



[CB-CDA 2024-059]

RULING OF THE BOARD

Proceeding: Online Music Video Services (2014-2018)

July 16, 2024

I. OVERVIEW

[1] This Order establishes the issues that the Board will consider in this proceeding. The expectation of the Board will be that any arguments and evidence filed in Case Records or Memoranda will clearly relate to one or more of these issues.

Background

[2] In Notice 2024-038, I triaged the issues proposed by parties into three groups, based on my preliminary assessment of those issues: those that could be retained (Annex A), those that required adjustments or clarification from parties (Annex B), and those that were not issues for the Board to consider in this proceeding (Annex C).

[3] On June 18, I held a Case Management Conference at which parties made representations about the triage.

[4] After the Case Management Conference, I issued a Notice permitting parties to file any wording suggestions. Only SOCAN filed wording suggestions.

II. RULING

[5] All issues that I had listed in Annex A of Notice 2024-038, I retain. Save in respect of issues related to exceptions, I have accepted the wording modifications suggested by SOCAN.

[6] the Board to consider in this proceeding. After considering the submission of the Parties, I remain of the view that those 3 should remain excluded for the reasons I provided in Notice 2024-038.

[7] I do not retain those issues previously in Annex B of Notice 2024-038 for which parties did not provide clarification.

[8] I provide below the reasons for my treatment of the other issues (those in Annex B of Notice 2024-038, and issues related to exceptions). These are the issues whose proposed treatment I either did not accept, or those on which there was disagreement among the parties.

A. APPLICATION OF EXCEPTIONS

[9] I have not adopted the wording suggested by SOCAN with respect to exceptions, which contemplated the Board determining the “correct interpretation [and] scope” of a set of exceptions.

[10] It is not necessary for the Board to provide a complete interpretation of the various exceptions, by which it would determine the entire scope of those exceptions.

[11] Instead, it is sufficient for the Board to determine which exceptions are potentially applicable to the uses covered in this proceeding. That is, are there any activities covered by the Proposed Tariff for which it is possible for any of the exceptions to apply at all.

[12] After doing so, the Board would determine

- the appropriate model to determine any effect on royalties of any applicable exceptions; and
- what mechanism, if any, the tariff should include to account for those exceptions (*e.g.*, MBL), and any parameters of that mechanism (*e.g.*, conditions by users to be met).

[13] The list of issues reflects this.

B. BUSINESS PRACTICES AND USE OF MUSIC BY TARIFF USERS

[14] In Annex C of Notice 2024-038, I identified 3 issues for which I was of the preliminary view that they are not appropriate to retain as issues for [1] In Notice 2024-038, I indicated that I was of the preliminary view there were three issues from the JSI (Q1, Q2, and Q3) related to the operations of users that required narrowing, reformulation, or clarification.

[15] For JSI Q1, SOCAN adopted the wording modifications suggested in Notice 2024-038, which tied the issue to the royalty rate and rate structure. I therefore retain this issue.

[16] For JSI Q2 and Q3, SOCAN submitted that those issues may be relevant to numerous other issues.

[17] The purpose of a statement of issues is to identify decision points for the Panel. JSI Q2 and Q3 are not stand-alone issues on which the Panel must make decisions. Nor have these proposed issues, as worded, been sufficiently linked to a concrete decision the Board has to make. Therefore, I do not retain them.

[18] For greater certainty, I note that the Parties

- may address the substance of JSI Q2 and Q3 in the context of the other issues I retain; and

- may still seek leave to pose interrogatories on the substance these proposed issues (where they will be required to demonstrate the relevance of the interrogatory to a decision point).

A. ISSUES RAISED BY SIRIUS XM

i. Copies made outside of Canada

[19] Sirius XM had identified the issue of how the tariff should address copies made outside of Canada.

[20] In Notice 2024-038, I expressed my preliminary view that this as an appropriate issue for the Board to consider.

[21] At the Conference, SOCAN submitted that “this issue would improperly expand the scope of the proceeding and is not an issue raised in SiriusXM’s request for leave to intervene.”

[22] For the following reasons, I conclude that this is an appropriate issue in this proceeding.

