



[CB-CDA 2024-052]

## **NOTICE OF THE BOARD**

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

June 27, 2024

#### **I. OVERVIEW**

[1] I will hold a Case Management Conference on July 11, 2024 (the “Conference”) to discuss:

- the issues for this proceeding to be considered by the Board; and
- a schedule of proceedings, up to the hearing on Phase I issues.

#### **II. ISSUES TO BE CONSIDERED BY THE BOARD**

[2] I have reviewed the Joint Statement of Issues (the “JSI”) filed by the Parties. I thank all of the parties for having worked together to develop the JSI, and having done so in an expeditious manner.

[3] Given the number of different parties in this proceeding, I understand that the issues identified will have varying degrees of relevance, depending on the party. This is my interpretation of the Parties’ statement in the JSI that “any party may take the position in the proceeding that the issue is irrelevant or immaterial to the Board’s determination.”

[4] If the statement should be interpreted in a different way, I ask that parties provide further explanation at the Conference, including concrete ways in which this position may affect the schedule of proceedings and/or the scope of next steps.

#### **A. PRELIMINARY VIEW ON ISSUES TO BE CONSIDERED**

[5] I am of the preliminary view that those issue in Annex A should be considered in Phase I of this proceeding because: a) they require little or no evidence, and b) a decision on these could reduce the scope of arguments and evidence required for Phase II.

[6] You will note that I accept the Phase I issues proposed in the JSI, albeit with some modifications. I am also suggesting additional issues for this Phase, and have made minor wording modifications, such as when splitting an issue across two phases.

[7] Next, I am of the preliminary view that those issues in Annex B should be considered in Phase II of this proceeding. Again, I have made some wording changes to consolidate issues, to simplify wording, or when an issue from the JSI was split between two phases.

[8] Parties should review Annex A and Annex B to ensure that their issues are adequately reflected. They should also be ready to address my proposed division of the issues between the two phases of this proceeding at the Conference.

[9] Last, I am of the preliminary view that the issues in Annex C—as presently worded— need to be more clearly connected to decisions on rates, rate structure, terms or conditions that the Board must make in this proceeding.

[10] Parties should review Annex C and be ready to speak to whether they wish to clarify, narrow, or otherwise modify the issues found therein at the Conference.

### **B. REPERTOIRE-USE STUDY**

[11] I note that the mechanism by which royalties would be adjusted in the tariff(s) to account for repertoire-use is an issue for the Board to consider in this proceeding (See e.g., Annex A, Issue 7).

[12] Some mechanisms, such as a fixed repertoire-use adjustment, may utilize a repertoire-use study.

[13] Were the Parties to agree on the appropriate mechanism to account for repertoire-use for each tariff family, any such study—if required—could be commenced without waiting for the Board’s decision on this issue in Phase I.

### **III. SCHEDULE OF PROCEEDINGS**

[14] I propose the following schedule for Phase I of the proceeding:

<b>Event</b>	<b>Allocated Time</b>
All parties file Case Record	8 weeks
All parties file Response Case Records	6 weeks
All parties file Replies	3 weeks

Board rules on Phase I issues	TBD
Case Management Conference for Phase II	TBD

[15] Given that issues to be considered in Phase I of the proceeding should require little or no evidentiary record, I have not included any steps for interrogatories, nor cross-examinations.

[16] Parties should be ready to discuss this proposed schedule at the Case Management Conference.

Lara Taylor  
Case Manager

**Annex A: Issues to be considered in Phase I**

Issue	Source(s)	Remarks
<p>1. Does the Supreme Court decision in <i>CBC v SODRAC</i>, 2015 SCC 57, apply to tariff proceedings before the Board?</p> <p>If so, how should the Board apply the principles of this decision (including technological neutrality and contributions by copyright owners) in the context of a tariff with more than one user?</p>	<p>JSI I.1</p>	<p>To determine the analytical framework to use to apply the <i>CBC v SODRAC</i> factors.</p> <p>Determining this framework may be possible without any evidence.</p> <p>Determining a framework could reduce the scope of Phase II case records and interrogatories (for example, were the Board to conclude that it is not bound to consider all <i>CBC v SODRAC</i> factors in a tariff proceeding).</p>
<p>2. Do any of the following exceptions apply to the services covered by the Proposed Tariffs: 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)?</p>	<p>JSI I.2</p>	<p>To determine the <i>prima facie</i> application of exceptions to certain types of services (not whether specific users are covered by these in respect of specific actions).</p> <p>This can be done with some evidence about the services covered by the Proposed Tariffs.</p> <p>Determining which of the exceptions can apply at all could reduce the scope of Phase II case records and interrogatories.</p>
<p>3. In s. 66.501(a), what is the meaning of the phrase “competitive market”?</p>	<p>Related to JSI III.A.1</p>	<p>This issue is primarily one of legal interpretation, and can be done with little or no evidence.</p> <p>A decision on this issue the scope of Phase II case records and interrogatories by limiting the kind of evidence that would be relevant to the Board’s</p>

