

Date	2025-11-12
Ruling of the Board	CB-CDA 2025-102
Proceeding	Online Audiovisual Services – Music (2014-2026)
Members	The Honourable Luc Martineau René Côté Katherine Braun

I. Overview

A. Summary

[1] This Ruling follows the Parties' submissions pursuant to Order CB-CDA 2025-065 on the issue of procedural fairness related to the repertoire-use adjustment mechanism in SOCAN's July 23, 2025 revised Request for Approval (the Revised RFA).

[2] We conclude that, for reasons of procedural fairness, the Board should not use the repertoire-use adjustment mechanism implicitly proposed in SOCAN's Revised RFA as a basis for a tariff. The Revised RFA does not provide adequate notice; neither in substance, nor in its timeliness.

[3] We have identified four mechanisms that, if we adopt them for the reproduction tariffs, are likely to address issues of procedural fairness: a per-user adjustment based on a per-user repertoire-use study, a limited sampling approach, a nominal rate, and a nominal repertoire-use adjustment factor. We allow parties to make submissions on these.

B. Procedural Context

[4] The issue of the kind of mechanism that should be used in the tariffs to account for repertoire-use is live in this proceeding,¹ and closely related to other issues, including whether the Board should order a repertoire-use study.

¹ Pursuant to Order CB-CDA 2025-024, Parties had been ordered to make submissions on this issue.

[5] The current dispute involves those Proposed Tariffs that, broadly speaking, cover the reproduction activities of users whose public performances (with communications by telecommunications, in particular) of musical works are covered by the SOCAN 22.D.1, 22.D.2, and 22.D.3 families of tariffs: online audiovisual services, user-generated content services, and allied online audiovisual services.

[6] In order to facilitate consideration of these proposed tariffs (the “Proposed Reproduction Tariffs”), on February 22, 2024, SOCAN filed a request for approval (Original RFA).

[7] Both the Proposed Reproduction Tariffs and the Original RFA contain a claims-based mechanism, referred to as “per-work-per-share” (PWPS). Under this mechanism, every user, for each reporting period, must submit a list of audiovisual works that they used and the “cue sheets” for those audiovisual works, listing the musical works contained therein. SOCAN would then identify those musical works, or fraction of musical works, that are in its repertoire, and invoice the user based on the percentage that in-repertoire works represent of all musical works used during that period.²

[8] The presence of the PWPS in the Proposed Reproduction Tariffs had been one of the main grounds on which SOCAN relied in support of its position that no repertoire-use study would be required in relation to reproduction rights.

[9] On June 13, 2025, SOCAN filed a letter with the Board, stating that it is incapable of administering the PWPS structure for audiovisual content.³ The Board ordered SOCAN to file a revised request for approval, and it did so on July 23, 2025.

[10] The Objectors claimed that the Revised RFA was procedurally unfair. The Board allowed parties to make submissions on this issue, and required Parties to also address possible remedies to any identified procedural unfairness (Order CB-CDA 2025-065).

II. Ruling

A. Issues

1. Would it be procedurally fair for the revised RFA to be the basis of an approved tariff?
2. Can the risk of procedural unfairness be addressed by giving notice to affected users?

² SOCAN, Consolidated Request for Approval, “SOCAN 22.D.1.R (2015–2026)”, s. 6; described in SOCAN, Responding Submissions (5 September 2025) at para 11 [SOCAN, Response].

³ SOCAN, email to the Board (13 June 2025)

3. Can the risk of procedural unfairness be addressed through the adoption of an alternative adjustment mechanism?

B. Analysis

1. Would it be procedurally fair for the revised RFA to be the basis of an approved tariff?

a. The changes in the Revised RFA

[11] The Revised RFA removed the reference to the PWPS mechanism from the calculation of royalties for

- permanent downloads (subsection 4(1));
- limited downloads, both for those offered on a per-transaction (paragraph 4(2)(a), and subscriptions bases (paragraph 4(2)(b));
- subscription-based on-demand streams (subsection 4(3)), as well as free on-demand streams (subsection 4(4));
- situations where a user provides more than one kind of service (subsections 4(5) and 4(6)).

[12] Section 4 of the Revised RFA is preceded by the following note:

Note to Reader: It is expected that the Copyright Board will adjust the percentage royalty rates and the minimum per-download and per-stream fees following the completion of a repertoire-use study in the Online Audiovisual Services – Music (2014-2026) proceeding.

