

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

[CB-CDA 2024-004]

## **ORDER OF THE BOARD**

### **Proceeding: Online Audiovisual Services-Music (2014–2026)**

January 19, 2024

## **I. OVERVIEW**

[1] This Order follows from the Case Management Conference held on December 18, 2023. This Order:

1. establishes the role of Objectors;
2. gives direction regarding expected role of interveners;
3. fixes a schedule for the filing of intervener requests;
4. gives direction regarding Google's request to intervene; and
5. extends the application of the previously-issued Confidentiality Order to this proceeding.

## **II. ROLE OF OBJECTORS**

### **A. OVERVIEW**

[2] During the December 18, 2023 Case Management Conference, parties put forward two possible modifications to Notice 2017-153.

[3] SOCAN put forward the possibility that Objectors should be able to act only in relation to the particular years to which they have objected. They argued that this could lead to a reduction in the amount of evidence and argument that would be adduced.

[4] Certain Objectors put forward the possibility that Objectors should be able to act in relation to all the Proposed Tariffs. One of the main arguments put forward was that, without this change, counsel that represent multiple clients would need to identify the particular client or clients on behalf of which a particular argument was made, or evidence led. In their view, this could be

even more difficult with respect to any expert witnesses, which may be retained by several objectors.

## **B. ORDER AND DIRECTIONS**

[5] I believe that the modification proposed by SOCAN would add complexity to the filing and parsing of evidence and argument that outweighs the benefits from a possible reduction in the amount of evidence and argument filed.

[6] I also believe that, despite the Objectors' arguments, the approach in Notice 2017-153 is not so strict as to prove impractical.

[7] For these reasons, I maintain the approach in Notice 2017-153.

[8] As requested by Parties at the Case Management Conference, I provide guidance on:

- what restrictions this approach imposes on non-objecting parties; and
- what obligations this approach imposes on counsel who are retained by multiple objectors.

### *1. Objectors cannot act solely in relation to an unobjected proposed tariff*

[9] First, Notice 2017-153 states that a party "will not be able to act solely in relation to [a proposed tariff to which it did not object]." This still permits doing so in an ancillary manner, if it is necessary to do so as part of a party's case. I maintain this approach.

[10] To use an example raised during the Case Management Conference, if a party's case relies on some relationship between the royalty rate for reproductions and communications of a musical work, it is possible for a party that has objected to a proposed tariff covering the communications to address the royalty rate for reproductions.

### *2. Arguments made on behalf of multiple clients*

[11] Second, parties that retain counsel jointly may have their counsel make arguments in respect of any of the families of proposed tariffs to which their clients have objected without having to identify specifically each objector that is permitted to raise that argument. An argument is not stronger or weaker based on the number of parties making it.

[12] That being said, if SOCAN wishes to draw to the Board's attention the fact that a certain argument only pertains to the objections of a certain subset of objectors, it may do so.

### *3. Evidence filed on behalf of multiple clients*

[13] Third, parties that retain counsel jointly may have their counsel adduce any evidence that could have been adduced by any of their clients had they been represented individually. This may be done without having to identify the specific client on whose behalf it is being adduced, as such identification neither increases nor decreases the probative value of that evidence and would introduce added complexity to the proceeding.

[14] For greater certainty, parties that jointly retain an expert witness may have that expert witness provide opinion evidence in relation to any issue relevant to any of the proposed tariffs objected to by any of the objectors by which the expert witness was retained.

## **III. ROLE OF INTERVENERS**

### **A. SCOPE OF PARTICIPATORY RIGHTS**

[15] As I stated during the December 18, 2023 Case Management Conference, I am not inclined to grant any intervener participatory rights akin to those of the objectors.

[16] That being said, if a request to intervene can make a *prima facie* case that, without the right for an intervener to file its own evidence, there may be a lack of useful evidence in relation to a particular family of proposed tariffs, I will weigh this favourably for the purposes of my consideration of the factor in Rule 52 (5)(b).

### **B. THE RIGHT OF INTERVENERS TO MAKE CLAIMS OF FACT**

[17] The Case Management Conference included discussion regarding whether interveners can make claims of fact in their submissions.

[18] The Board is flexible in the way it receives evidence. For example, submissions that would amount to hearsay in a court can be made before the Board. As such, claims of fact in submissions are not prohibited by default.