[23] First, where a user makes most copies on foreign servers, it may still be covered by the Proposed Tariffs in respect of the copies it makes in Canada. In this way, it may be “low-use” in respect of reproductions in Canada. Sirius XM’s intervention primarily relates to the tariffs’ treatment of low-use users. There is therefore some relationship between this issue and Sirius XM’s request to intervene.

[24] Second, this issue is one primarily of law and policy. It will require little or no evidence and will therefore not unduly expand the scope of the proceeding.

[25] Weighing these two considerations, I conclude that it is appropriate for the Board to consider this issue in this proceeding.

ii. Reporting obligations for low-use users

[26] Sirius XM had identified the issue of what reporting obligations should the tariff include for low-use users. One way in which a user may be “low use” is if many of their uses do not require authorization from SOCAN.

[27] [Given that Sirius XM’s intervention relates to the tariffs’ treatment of low-use users, I conclude that it is appropriate for the Board to consider this issue.

iii. Minor uses of music videos

[28] Sirius XM proposed the following issue:

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?

[29] In Notice 2024-038, I had asked SiriusXM to “speak to the kinds of offerings or services it believes may be covered by the Proposed Tariffs and contains substantial non-musical audio components?”

[30] At the Case Management Conference, Sirius XM provide such an example.

[31] Based on their response, I am satisfied that it is prima facie possible that Sirius XM operated a service during the tariff period that only made “minor uses of music.” Given that Sirius XM’s intervention relates to the tariffs’ treatment of low-use users, I conclude that it is appropriate for the Board to consider this issue.

iv. Use of third-party platforms

[32] In Notice 2024-038, I had put the following issue proposed by Sirius XM in Annex B:

Who pays the tariff when use takes place on a third-party platform?

[33] I remain of the view that this issue is not sufficiently linked to Sirius XM’s intervention. As such, it will not be an issue for the Board to consider in this proceeding.

II. CONCLUSION AND NEXT STEPS

[34] Based on my reasons above, Annex A below lists the issues that the Board will consider in this proceeding.

[35] I will issue a Schedule after considering the Parties’ submissions on their use of existing interrogatory responses.

Lara Taylor
Case Manager

ANNEX “A”: Issues Retained

Issue	Source	Remarks
Rate		
<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>What effect, if any, should this have on the royalty rate or tariff structure?</p>	JSI Q1	From Notice 2024-038, Annex B, based on SOCAN’s submissions
<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	Appeared in Notice 2024-038, Annex A
<p>What would be the rate set in a competitive market for the sale of licences for the communication and reproduction of musical works to services providers covered in this proceeding?</p>	JSI Q7	Moved from Notice 2024-038, Annex B, based on Board’s suggested rewording
<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	Appeared in Notice 2024-038, Annex A
<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>If so, what should that ratio be?</p>	JSI Q12	Amended from Notice 2024-038, Annex A based on SOCAN’s submissions

Issue	Source	Remarks
<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	Appeared in Notice 2024-038, Annex A
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	Appeared in Notice 2024-038, Annex A
<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>	JSI Q9	Appeared in Notice 2024-038, Annex A
Possible Adjustments for Repertoire Use or Pre-Clearance		
<p>Should the royalty rates or rate base be adjusted to reflect circumstances, if applicable, where the user does not require the tariff for part or all of their uses?</p> <p>In particular, if:</p> <ul style="list-style-type: none"> a. the service provider has precleared the necessary reproduction rights; or b. some or all works in a stream or file are not held in SOCAN’s repertoire? 	JSI Q10, Q13, Q18, 18c, Q19	Amended from Notice 2024-038, Annex A based on SOCAN’s submissions
<p>What is the use of SOCAN reproduction repertoire by users?</p>	JSI Q18	Appeared in Notice 2024-038, Annex A
<p>Should any repertoire-use adjustment vary per year and/or per user?</p>	JSI Q18b, d	Appeared in Notice 2024-038, Annex A

