

## ONLINE AUDIOVISUAL SERVICES - MUSIC (2014-2026)

### JOINT STATEMENT OF ISSUES

*NOTE: No party concedes that any issue is necessarily relevant or material to a determination of the amount of royalties payable. The parties acknowledge that, despite the fact an issue has been included on this list, any party may take the position in the proceeding that the issue is irrelevant or immaterial to the Board's determination, and no admissions are made regarding the merits of any issue. No party concedes that the issues are applicable to any objector's business operations or service model.*

#### I. LEGAL ISSUES [PHASE I]

1. How do the *CBC v SODRAC* factors apply to this proceeding, if at all, including how the principles regarding technological neutrality and the relative contributions by copyright owners and users should apply in this case?
2. The objectors intend to rely on the following statutory exceptions: ss 29.21 (non-commercial user generated content), 29.24 (backups), 30.7 (Incidental Inclusion), 30.71 (Temporary Reproductions for Technological Processes), and 31.1 (Network Services). How should the Board interpret the meaning, scope, and potential applications of the exceptions, including what criteria or conditions a service must satisfy to rely on them?

#### II. NATURE OF OAV AND UGC SERVICES [PHASE II]

1. How have OAV and UGC services evolved in Canada, including as to service offerings, revenue-generation and revenue-sharing schemes, amount of revenue generated, and functionalities?
2. How do OAV and UGC services use music in Canada?
3. What technology do OAV and UGC services and their authorized distributors use to offer and deliver music to end users in Canada? How do they use that technology?

#### III. ECONOMIC AND VALUATION ISSUES [PHASE II]

##### A. Statutory Criteria

1. How should the Board apply the criteria in s. 66.501 of the *Copyright Act*?

##### B. Rate Base

2. For each tariff, what is the appropriate rate base?
  - (a) For a service that generates revenue on a subscription basis, should the rate base reflect the amounts received by the service, rather than the amounts paid by subscribers?

- (b) For a service that generates revenue on a subscription basis, when the service is made available as part of a bundle of services (or goods and services) for which subscribers are charged a single subscription fee, and other items in the bundle may or may not also be subject to the same tariff, should the bundle's revenue be allocated to reflect the relative value of the items in the bundle, and if so, how?
  - (c) How should the rate base be calculated for a service that offers a mix of content, not all of which is subject to the tariff (including content or functions which may not use musical works), and generates revenue that is not distinctly associated with specific different content or functions offered?
  - (d) Should the fees collected by app stores and intermediate billing providers be excluded from the revenue base calculation?
3. For a service that offers both streams and compensable downloads, should the rate base (or possibly the percentage rate) be calculated in a way that reflects the extent to which end users consume programs via streams rather than downloads and vice versa?
4. Is the proposed definition of "Service" appropriate for the scope of the tariff?
- (a) Should the definition be modified to account for corporations that offer more than one service (sometimes at different times) that could each attract different royalty calculations?
5. Should the tariffs provide for an optional "modified blanket licence" whereby certain identifiable revenue is excluded from the rate base where that revenue is earned exclusively by programming which only contain musical works that do not require a licence from SOCAN? If so, how should the modified blanket licence be structured?

**C. Percentage rate**

6. What are the appropriate percentage rates for the tariffs?
7. Are there any benchmarks, including the last certified tariffs, any other approved tariffs, or other proxies, that should be considered?
8. Should the Board determine a ratio between the value of the reproduction right and the value of the communication to the public right when both rights are required for the same use? Is the historical 1:3.2 ratio relevant to this proceeding?
9. Should the rates be adjusted to reflect circumstances where the rights to use some of the musical works have been cleared through other means or where the rights being granted under the tariffs are not necessary for all works used by a service, for example, where
- (a) the service has precleared certain rights;

(b) the service is the rights-holder of certain of the rights, by nature of the fact that it produces its own musical works that are embedded in the audiovisual content, even if SOCAN in turn represents the rights in those works; or

(c) some or all works in a stream or file are not held in SOCAN's repertoire;

or could the tariffs address these circumstances, if they exist, in ways other than an adjustment to the rates.

10. Should the tariffs incorporate a type of "low music use" rate or other rate for services that use less than a threshold amount of music?
11. Should the tariffs incorporate different rates for types of services that use music in a way that has less value than other services?
12. How should the rate for offline viewing copies be set, particularly given the potentially different degrees of usage between different services that make offline viewing copies available?
13. Should there be variation in the rates set for limited downloads to account for different ways in which services may offer limited downloads to end users?
  - (a) Should the definition of "Limited Download" service be modified to reflect these differences?
14. Should the tariff be structured to provide for different reproduction percentage rates depending on the different types of compensable copies made in Canada (e.g. for services that only make copies to facilitate offline viewing, versus services having all copies, including master server copies, made in Canada)? If so, should services be required to provide reporting to SOCAN regarding the different types of compensable copies made in Canada?
15. Is there any basis upon which certain UGC services should pay royalties under an alternative to a percentage of revenue structure?

***D. Exemptions and potential adjustments to percentage rate (including for reproductions)***

16. If any of the statutory exceptions referred to in Issue #2 are applicable, should they be factored into the percentage rate, and if so, how?
  - (a) If applicable, what is the appropriate model to determine the value and corresponding royalty rate adjustment, if any, for any statutory exception?
17. If the objectors intend to claim the benefit of any exception in the *Copyright Act*, can they establish that the criteria for each such exception are satisfied and, if so, for what types of copies?
  - (a) How, if at all, should any particular objector's entitlement to benefit from an exception in the *Copyright Act* factor into a tariff of general application?

18. Should the tariff provide for an adjustment that would account for the extent of a service's use of SOCAN's repertoire for reproduction rights and, if so, how?
  - (a) How should repertoire be established?
  - (b) Does the repertoire vary over the years in the tariff?
  - (c) Is a blanket repertoire adjustment appropriate for a tariff for which royalties are to be paid on a "per-work, per-share" basis (for example, as contemplated by paragraph 4(7) of the consolidated request for approval of Tariff 22.D.1.R (2015-2026)?
  - (d) Is a blanket repertoire adjustment for all users appropriate?

**E. Minimum Fees**

19. For each of 22D1, 22D2, and 22D1R,
  - (a) Are minimum fees appropriate and, if so, what should the Board consider when determining the appropriate structure and amount of minimum fees, including whether a "greater of" structure is appropriate?
  - (b) If minimum fees are appropriate, are the minimum fees proposed by SOCAN fair and equitable?
  - (c) When setting minimum fees, how, if at all, should the Board account for differences in business models among services, such as subscriptions that permit more than one end user, free trials, promotional content, sample programming, student plans, and demo accounts?

**IV. TERMS AND CONDITIONS [PHASE II]**

1. What terms and conditions, including reporting requirements, should the Board set for the tariffs?
2. Should the qualifying language "if available" be added for any of the music use-related information to be reported?
3. What is the appropriate frequency (e.g. monthly, quarterly) for royalty payments and reporting requirements?
4. Are the administrative obligations in the proposed tariffs appropriate?
5. Where a user reports that a licence is not required for a particular program or work, should the user provide supporting documentation to SOCAN, and if so, what documentation is appropriate?