[13] SOCAN provided the following explanation of these changes:

(i) the Revised RFA contains a note to the reader advising that SOCAN expects that the rates will be adjusted following the completion of a repertoire-use study in this proceeding; and (ii) the per-transaction rates previously proposed for permanent downloads and certain limited downloads and on-demand streams have been replaced with blanket rates that SOCAN expects to be adjusted for repertoire.⁴

b. The effects of the changes

[14] The Revised RFA implies a single, uniform repertoire-use adjustment figure for all users that is incorporated directly into royalty rates.

⁴ SOCAN, Letter with Revised RFA (23 July 2025) at p 1.

[15] SOCAN submits that it “is not seeking to increase the proposed royalty rate, only to change the adjustment mechanism.”⁵ Furthermore, “it has never been a foregone conclusion that the Board would approve a PWPS mechanism[,]”⁶ “[i]t is always open to the Board to vary a proposed tariff, including any repertoire adjustment mechanism.”⁷

[16] We agree with SOCAN that it is open for the Board to approve a tariff with a repertoire-use adjustment mechanism different than that in a proposed tariff. Nevertheless, in so doing, the Board cannot approve royalty rates and rate structures that, together, would result in a procedurally unfair increase to the actual royalties payable.

[17] The Objectors raise just this possibility: the Revised RFA could lead to some users paying significantly higher royalties for reproduction than those in the Proposed Tariffs, without regard to the actual amount of music they use that is in SOCAN’s repertoire.⁸

[18] SOCAN submits that the Revised RFA does not raise procedural fairness issues:

There is no basis to conclude that a different adjustment mechanism, established following a comprehensive repertoire-use study, would result in any user’s paying more royalties than it would have under the PWPS mechanism. Under both the Proposed Tariff and the Revised RFA, SOCAN would be entitled to the same royalty rate, adjusted for repertoire proportionately to reflect the repertoire that SOCAN represents.⁹

[19] Since the actual royalties payable would be the product of the (unadjusted) royalty rate times the repertoire-use adjustment, it is possible—in theory—for the Board to fix a royalty rate sufficiently low such that all users would pay royalties similar or lower to those they would have paid under the Proposed Tariffs.

[20] However, despite this theoretical possibility, in this case, there is a real risk that a single, uniform repertoire-use adjustment will result in a substantial increase in royalties to certain users. This is on account of two factors.

[21] First, existing submissions suggest that users of the Proposed Tariffs are heterogeneous, and that their use of SOCAN’s repertoire varies significantly.¹⁰ As such,

⁵ SOCAN, Response at para 7

⁶ SOCAN, Response at para 4

⁷ SOCAN, Response at para 4.

⁸ Fasken Objectors, Submissions per Order CB-CDA 2025-024 [Fasken Submission]; McMillan Objectors, Submissions per Order CB-CDA 2025-024 at p 2 [McMillan Submissions].

⁹ SOCAN Response at p 5.

¹⁰ See e.g., McMillan Objectors response to Order CB-CDA 2025-024, HCONF App C, Response A

adjusting the rate for an average use of repertoire will almost certainly result in some users paying more than under the PWPS mechanism.

[22] Second, it is likely that SOCAN repertoire includes only a minority of the musical works used by users.¹¹ In such a situation, a modest percentage-point change in the repertoire-use adjustment can result in the royalties payable becoming multiples of what would have otherwise been payable. For example, if the measured PWPS would have resulted in 5% for a particular user, then a 15% repertoire-use adjustment factor would mean that the royalties payable by that user would triple.

[23] As such, it is not merely the removal of the PWPS mechanism that creates a risk of procedural unfairness; it is the removal of the PWPS mechanism coupled with a proposal (in the Revised RFA) of a single, uniform repertoire-use adjustment factor.

[24] While some Objectors have criticized the PWPS mechanism, such critiques have been paired with alternative proposals, such as combining a default repertoire-use adjustment with a Modified Blanket Licence for situations where a user purports to use less SOCAN repertoire.¹² These alternatives clearly aim at approximating the results of a PWPS mechanism.

c. Conclusion

[25] We therefore conclude that were the Board to rely on the Revised RFA, there is a risk of procedural unfairness.

[26] While this risk has not yet materialized, we prefer to deal with it sooner, rather than later. As such, we consider potential ways of mitigating this risk now.