Non-compensable uses		
What is the potential application of exceptions to the uses covered by the Proposed Tariffs?	JSI Q6 JSI Q15, Q16, Q17 SiriusXM Q3	Appeared in Notice 2024-038, Annex A and B.
What is the appropriate model to determine the effect, if any, of any applicable exceptions on royalty rates?		Wording modified, as per Ruling paras. Erreur ! Source du renvoi introuvable.–
What mechanism, if any, should the tariff include to account for any applicable exceptions? What are the appropriate parameters of this mechanism (e.g., under which conditions is it triggered or available?)		Erreur ! Source du renvoi introuvable.
Modified Blanket Licence (MBL) and other Rate Adjustments		
Should variations among users with respect to: - appropriate rate; - appropriate rate base; - use of repertoire; - applicability of exceptions (explicitly enumerated and fair dealing); be addressed by way of a Modified Blanket Licence, or other mechanism, as opposed to adjustment to the rate or rate base?	Adapted from issues that raise the possibility of a modified rate to account for these variations JSI Q10 Sirius XM Q1 Apple	Amended from Notice 2024-038, Annex A based on SOCAN's submissions.
In particular, 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?		Moved to Annex A as per Ruling paras. Erreur ! Source du renvoi introuvable.– Erreur ! Source du renvoi introuvable..
How should the tariff address copies made on foreign servers?	SiriusXM Q7	Appeared in Notice 2024-038, Annex A. Retained, as per Ruling at paras. Erreur ! Source du renvoi introuvable.– Erreur ! Source du renvoi

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Minimum Fees		
<p>Are minimum fees appropriate, and if so, 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>	<p>Appeared in Notice 2024-038, Annex A</p>
Terms and Conditions		
<p>What reporting obligations are appropriate?</p> <p>In particular what reporting, if any, should be required in relation to a music video if authorization from SOCAN is not required for the use of that music video?</p> <p>Should any reporting obligation vary for different OMV uses/users, in particular those, if any, that are “low-use”?</p>	<p>JSI Q22 Sirius XM Q4 SiriusXM Q8</p>	<p>Amended from Notice 2024-038, Annex A based on SOCAN’s submissions and to explicitly include Sirius XM Q4.</p> <p>Addressed at Ruling paras. Erreur ! Source du renvoi introuvable.–Erreur ! Source du renvoi introuvable.</p>
<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>Appeared in Notice 2024-038, Annex A</p>
<p>What is the appropriate frequency (e.g. monthly, quarterly) for royalty payments and reporting requirements?</p>	<p>JSI Q24</p>	<p>Appeared in Notice 2024-038, Annex A</p>

ANNEX “B”: Issues Not Retained

Issue	Sources	Remarks
How do OMV services use music in Canada?	JSI Q2	<p>Appeared in Notice 2024-038, Annex B.</p> <p>Issue not retained, as per Ruling at paras. Erreur ! Source du renvoi introuvable.–Erreur ! Source du renvoi introuvable..</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?	JSI Q3	<p>Appeared in Notice 2024-038, Annex B.</p> <p>Issue not retained, as per Ruling at paras. Erreur ! Source du renvoi introuvable.–Erreur ! Source du renvoi introuvable..</p>
Who pays the tariff when use takes place on a third-party platform?	SiriusXM Q5	<p>Appeared in Notice 2024-038, Annex B.</p> <p>Issue not retained, as per Ruling at paras. Erreur ! Source du renvoi introuvable.–Erreur ! Source du renvoi introuvable..</p>
Are the administrative obligations in the proposed tariffs appropriate?	JSI Q25	<p>Appeared in Notice 2024-038, Annex B, but was not clarified by parties.</p> <p>Issue not retained.</p>
Which, if any, reproduction exceptions in the <i>Copyright Act</i> does the objector intend to rely on in this proceeding?	JSI Q5	<p>Appeared in Notice 2024-038, Annex C.</p> <p>Issue not retained, as per Ruling at para. Erreur ! Source du renvoi introuvable..</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</p>	Sirius XM Q2	<p>Appeared in Notice 2024-038, Annex C.</p> <p>Issue not retained, as per Ruling at para. Erreur ! Source du renvoi introuvable..</p>

Issue	Sources	Remarks
<p>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>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>Appeared in Notice 2024-038, Annex C.</p> <p>Issue not retained, as per Ruling at para. Erreur ! Source du renvoi introuvable..</p>