

NOTICE OF GROUNDS FOR OBJECTION

Filed by the Canadian Broadcasting Corporation/Société Radio-Canada.

In relation to proposed tariff *SOCAN Tariff 2.A.R – Commercial Television Reproduction Tariff (2025-2027)*.

Filed electronically with the Copyright Board on December 15, 2023, pursuant to Rule 18 of *Copyright Board Rules of Practice and Procedure*.

General

1. CBC reserves the right to rely upon new objections that arise from documents and information disclosed during the interrogatory process, whether by SOCAN, by other users, or otherwise. CBC reserves the right to rely upon objections raised by other objectors in this proceeding or by the Board itself, or objections which might arise from the Board's ruling on CBC's earlier oppositions to SODRAC Tariff 8 (2017-2019) and SOCAN Tariff 2.A.R (2020-2024).
2. Given the objections raised by CBC and the information contained in the Notice of Grounds for this tariff, CBC submits that the case will require the Board to hold an oral hearing.
3. As Canada's national public broadcaster, CBC will be participating in both official languages. CBC anticipates that its counsel will use both English and French, and that its witnesses and supporting documents will be in both official languages.

Grounds of Objection

4. CBC objects to SOCAN's proposed increase in the base royalties from 0.66% to 1.4%. This objection is based on at least the following reasons:
 - a. SOCAN's Notice of Grounds contains a bald and unsupported assertion that the value of music has increased. Yet that same document candidly admits that SOCAN has no factual basis for its requested increase in royalties: "SOCAN cannot know the full extent of the changes to the market since the last contested hearing until the interrogatory phase of this proceeding." This is a frank admission that SOCAN has no economic or legal basis for its requested increase. For this reason alone, SOCAN's claim to increased royalties must fail.
 - b. CBC objects to the use of the so-called "ratio approach" to set royalties for television BICs. This approach has been decisively rejected by both the Supreme Court and the Board in cases involving SODRAC, whose rights are now being asserted by SOCAN (*CBC v SODRAC*, 2015 SCC 57 ¶¶92-96; *SODRAC 2003 Inc v CBC*, 2020 CB 1 ¶¶12-18, 66-84; *SODRAC 2003 Inc v CBC*, 2021 CB 1 ¶¶18-20). As a matter of issue estoppel and abuse of process, SOCAN may not relitigate issues which SODRAC has previously

litigated and lost.

- c. In any event, even if SOCAN could relitigate the conclusive rejection of the ratio approach, its Notice of Grounds provides no basis to resurrect this discredited theory. All available evidence suggests that broadcast incidental copies (BICs) that are targeted by this tariff have no independent economic value.
- d. Even if SOCAN could show that making broadcast incidental copies had value, this value would be due entirely to investments and risks in new technologies that were incurred by users. Pursuant to the principle of technological neutrality applied in *CBC v SODRAC 2003 Inc*, 2015 SCC 57, SOCAN has no right to obtain an increase in its royalty rate.
- e. SOCAN's attempted doubling of the applicable royalty rate from 0.66% to 1.4% is the kind of abusive behaviour that the Copyright Board was created to police and prevent.
- f. If a royalty rate will be set, it should follow the methodology used by the Board in the previous SODRAC arbitration, which remains binding on SOCAN. The Board's approach in the SODRAC arbitration derived royalties for BICs as representing 25% of the value of the reproduction right in the television industry. Synchronization fees (for both the "master" and for production incidental copies) represented the other 75%. Thus, BIC royalties can be calculated as at most one-third of synchronization fees paid by a user during the relevant period.
- g. The Board has historically applied discounts ranging from 10% to 25% for "infant industries." In its recent *Stingray Pay Audio and Ancillary Services Tariff (2007–2016)*, the Board generalized this approach and applied a 20% "declining industry" discount that reflected increased competition and declining profitability in the relevant sector. Those same factors are present here: specialty television is subject to competitive pressures, declining revenues/profits, and similar economic forces that justify a decrease in the royalties. As SOCAN's own 2016-2020 Financial Highlight noted: "TV has been trending slowly downward year over year." This trend has continued and will continue for the period covered by this tariff (2025-2027). CBC proposes a 20% declining industry discount to the royalties set by the Board (if any) for this activity.
- h. Section 66.501 now directs the Board to consider "the public interest" when deciding whether a tariff is fair and equitable. As Canada's national public broadcaster, many of CBC's activities are undertaken in the public interest rather than as part of a commercial or profit-seeking activity. Pursuant to s. 66.501, CBC deserves credit for its public-interest mission and activities, many of which contribute directly to the promotion of Canadian musical talent. Drawing inspiration from the infant-industry/declining-