Issue	Source(s)	Remarks
		consideration of s. 66.501(a).
<p>4. When offline viewing copies are created and used, which rights are triggered?</p>	<p>Related to JSI III.B.3 and III.C.12</p>	<p>This issue is primarily legal, and can be done with little or no evidence.</p> <p>A decision on this issue could reduce the scope of Phase II case records and interrogatories by limiting the range of appropriate rates or rate structures.</p>
<p>5. Should provisions of the tariff be adjusted to account for users that offer more than one service (sometimes at different times) that could each attract different (or no) royalties? If so, how?</p>	<p>JSI III.B.2(b), (c) JSI III.B.4</p>	<p>This can be done with some evidence about the users that offer the services covered by the Proposed Tariffs.</p> <p>A decision on this issue would restrict the case records and interrogatories in Phase II to the information necessary to implement the mechanism chosen by the Board in Phase I.</p>
<p>6. How should repertoire-use be established?</p>	<p>JSI III.D.18(a)</p>	<p>Determining the way in which repertoire-use is to be established will inform what kind of information is relevant to determining repertoire-use.</p> <p>In the case of a repertoire-use study, such a study could occur in parallel with the determination of other issues.</p>
<p>7. What mechanism, if any, should the tariff (or each tariff family) use to adjust royalties for repertoire use?</p> <p>For example:</p> <ul style="list-style-type: none"> <li>- have a repertoire-use adjustment fixed in the tariff;</li> <li>- have a modified blanket licence rate structure;</li> </ul>	<p>JSI III.C.9(c) JSI III.D.18(c), (d)</p>	<p>The selection of a mechanism will require little or no evidence.</p> <p>A decision on this issue would restrict the case records and interrogatories in Phase II to the information necessary to implement the mechanism</p>

<b>Issue</b>	<b>Source(s)</b>	<b>Remarks</b>
<ul style="list-style-type: none"><li>- have the repertoire-use adjustment be determined on a transactional basis; or</li><li>- have the repertoire-use be determined for each user, each payment period based on a reported sample?</li></ul>		chosen by the Board in Phase I.

**Annex B: Issues to be considered in Phase II**

Issue	Source(s)	Remarks
<b>Rate</b>		
1. What are the appropriate percentage rates for the tariffs?	JSI III.C.6	
2. Are there any benchmarks, including the last approved tariffs, any other approved tariffs, or other proxies, that should be considered?	JSI III.C.7	
3. 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?	JSI III.C.8	
4. What effect, if any, should the Board's consideration of any applicable <i>CBC v SODRAC</i> factors have on the royalty rates?	JSI I.1	Related to Annex A, Issue 1
5. What effect should the Board's considerations of the criteria in paragraphs 66.501(a) and (b) have on the rates?  In particular, how should the Board consider 66.501(a) if there is no direct evidence of a competitive market price?	JSI III.A.1	Related to Annex A, Issue 3
<b>Rate Base</b>		
6. For each tariff, what is the appropriate rate base?	JSI III.B.2	
7. In particular, what is the appropriate rate base for a service that generates revenue on a subscription basis?  Should the rate base reflect the amounts received by the service, the amounts paid by subscribers, or some other amount (e.g., net of fees collected by intermediaries)?	JSI III.B.2(a), (d)	

8. 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?	JSI III.B.3	Related to Annex A, Issue 4
9. How should the Board implement revenue allocation for situations where a bundle of goods and/or services, not all of which are covered by the Proposed Tariffs, are offered for a single payment?	JSI III.B.2 (b), (c)	Related to Annex A, Issue 5
<b>Rate Structure &amp; Rate Adjustments</b>		
10. Should the tariffs incorporate a “low music use” rate or other rates for services that use less than a threshold amount of music?	JSI III.C.10	
11. What is the appropriate rate and rate structure for offline viewing copies/limited downloads, if any?  Should these take into account variation in i) different degrees of usage between different services that make offline viewing copies available; and  ii) ways in which services may offer limited downloads to end users.	JSI III.C.12, 13	Related to Annex A, Issue 4
12. Should user-generated content (UGC) services pay according to an alternative royalty structure, such as: per subscriber, per user, per file streamed?	JSI III.C.15	



