

Copyright Board
Canada



Commission du droit d'auteur
Canada

[CB-CDA 2024-038]

NOTICE OF THE BOARD

Proceeding: Online Music Video Services (2014-2018)

May 24, 2024

I. OVERVIEW

[1] This Notice is to

- encourage SOCAN and SiriusXM to discuss their understanding of SiriusXM's activities, and the application of SOCAN's tariffs or licences to those activities;
- inform all of the Parties that I am postponing the scheduled Case Management Conference to the week of June 17, 2024 to provide sufficient time for the above;
- provide an agenda for the Case Management Conference; and
- provide the Parties with my preliminary views on the matters that I intend to discuss with them at the Case Management Conference.

II. ISSUES RAISED BY SIRIUSXM

[2] In its Statement of Issues, SiriusXM identifies certain issues in the context of "minor promotional uses of 'talk and music' videos by services predominantly engaged in other activities."

[3] It appears to me that some or all of the issues raised by SiriusXM could be resolved through discussion with SOCAN. I therefore recommend that, in advance of the Case Management Conference, SOCAN and SiriusXM discuss which, if any, of SiriusXM's activities are covered by the proposed tariffs in this proceeding. It will be more efficient to rule on a list of issues that have been confirmed as relevant by SOCAN and SiriusXM. Please let the Board know if the parties are interested in having the Board staff present to provide assistance with technical subject matter.

[4] Either before or at the Case Management Conference, SOCAN and SiriusXM shall provide an update on whether there is a common understanding of Sirius XM's activities, and how it affects the scope of issues raised by Sirius.

III. CASE MANAGEMENT CONFERENCE DATE AND AGENDA

New Date for Case Management Conference

[5] For the reason described above, I am postponing the Case Management Conference. I intend that it be held on the week of June 17, 2024 and expect that it will last 60 minutes. I am available at the following times:

- Tuesday June 18, 2024, between 1:30 p.m. and 4:00 p.m.
- Thursday June 20, 2024 between 9:30 a.m. and 12:00 p.m.

[6] Parties are to inform me of their availability at these times by **Friday, May 31, 2024**.

Agenda

[7] At the Case Management Conference, I intend to discuss the following with the Parties:

- the list of issues to be considered;
- the treatment of statement of facts made by interveners in their Memoranda; and
- the Schedule of Proceedings.

[8] As these items are interrelated, it is possible we may move back and forth among them.

[9] If any party wishes to add any other item on the agenda, please let me know no later than 3 business days before the date that will be fixed for the Case Management Conference, copying all other parties, including the interveners.

A. THE LIST OF ISSUES

[10] Instead of issuing a final list of issues at this time, as contemplated in Ruling 2024-024, I have provided my preliminary views in three Annexes attached to this Notice. Parties will be invited to address these at the Case Management Conference.

Grouping of Issues

[11] I am of the view that the issues in the first group (Annex "A") should be retained for this proceeding. I have made a few modifications, primarily to consolidate issues or to simplify wording. Parties should ensure that my text continues to reflect the issues, as intended.

[12] I am of the view that the issues in the second group (Annex “B”) are—as presently worded—overbroad, unclear, or not sufficiently connected to a particular decision the Board must make in this proceeding. They should not be retained as worded.

[13] It is also possible that some may be sub-issues of issues found in Annex “A”. Parties should review my remarks, and be ready, at the Case Management Conference, to speak to whether they wish to re-word them, make them more concrete and/or identify them as sub-issues to other issues in Annex A.

[14] Last, I am of the view that issues in the third group (Annex “C”) are not issues for the Board to determine in this proceeding and should not be retained. Again, Parties should review my remarks in case there is additional context or information they wish to bring to my attention.

B. THE TREATMENT OF STATEMENTS OF FACT MADE BY INTERVENERS

[15] SOCAN submits that many of the issues identified by the interveners, SiriusXM and Apple, “are fact-dependent and would therefore call for a proper evidentiary record.”

[16] I am of the preliminary view that, in relation to those issues that I will retain, Apple and SiriusXM will be permitted to provide information about their respective businesses and operations. In addition, SOCAN and Stingray will have the right to:

- respond to any statements of fact made by the interveners; and
- seek leave to put interrogatory questions to each intervener in relation to such statement made by the interveners.

[17] The steps in the preliminary Schedule of Proceedings, below, are one way of achieving this. Parties will be asked to speak to this approach at the Case Management Conference.

C. SCHEDULE OF PROCEEDINGS

[18] Based on the currently-identified issues, and given that this proceeding was intended to be less complex than its OAVS-M counterpart (see *e.g.*, Ruling 2023-047), I propose the following as a preliminary Schedule of Proceedings.

[19] The schedule would start on the date on which I issue my ruling regarding the list of issues to be considered in this proceeding.

