



[CB-CDA 2024-061]

NOTICE OF THE BOARD

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

July 24, 2024

I. OVERVIEW

[1] At the Case Management Conference of July 11, 2024, I discussed with the Parties the possibility of the Board determining certain issues in Phase I of this proceeding. In Notice CB-CDA 2024-052, I identified issues that could be dealt with in such a preliminary phase. Some parties expressed concerns with some aspects of the approach in the Notice.

[2] At the conclusion of the Case Management Conference, I informed the Parties that I would consult them on a revised approach that attempts to address some of those concerns. I do so in this Notice.

[3] In particular, I have

- moved Issues 5 and 7 of Notice CB-CDA 2024-052, Annex A, into Phase II;
- specified that the issue of whether and how to conduct a repertoire-use study will be treated separately from Phase I;
- re-worded the remaining issues to better delineate them (Annex A, below); and
- modified the proposed Schedule to include a limited opportunity for cross-examination, to ensure that those issues that require an evidentiary context have one.

Submissions of the Parties

[4] Broadly speaking, the objectors tended to favour the inclusion of the issues I had identified in Notice CB-CDA 2024-052 as belonging in Phase I, while SOCAN did not.

[5] All the Parties agreed that, were there not a sufficient number of issues for the Board to determine in a first phase, all issues should be heard and determined at once.

[6] I understand that SOCAN believes that there are risks to the phased approach proposed in Notice CB-CDA 2024-052. In particular, it is concerned that the Board may

- reach a conclusion on an issue without sufficient evidence;
- reach a conclusion beyond the identified issue; or
- reach a conclusion that does not sufficiently narrow the range of possibilities for the second phase.

[7] I first address why I currently favour a phased approach, and then the modifications I have made to the approach outlined in Notice CB-CDA 2024-052.

II. MERITS OF A PHASED APPROACH

[8] A phased approach has the potential to reduce the total time and other resources required for

- parties to participate in Board proceedings; and
- the Board to consider the proposed tariffs before it.

[9] In most Board proceedings, parties may propose—for each issue— an approach and the implementation of that approach. For example, a blanket repertoire adjustment is an approach to dealing with the issue of repertoire use, whereas multiplying the unadjusted tariff by 10% is an implementation of that approach. Implementing an approach requires gathering information.

[10] Many competing approaches may be proposed by parties to a proceeding. Most of the time, the Board can only select one approach for each issue.

[11] It is inefficient when resources are expended to collect information necessary for implementation, when the Board ultimately does not adopt that approach. Therefore, where possible, it is better for the Board to first determine the appropriate approach, before resources are invested in gathering of information that permits implementation of the approach.

[12] For this reason, I remain of the view that it is more efficient, and therefore preferable, that this proceeding be conducted in two phases rather than all at once.

III. ISSUES 5 AND 7 REMOVED FROM PHASE I

[13] After considering the submissions of the Parties, I am now of the view that the issues 5 and 7 in Notice CB-CDA 2024-052, Annex A belong in Phase II.

[14] These issues deal with determining the appropriate mechanisms to i) address entities that operate more than one service and ii) to account for repertoire-use. The selection of both of these mechanisms is likely to depend on the rate structure of the tariff, and possibly on how the Board addresses issues such as pre-clearance of rights or exceptions in the tariff.

IV. REPERTOIRE-USE STUDY

[15] The Parties indicated their openness to discussing amongst themselves the modalities of a possible repertoire-use study, and that this issue therefore can be removed from Phase I.

[16] I view this positively. In such discussions, the parties are encouraged to consider the following:

- Would the study measure the use of SOCAN's reproduction and communication repertoires? Would it measure the use of the right to authorize?
- Would the study measure the fraction of the right in repertoire?
- Would the study measure pre-clearance (i.e., a work in SOCAN's repertoire, for which authorization has been otherwise obtained)?
- From which services would samples be drawn? Would it include some services covered by SOCAN 22.D.1 and some covered by SOCAN 22.D.2 (and the corresponding reproduction tariffs)?
- Will the study include an audit of any claims of either repertoire or pre-clearance? What subsample would be used?

