide evidence.

It would be contrary to the principles of procedural fairness for an intervener to introduce numerous new issues that call for a proper evidentiary record, while avoiding the obligation to contribute to the record. That would risk imposing an unfair burden on SOCAN, and the Board, to attempt to deal with the issues in the absence of appropriate participatory support or evidence from the interveners, among other concerns. An intervener is typically required to take the record as it exists and limit its comments to the evidence on the record. Permitting an intervener to raise issues without the obligation to contribute to the record or be subject to cross-examination would be unfair and improper.²

2. Interveners' Issues are Disproportionate and Would Create Inefficiencies

The interveners' proposals are disproportionate to their interests and the parties' interests and would result in inefficiencies.

SiriusXM has a limited interest in the proceeding. Its request for leave to intervene dated September 20, 2023 states that SiriusXM "did not offer a covered service for the vast majority of the period under consideration as set out in the Ruling, and even then only in a *de minimis* fashion as an experimental offering."

¹ At the case conference held November 29, 2024, it was discussed that SOCAN may raise concerns regarding any additional issues proposed by the interveners at this step in the proceeding.

² SOCAN reserves the right to seek an order compelling the interveners to provide evidence that may be necessary in connection with any issues raised by them in the proceeding, including under section 66.7(1) of the *Copyright Act*.

Despite its minimal interest, SiriusXM proposes numerous issues that appear to be niche and specific to its service. Each issue proposed by SiriusXM concerns “promotional uses of ‘talk and music’ videos by services predominantly engaged in other activities...”³ SOCAN is not aware of any other service to which that description would have applied in 2014 to 2018.

It would be inefficient for the Board and the parties to dedicate time, cost, and energy to numerous issues that are unique to SiriusXM, when SiriusXM has a limited interest in the proceeding and has chosen to avoid participatory obligations. Given the combination of SiriusXM’s limited interest, limited participation, and the service-specific nature of its numerous proposed issues, the Board ought to decline to consider those issues in the proceeding.

SiriusXM would not be prejudiced if its proposed issues are not considered in this proceeding. If SiriusXM does not wish to operate under the tariff that is eventually certified, other licensing options are available. However, it would not be appropriate for SiriusXM to use this proceeding, which is intended to establish a tariff of general application, to seek a bespoke licence while participating from the sidelines as an intervener with limited obligations.

3. SiriusXM Proposes Issues That Exceed the Scope of its Request for Intervention

Rule 52(3)(d) of the *Copyright Board Rules of Practice and Procedure* requires that a request for leave to intervene state the issues that the person seeking leave to intervene intends to address. In its request for leave to intervene dated September 20, 2023, SiriusXM stated that it “intends to focus its submissions on ensuring any certified tariff takes into account minor uses of music videos by services predominantly engaged in other activities.” However, only one of its proposed additional issues arguably falls within the scope of that request, namely issue # 8 (considering whether terms and conditions and reporting requirements should be varied for minor users). The rest of SiriusXM’s proposed issues go well beyond the scope of its intervention, such as issues relating to fair dealing, foreign server copies, and issues concerning so-called “talk and music clips”.

SOCAN respectfully submits that the Board ought not to permit an intervener to raise issues that have not been stated in its request to intervene. That would be contrary to the purpose and intention of rule 52(3)(d), deprive the other parties of procedural fairness, and undermine the Board’s goals of certainty and transparency.

4. SiriusXM Misinterprets the Definition of Music Video

SiriusXM’s issue #4 is not an appropriate or relevant issue because it is based on a misinterpretation of the Board’s definition of music video in Ruling CB-CDA 2023-047.

SiriusXM’s issue #4 states as follows:

Identifying the author and owner of talk and music clips when ‘the making of the audiovisual work was authorized by the owner of copyright...’ (emphasis added).

That language reflects a misinterpretation of the Board’s definition of a music video, which includes the following component: “the making of the audiovisual work was authorized by the owner of copyright, or their agent, licensee, or other representative.”

³ Preamble to SiriusXM’s proposed Statement of Issues.

It is clear from the context of the Ruling, including the parties' submissions that led to the Ruling, that the "owner of copyright" contemplated in the Board's definition is the owner of copyright *in the musical work(s)* that are embedded in a music video, not the owner of copyright in the music video. Indeed, in its consolidated Requests for Approval filed in the *Online Audiovisual Services – Music (2014-2026)*, SOCAN has defined "music video" as follows:

- "music video" means an audiovisual program, including a concert video,
- (a) for which the visual content was produced to feature, accompany, depict, portray, or represent one or more sound recordings or performances of one or more musical works;
 - (b) where the musical work(s) are in the foreground of the audiovisual program; and
 - (c) where the making of the audiovisual program was authorized by the owner of copyright in each musical work it contains, or the owner's agent, licensee, or other representative. (emphasis added)

SiriusXM's issue #4 poses the wrong question by focusing on the author and owner of copyright in so-called "talk and music clips," rather than the owner of copyright in the musical work(s) contained in those clips. Therefore, the issue is not proper and should not be considered in the proceeding.

All of which is respectfully submitted.