[19] This is so for several reasons. First, the Board is not a court, and has a mandate to proceed informally and expeditiously. Second, most tariffs are of general application, and the Board tends to prefer more relevant information on the record, rather than less.

[20] The Board determines the weight given to any claims of fact on a case-by-case basis. For example, if the claim relates to an intervener's own specific businesses practices, it may give such statements more weight than a claim made in relation to an entire market segment.

[21] Other parties will be given an opportunity to respond to filings made by interveners, including claims of fact contained therein. This may include the right to file comments in response to that filing.

#### **IV. TIMING OF INTERVENER REQUESTS**

[22] During the Case Management Conference, SOCAN spoke of the benefit of having some certainty with respect to the status of all parties. In particular, knowing which parties will be intervening, and what the scope of their intervention would be.

[23] I agree. Notwithstanding the fact that the Parties have offered to file a joint proposed Schedule of Proceedings, I fix **February 7, 2024** as the date by which any current Party to this proceeding that intends to seek leave to intervene should do so. Any Party may file submissions with respect to any such request by **February 22, 2024**.

[24] If the jointly proposed Schedule of Proceedings proposes different dates for these steps, I will consider them, and may vary this Order.

[25] While Parties will not be completely precluded from seeking intervener status later in the proceeding, any such later requests may be denied or narrowly circumscribed either under Rule 52(2) or pursuant to my consideration of factors in Rule 52(5)(c) and (d).

#### **V. GOOGLE’S REQUEST TO INTERVENE**

##### **A. OVERVIEW**

[26] On October 18, 2023, Google filed a request seeking intervener status with respect to the SOCAN Tariff 22.D.1 family of proposed tariffs. It seeks “to participate on the same basis as the objectors.”

[27] While Rule 52(4) contemplates that other parties have an opportunity to respond to such a request, I was of the view that such responses would be premature prior to the December 18, 2023 Case Management Conference (see Order 2023-051).

[28] It appears to me that Google’s request seeking “full participatory status” would be almost identical to it participating as an objector. In accordance with my direction above, with respect to interveners, I am not in favour of granting an intervener similar rights as that of an objector.

[29] That being said, Google has objected to proposed tariffs in the SOCAN Tariff 22.D.1 family: SOCAN 22.D (2014, 2015) and SOCAN 22.D.1 (2016–2018); and on February 2, 2018, Google stated that it would withdraw from participation in the *Online Audiovisual Services – Music (2007-2018)* proceeding, which was to consider those proposed tariffs.

[30] While Google withdrew from participation, this does not change the fact that it filed objections, and these objections continue to be on the record, in-line with Practice Notice PN 2023-010 (“No Effect on Record”). This is not a case of a stranger to the proceeding suddenly seeking significant participatory rights.

[31] As such, should it apply to do so, I am ready to reinstate Google's participation as objector in relation to those proposed tariffs, unless another party shows that this would cause undue prejudice, or affect the expeditious consideration of the proposed tariffs.

## **B. ORDER**

[32] By the date established for the filing of requests to intervene (**February 7, 2024**, or if varied prior to that date by a subsequent Order, as per para. **Erreur ! Source du renvoi introuvable.**, by that date), Google may file a new request to intervene, or a request to reinstate its participation as objector, or both.

[33] Any Party may make submissions with respect to any request by Google to intervene or to resume its participation as objector to the SOCAN 22.D.1 family of proposed tariffs by the date established for the filing of submissions on any request to intervene (**February 22, 2024**, or if varied prior to that date by a subsequent Order, as per para. **Erreur ! Source du renvoi introuvable.**, by that date).

## **VI. CONFIDENTIALITY ORDER 2018-035 CONTINUES TO APPLY**

[34] A Confidentiality Order was issued on March 2, 2018 as Order 2018-035 in the proceeding then styled as *Online Audiovisual Services – Music [SOCAN: 2007-2018; CMRRA: 2014-2018; SODRAC: 2014-2018]*. Since that time, the scope of the proceeding has changed significantly. Therefore, Parties have asked me to confirm that Order 2018-035 continues to apply.

[35] The Confidentiality Order issued on March 2, 2018 as Order 2018-035 continues to apply to this proceeding. In particular:

- documents and information previously exchanged under the Confidentiality Order, in the *Online Audiovisual Services – Music (2014-2018)* proceeding, remain subject to the Confidentiality Order, in this OAVS-M proceeding; and
- confidentiality agreements delivered under the Confidentiality Order are effective in this proceeding.

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