[17] The parties may ask for assistance

- from me, as Case Manager (e.g., to fix deadlines for intermediate steps in the study); and
- from the Staff, to discuss technical aspects of the study (e.g., to suggest mechanics of sampling).

[18] If the parties would like the Panel to consider and approve any study before it is conducted, they may submit their proposal to the Panel.

[19] When I will issue the Schedule, I will fix a date, after which, if there is no agreement amongst Parties, I will return the issue of how to measure repertoire-use in this proceeding to Phase I, for the Panel to determine.

V. WORDING OF PHASE I ISSUES

[20] I propose modifications to the wording of the remaining issues in Phase I, as reflected in Annex A, below.

[21] Further, I propose adding the following two safeguards in the Order in which I will fix the issues for Phase I.

[22] First, if any party is of the view that arguments or evidence another party adduces go beyond the issues to be determined in Phase I, it may bring this to the attention of the Board. The Board may address such departures of its own motion.

[23] Second, if evidence in Phase II significantly throws into doubt a conclusion from Phase I, parties can ask the Board to reconsider that conclusion.

VI. SCHEDULE

[24] I have added time for cross-examination of fact witnesses. Unless ordered otherwise, cross-examinations of any witness shall not exceed 3 hours and shall be conducted off-site.

[25] If either of the cross-examinations are not required, or completed sooner, I may adjust the Schedule.

Event	Approximate Elapsed Time from Issuance of Final Schedule
Parties to confirm agreement on repertoire-use study	4 weeks
All parties to file their Case Record	8 weeks
Cross-Examinations	12 weeks
All parties to file their Response to Case Records	18 weeks
Cross-Examinations	21 weeks
All parties to file their Replies to the Responses to the Case Records	24 weeks
Board rules on Phase I issues	TBD
Case Management Conference for Phase II	TBD

VII. PHASE II ISSUES

[26] It is not necessary for me to fix the issues for Phase II at this time. Once the Board makes a decision on the issues in Phase I, I will review the scope and wording of Phase II issues.

VIII. NEXT STEPS

[27] Parties may file comments on the elements of this Notice by **Tuesday, August 6, 2024**. Parties may file replies to each other's comments by **Monday, August 12, 2024**.

Lara Taylor
Case Manager

ANNEX A

Issue	Source(s)
<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>2. For each of the following exceptions, is it at all possible for the exception to apply to a class of services covered by the Proposed Tariffs:</p> <ul style="list-style-type: none"> • s. 29.21 (non-commercial user generated content); • s. 29.24 (backups); • s. 30.7 (Incidental Inclusion); • s. 30.71 (Temporary Reproductions for Technological Processes); and • s. 31.1 (Network Services)? <p>This issue does not extend to the consideration of</p> <ol style="list-style-type: none"> i) whether a particular service is covered by any exception; ii) the extent to which a service’s activities are covered; iii) the effect, if any, on the royalties payable by that service this should have; iv) the mechanism the tariff should have to account for this effect; <p>nor</p> <ol style="list-style-type: none"> v) any conditions in the tariff that will specify what a service has to do in order to benefit from such a mechanism. 	<p>JSI I.2</p>

Issue	Source(s)
<p>3. What is the interpretation of paragraph 66.501(a) of the <i>Copyright Act RSC, 1985, c. C-42</i>?</p> <p>In particular,</p> <ul style="list-style-type: none">• does “competitive market” refer to a perfectly competitive market, a monopolistically competitive market, or a market with other features (e.g., a market that is as competitive as possible, given the parameters of the <i>Copyright Act</i>)?• how should the requirement of being “free of external constraints” be interpreted in the presence of the tariff-setting regime administered by the Board?• what effect do the three conditions “with all relevant information, at arm’s length and free of external constraints” have on the meaning of “a willing buyer and a willing seller” or “competitive market”? <p>This issue does not extend to the consideration of whether any particular transaction has the characteristics enumerated in paragraph 66.501(a).</p>	Related to JSI III.A.1
<p>4. When offline viewing copies are offered, created, and used, which rights are triggered?</p> <p>This issue does not extend to the consideration of the value, nor relative value, of these rights.</p>	Related to JSI III.B.3 and III.C.12