Step	Time for Step	Comments
SOCAN files Case Records	8 weeks	
Stingray files Case Record	4 weeks	

Apple and Sirius XM file Memoranda	3 weeks	
SOCAN and Stingray file Reply Case Records (reply to both Case Records and Memoranda)	3 weeks	
SOCAN and Stingray may file Applications for leave to ask Interrogatories	3 weeks	To be filed no earlier than the Reply Case Records
All Parties file Response to Applications (if any)	2 weeks	
Case Management Conference re. interrogatories (if any)	2 weeks	
Interrogatory Process (if any)	Completed by: TBD	
Case Management Conference to re. cross examination (to determine whether appropriate & scope)	TBD	
Cross Examination and Redirect Examination (if any)	TBD	
Questions from the Board, if any	TBD	
All parties file Final Submissions (with any new evidence)	TBD	
SOCAN and Stingray file Final Reply Submissions (with any new reply evidence)	TBD	

[20] Parties should be ready to discuss the proposed Schedule of Proceedings at the Case Management Conference.

IV. NEXT STEPS

[21] After the Case Management Conference, I intend to issue an Order that will set out the final list of issues, provide direction regarding the treatment of statements of facts made by interveners, and fix a Schedule of Proceedings.

Lara Taylor
Case Manager

ANNEX “A”: Issues to Retain

Issue	Sources	Remarks
Rate		
<p>How do the <i>CBC v SODRAC</i> factors apply to this proceeding, if at all?</p> <p>How do the principles of technological neutrality and the relative contributions of copyright owners and users should apply in this case?</p>	JSI Q4	
<p>What is the appropriate basis to determine a fair and equitable rate for each use covered by the tariffs?</p> <p>In particular, should the relationship between the rates for audiovisual files and audio files be considered in this proceeding?</p>	JSI Q11	
<p>Should the Board determine a ratio of the value of the reproduction right to the value of the communication to the public right when both rights are engaged by the same use?</p> <p>What should that ratio be?</p>	JSI Q12	
<p>In the case of a hybrid service, should the Board determine an apportionment of the royalties for the communication and reproduction of musical works?</p> <p>If so, how?</p>	JSI Q14	
Rate Base		
<p>What is the appropriate rate base for the tariffs?</p> <p>In particular, should the revenue base reflect the amounts received by the service provider, rather than paid by subscribers?</p>	JSI Q8	

Issue	Sources	Remarks
<p>Is the proposed definition of “Service” appropriate for the scope of this tariff?</p> <p>In particular, should the definition be modified to account for entities that offer more than one service where each could attract different royalty calculations?</p>	<p>JSI Q9</p>	
Repertoire Use		
<p>Should the royalty rates or rate base be adjusted to reflect circumstances where the user does not require the tariff for part or all of their uses?</p> <p>In particular, when:</p> <p>a. the service provider has precleared the necessary reproduction rights; or</p> <p>b. some or all works in a stream or file are not held in SOCAN’s repertoire?</p>	<p>JSI Q10, Q13, Q18, 18c, Q19</p>	
<p>What is the use of SOCAN reproduction repertoire by users?</p>	<p>JSI Q18</p>	
<p>Should any repertoire-use adjustment vary per year and/or per user?</p>	<p>JSI Q18b, d</p>	
Non-compensable uses		
<p>Do any exceptions apply to the uses at issue in the Proposed Tariffs?</p>	<p>JSI Q15, 16 SiriusXM Q3</p>	
<p>What is the appropriate model to determine the effect, if any, of any applicable reproduction exceptions on royalty rates?</p>	<p>JSI Q17</p>	
<p>How should the tariff address copies made on foreign servers?</p>	<p>SiriusXM Q7</p>	<p>Where a user makes many copies on foreign servers, it may still be covered by the Proposed Tariffs, but—in effect—be “low use” in respect of reproduction uses in Canada.</p> <p>Can the Board consider this issue without data?</p>

Issue	Sources	Remarks
		If not, should SiriusXM be permitted to adduce evidence, and that evidence be tested?
Modified Blanket Licence/Rate		
<p>Should variations among users with respect to:</p> <ul style="list-style-type: none"> - appropriate rate; - appropriate rate base; - use of repertoire; - applicability of exceptions (explicitly enumerated and fair dealing); <p>be addressed by way of a Modified Blanket Licence approach as opposed to adjustment to the rate or rate base?</p>	<p>Adapted from issues that raise the possibility of a modified rate to account for these variations</p> <p>JSI Q10 Sirius XM Q1 Apple</p>	
Minimum Fees		
<p>Are minimum fees appropriate, and what should they be?</p> <p>In particular, should they take into consideration variations in business models (e.g., free trials, special plans, bundles)</p>	<p>JSI Q20, Q21 Apple</p>	
Terms and Conditions		
<p>Should the qualifying language “if available” be added for any of the music user related information to be reported?</p> <p>If so, which ones?</p>	<p>JSI Q23</p>	
<p>What is the appropriate frequency (e.g. monthly, quarterly) for royalty payments and reporting requirements?</p>	<p>JSI Q24</p>	
<p>What reporting obligations are appropriate? Should they vary for different OMV uses/users, in particular those that are “low-use”?</p>	<p>JSI Q22 SiriusXM Q8</p>	