2. Can this risk be addressed by giving notice to affected users?

[27] SOCAN submits that any risk of procedural unfairness to any current party has been remedied because they have been given notice of the Revised RFA.¹³ Furthermore, any risk that a non-party may be adversely affected can be remedied using the Board's power to issue notices under section 66.71 of the Act.¹⁴

[28] The Board addressed the possibility of providing notice to affected users of a potential increase in royalties payable in *Tariff for the Retransmission of Distant Television Signals, 2014-2018*.¹⁵ We identify two principles from that decision that we find applicable and elaborate here.

¹¹ Fasken Response at para 14

¹² Van Loon Simmons, Response to Order CB-CDA 2025-024 (25 April 2025) at paras 9–10.

¹³ SOCAN Response at para 54.

¹⁴ SOCAN Response at para 59.

¹⁵ *Tariff for the Retransmission of Distant Television Signals, 2014-2018*, CB-CDA 2019-056. (upheld on

[29] First, any notice must have an effect similar to that of a duly filed and published proposed tariff.¹⁶ This means not only that it must be published in such a way that it can be considered to provide sufficient notice to affected persons, but that that it must contain sufficient information for affected persons to understand what is being sought.

[30] In our view, the Note to Reader in the Revised RFA is not sufficient in this respect. It should provide reasonable notice of what SOCAN is actually proposing. An implied empty placeholder, with a statement that the Board will determine its value, does not achieve this function.

[31] This is particularly an issue in this proceeding where the adjustment for repertoire-use for reproductions is likely to be significantly different from that for public performance. A user will not know whether SOCAN expects this to be around 95%, 50%, or 10%. Each value results in significantly different royalties payable.

[32] Second, any such notice should not be shorter than that of a proposed tariff. Under the scheme in the *Copyright Act*, proposed tariffs have to be filed no later than 13.5 months before the proposed tariff is to take effect. In practice, this provides users with at least 12 months' notice.

[33] SOCAN provided the Revised RFA to current and past objectors on July 23, 2025. This means that, had the Revised RFA actually been sufficient to provide notice, that its effect would be—at the earliest—July 23, 2026. Thus, even if the Revised RFA had been brought to the attention of all users of the Proposed Reproduction Tariffs when it was filed with the Board (and not only those who filed objections), only about 6 months of the entire tariff period could have been affected. Causing the distribution or publication of the Revised RFA by the Board at this time—as SOCAN suggests the Board do under section 66.71—could affect even a shorter period.

[34] We therefore conclude that users of the Proposed Tariff have not received sufficient notice of what is being sought by SOCAN in respect of the Proposed Reproduction Tariffs.

3. Can the risk of procedural unfairness be addressed through the adoption of an alternative adjustment mechanism?

a. Positions of the Parties

[35] In Order CB-CDA 2025-065, the Parties were ordered to address possible remedies to potential procedural unfairness. They were informed that this could include

judicial review, *Bell Canada v. Copyright Collective of Canada*, 2021 FCA 148) [Retransmission (2014–2018)]

¹⁶ *Retransmission (2014–2018)* at paras 237–240.

“tariff structures that would reduce the likelihood that any royalties payable would be greater than those under the published Proposed Tariffs for reproduction.”

[36] Two tariff structures were raised by some of the Objectors. The first is a nominal royalty. The second is a user-specific repertoire-use adjustment, based on a user-specific repertoire-use study.¹⁷

[37] Apple, while endorsing these approaches, submits that the Board should allow those users not willing to participate in a repertoire-use study to rely on the results from the studies of other, similarly situated users.¹⁸

b. Possible approaches

[38] We agree that these two approaches put forward by the Objectors can mitigate the risk of procedural unfairness.

[39] However, the Board must be fair not only to those users that are party to a proceeding, but also all other potential users. Those parties that proposed a user-specific repertoire-use adjustment did not address how non-participating users should be treated. This is exacerbated by the fact there are no parties participating in this proceeding that are potential users of the SOCAN 22.D.2 proposed tariffs.

[40] To address this gap, we put forward, for parties’ submissions, a limited sampling approach that could apply to users that are not parties to this proceeding (see paras [49]–[50]).

[41] Therefore, we are of the view that the following approaches are possible:

1. user-specific repertoire-use adjustments (based on a repertoire-use study);
2. a limited sampling approach; and
3. a nominal royalty rate or nominal repertoire-use adjustment factor.