<p>13. Should the royalties be adjusted to reflect any of the following circumstances:</p> <ul style="list-style-type: none"> <li>- where an exception applies;</li> <li>- where the service has previously obtained authorization to use the musical works;</li> <li>- where the service owns the musical works;</li> <li>- where programming only contains musical works that do not require authorization from SOCAN; and</li> <li>- where the activity occurs outside of Canada?</li> </ul>	<p>JSI I.2                  JSI III.B.5                  JSI III.C.9                  JSI III.C.14                  JSI III.D.16                  JSI III.D.17(a)</p>	<p>Related to Annex A, Issues 2 and 7</p>
<p>14. In each of these circumstances, should any adjustment be done through a Modified Blanket Licence or some other means?</p>		
<p>15. In the case of an MBL or similar rate structure to account for exceptions, what criteria or conditions must a service satisfy to rely on those exceptions?</p>	<p>JSI III.D.17</p>	
<p>16. Does repertoire-use vary over the tariff period?</p>	<p>JSI III.D.18(b)</p>	<p>Related to Annex A, Issue 6</p>
<p>17. In the case of an adjustment for exceptions, what model can be used to determine the appropriate adjustment, if any?</p>	<p>JSI III.D.16(a)</p>	
<p><b>Minimum Fees</b></p>		
<p>18. Are minimum fees appropriate?</p>	<p>JSI III.E.19(a)</p>	
<p>19. What should the Board consider when determining the appropriate structure and amount of minimum fees, including whether a “greater of” structure is appropriate?</p>	<p>JSI III.E.19(a)</p>	

<p>20. What are the appropriate minimum fees, if any, taking into account 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?</p>	<p>JSI III.E.19(b), (c)</p>	
<p><b>Terms and Conditions</b></p>		
<p>21. What reporting requirements, should be set for the tariffs?</p>	<p>JSI IV.1</p>	
<p>22. Should the qualifying language “if available” be added for any of the music use-related information to be reported?</p>	<p>JSI IV.2</p>	
<p>23. What is the appropriate frequency (e.g. monthly, quarterly) reporting requirements?</p>	<p>JSI IV.3</p>	
<p>24. What is the appropriate frequency (e.g. monthly, quarterly) for royalty payments?</p>	<p>JSI IV.3</p>	
<p>25. If a user reports that a licence is not required for a particular program or work and the tariff requires them to provide documentation, what documentation is appropriate?</p>	<p>JSI IV.5</p>	
<p>26. When a user communicates or reproduces a musical work in a manner that does not require authorization from SOCAN:  i) do they have to report that use to SOCAN?; and ii) if so, do they have to provide supporting documentation to SOCAN?</p>	<p>JSI III.C.14 JSI IV.5</p>	
<p>27. What effect should the Board’s considerations of the criteria in paragraphs 66.501(a) and (b) have on the terms, or conditions?</p>	<p>JSI III.A.1</p>	<p>Related to Annex A, Issue 3</p>

Issue	Source	Remarks
<p>1. How have OAV and UGC 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 II.1</p>	<p><b>Idea for re-wording:</b></p> <p>During the tariff period, have OAV or UGC services in Canada changed their service offerings, revenue-generation, revenue-sharing scheme, amount of revenue generated, or offerings? If so, how?</p> <p>What effect, if any, should this have on the royalty rate?</p>
<p>2. How do OAV and UGC services use music in Canada?</p>	<p>JSI II.2</p>	<p>Can the parties tie this to a particular issue for the Board to decide?</p>
<p>3. What technology do OAV and UGC services and their authorized distributors use to offer and deliver music to end users in Canada?</p> <p>How do they use that technology?</p>	<p>JSI II.3</p>	<p>Can the parties tie this to a particular issue for the Board to decide?</p>
<p>4. Should the tariffs incorporate different rates for types of services that use music in a way that has less value than other services?</p>	<p>JSI III.C.11</p>	<p>What kind of distinctions among services should be considered?</p> <p>Is this related to the difference in value of background vs foreground music? Differences in value of uses by UGC services vs uses by OAV services?</p> <p>Is this related to issue 8 in Annex B? Is this related to issue 9 in Annex B?</p>
<p>5. What terms and conditions should the Board set for the tariffs? Are the administrative obligations in the proposed tariffs appropriate?</p>	<p>JSI IV.1 JSI IV.4</p>	<p>Can parties refer to particular terms and conditions, or administrative obligations, of the Proposed Tariffs they want the Board to consider?</p> <p>Is this related to issue 21 in Annex B?</p>