ANNEX “B”: Issues that may require narrowing, reformulation, or clarification

Issue as worded by Parties	Sources	Remarks
<p>How should the Board interpret the meaning, scope, and potential applications of the exceptions in ss 29.24 (backups), 30.7 (Incidental Inclusion), 30.71 (Temporary Reproductions for Technological Processes), and other reproduction exceptions in the Copyright Act, including what types of conditions are required for relevant services to meet the exceptions?</p>	<p>JSI Q6</p>	<p>Ideas for rewording:</p> <p>Should the application of exceptions be addressed by modifying the royalty rate, or by a “modified blanket licence”?</p> <p>What conditions in the tariff are appropriate for a service provider to be entitled to an adjustment to royalties payable?</p>
<p>How should the Board apply the criteria set out in s. 66.501 of the Act?</p>	<p>JSI Q7</p>	<p>Ideas for rewording:</p> <p>What would be the rate set in a theoretical competitive market for the sale of licences for the communication and reproduction of musical works to services providers covered in this proceeding?</p> <p>In which ways, if any, do any observed transactions deviate from this theoretical ideal?</p> <p>What effect, if any, does this consideration have on the royalty rate the Board should set?</p>
<p>How have OMV services evolved in Canada, during the tariff period, including as to service offerings, revenue-generation and revenue-sharing schemes, amount of revenue generated, and functionalities?</p>	<p>JSI Q1</p>	<p>Ideas for rewording:</p> <p>During the tariff period, have OMV service providers materially changed their service offerings, revenue-generation, revenue-sharing scheme, amount of revenue generated, or offerings?</p> <p>What effect, if any, should this have on the royalty rate?</p>
<p>How do OMV services use music in Canada?</p>	<p>JSI Q2</p>	<p>Can the parties tie this to a particular issue for the Board to decide?</p>

Issue as worded by Parties	Sources	Remarks
		<p>Is this issue related to the volume of reproductions or communications to the public made?</p> <p>Is this issue related to repertoire use?</p>
<p>What technology do OMV services and their authorized distributors use to offer and deliver music to end users in Canada? How do they use that technology?</p>	<p>JSI Q3</p>	<p>Can parties tie this to a particular issue for the Board to decide?</p> <p>Is this issue related to the royalty rate?</p> <p>Is it related to the application of <i>CBC v SODRAC</i> factors (JSI Q4)?</p>
<p>Are the administrative obligations in the proposed tariffs appropriate?</p>	<p>JSI Q25</p>	<p>Can parties refer to particular terms and conditions of the Proposed Tariffs they want the Board to consider?</p>
<p>What modifications to the Proposed Tariffs (e.g., rate base, MBL, terms and conditions) are appropriate for users that qualify as an OMVS but make minor uses of music videos?</p>	<p>Adapted from the chapeau of SiriusXM’s Statement of Issues</p>	<p>Can SiriusXM speak to the kinds of offerings or services it believes may be covered by the Proposed Tariffs and contains substantial non-musical audio components?</p>
<p>Who pays the tariff when use takes place on a third-party platform?</p>	<p>SiriusXM Q5</p>	<p>Can SiriusXM speak to situations that this issue is intended to address, and how this issue relates to “low use”?</p>

ANNEX “C”: Issues not to Retain

Issue	Sources	Remarks
<p>Which, if any, reproduction exceptions in the <i>Copyright Act</i> does the objector intend to rely on in this proceeding?</p>	<p>JSI Q5</p>	<p>This is a procedural matter for the Parties, not an issue for the Board to decide</p>
<p>Defining the boundaries between “talk and music” works that qualify as “music videos” covered by the tariff and “non-music videos” that are not.</p> <p>For example, how would the Board categorize an interview interspersed with occasional short clips of a live or pre-recorded song?</p> <p>How should the Board:</p> <p>a. differentiate the “foreground” from the “background” for “talk and music” clips?</p> <p>b. apply the requirement that the “visual content [be] <i>produced to accompany</i> one or more sound recordings of one or more musical works”?</p> <p>c. account for non-substantial uses, including when a skip precedes the musical portion of a talk and music clip</p>	<p>Sirius XM Q2</p>	<p>The scope of the proceeding has already been established, based on the submissions of parties in the OMVS and OAVS-M proceedings, including those of Sirius XM.</p>
<p>Assessing whether SiriusXM’s online music and talk video offering is covered by SOCAN Tariff 22.B and/or other tariffs or licences</p>	<p>SiriusXM Q6</p>	<p>Whether other tariffs or licences do or do not apply to a particular situation is one of enforcement, and outside the scope of the consideration of proposed tariffs.</p>