[42] Each of the possible approaches have many possible parameters. Therefore, we put a series of questions to the Parties on these approaches below.

[43] There appear to be advantages to using user-specific repertoire-use adjustments or a limited sampling approach—or both—as opposed to fixing nominal royalty rates or adjustments. However, these approaches must be practicable, and we are aware of

¹⁷ Fasken Response at paras 33–34; McMillan Response at p 5.

¹⁸ Apple Response to Order CB-CDA 2025-065.

some of the Objectors' concerns about SOCAN's ability to conduct a repertoire-use study in the context of this proceeding.¹⁹

[44] If there is no way to implement these approaches for one or more category of uses of the Proposed Reproduction Tariffs, the nominal royalty rate or nominal repertoire-use factor remains a useful option for those.

III. Questions to the Parties

A. User-specific repertoire-use adjustments

[45] All the Parties, save for Apple, appear to be willing to accept repertoire studies for each user. Some parties state or imply that this would lead to a per-user repertoire-use adjustment.

[46] **Order 1(a).** Parties shall make submissions on this approach that should include

- what rate structure should be set with the information from the repertoire-use;
- whether participating users should be specifically named in an approved tariff, and the repertoire-use adjustment factor listed for each named user; and
- the advantages and disadvantages of this approach.

[47] **Order 1(b).** Apple submits that the Board should allow those users not willing to participate in a repertoire-use study to rely on the results from the studies of other, similarly situated users. Parties shall make submissions on this approach. Such submissions should include

- how to determine or define "similarly situated users" (e.g., should it be based on the tariff family applicable to the public performance, SOCAN 22.D.1, 22.D.2, 22.D.3?);
- how past periods should be treated; and
- whether the repertoire-use adjustment factor applicable to such users should be some average of "similarly situated users", or calculated otherwise.

[48] **Order 1(c).** SOCAN shall address the feasibility of the approach described in paragraph [45] (i.e., a separate repertoire-use study for each participating user in this proceeding).

¹⁹ Fasken Response at para 24.

B. Limited sampling

[49] SOCAN has stated that it can analyze a sample of works for the purpose of a repertoire study. It follows that a mechanism with limited sampling may be possible, where the sample is sufficiently small and the sampling is sufficiently infrequent.

[50] For example, a user could provide a sample (e.g., the 1000 most played audio-visual works within a reference month) every three years (the minimum tariff period), with their claims as to pre-clearance or ownership of copyright. SOCAN would then make their own claims as to repertoire. The results of this sample could then determine the repertoire-use adjustment for a three-year period, as well as any potential period in the past.

[51] **Order 2(a).** The Parties shall make submissions on this approach. Such submissions should address:

- the size, frequency, and selection method of the sample (and are these the same for different users?);
- whether there should be a default rate, and how should that default rate be set;
- how past periods should be treated;
- whether users that do not participate in a repertoire-use study in this proceeding should fall under the a Modified Blanket Licence; and
- the advantages and disadvantages of this approach.

[52] **Order 2(b).** SOCAN shall address the feasibility of this approach and shall provide an estimate of how long it would take to determine SOCAN's repertoire-share in musical works contained in 1000 audio-visual works i) with cue sheets and ii) without cue sheets.

C. Nominal Royalty or Nominal Repertoire-Use Adjustment

[53] In their submissions, some of the Objectors raise the possibility of a nominal royalty.²⁰ It appears to us that, similarly, a nominal repertoire-use adjustment factor can be set (e.g., 1%), with the remainder the tariff rates and structure being set normally.

[54] **Order 3(a).** Parties shall address the possibility of the Board setting a nominal royalty amount for the Proposed Reproduction Tariffs. Such submissions should address:

²⁰ Fasken Response at para 33; McMillan Response at p 5.

- the amount,
- whether this amount would differ by category of users (e.g., users of SOCAN 22.D.1, 22.D.2, and 22.D.3 tariff families); and
- the advantages and disadvantages of this approach.

[55] **Order 3(b).** Parties shall address the possibility of the Board setting a nominal repertoire-use adjustment factor. Such submissions should address:

- the amount of the factor,
- whether this amount would differ by category of users; and
- the advantages and disadvantages of this approach.

IV. Next Steps

[56] All Parties shall file submissions in response to the above no later than by **January 9, 2026**. All Parties may reply to each other no later than **January 30, 2026**.