industry cases, CBC proposes a 10% discount to the royalties set by the Board (if any) for this activity.

- i. The above adjustments will apply to the entire tariff period.
5. CBC requests a downwards adjustment to the royalty rate to account for repertoire use, notably for the following reasons:
 - a. SOCAN does not own all or substantially all of the relevant copyrights. A repertoire adjustment will be required.
 - b. SODRAC's Notice of Grounds for *SODRAC Tariff 8 – Reproduction of Musical Works by Commercial Television Stations (2017, 2018, 2019)* conceded that repertoire adjustments are required. That concession continues to be relevant here.
 - c. This adjustment will apply to the entire tariff period.
 6. CBC requests a downwards adjustment to the royalty rate to account for chain of title deficiencies, notably for the following reasons:
 - a. CBC's most recent experience in Board arbitration revealed deficiency rates on the order of 38% for SODRAC's chain of title (*SODRAC 2003 Inc v CBC (2012-2018)*, 2021 CB 1 ¶88).
 - b. CBC will thus be requesting a chain of title audit of SOCAN's works, and will seek a corresponding discount on Tariff 2.A.R royalties based on the results of that audit.
 - c. This adjustment will apply to the entire tariff period.
 7. CBC requests a downwards adjustment to the royalty rate to account for fair dealing and users' rights, notably for the following reasons:
 - a. CBC intends to assert substantially the same exceptions/users' rights that were raised in the *SODRAC 2003 Inc v CBC* case. While the Board did not rule on the applicability of those exceptions to television BICs, in part due to data concerns, the data presented in this proceeding will be sufficiently different to alleviate those concerns.
 - b. CBC anticipates that a survey approach will be the preferred method of making this adjustment.
 - c. The principle of user-creator balance and technological neutrality require that the exceptions/users' rights be applied to all technologies equally. It would not be fair and equitable for CBC's radio operations to be protected by the exceptions, but not its television operations.
 - d. This adjustment will apply to the entire tariff period.

8. CBC objects to SOCAN's proposed modifications to the terms and conditions of the proposed tariff, notably for the following reasons:
 - a. The reporting requirements of this tariff are overly onerous and require information beyond that which is reasonably necessary for tariff administration. This is the case regardless of which approach will be used for royalty calculation.
 - b. Clause 11 of the draft tariff purports to give SOCAN the right to force CBC to produce contracts with third parties upon 10 days notice. This is not standard, and should be removed.
 - c. The changes to the audit clause (clause 12) are harsh and unnecessary. SOCAN has not required these modifications to effectively apply this tariff, which has existed for decades. No real justification for their inclusion is provided in SOCAN's Notice of Grounds, nor can one be provided.
 - d. The changes to the confidentiality clause (clause 13) are unnecessary and unjustified in SOCAN's Notice of Grounds. They expand the number of exceptions to confidentiality in broad and ambiguous ways, including by allowing SOCAN to share information with anyone "presumed" to know it. No changes should be made to this provision.
 - e. The interest rate provisions of this tariff (clause 15(1)) should be symmetric with respect to overpayments and underpayments. The Board has said many times that it is unfair and inequitable for collectives to request interest on underpayments, but refuse interest on overpayments. Users and collectives should be treated equally with respect to the interest provisions of tariffs.
 - f. The proposed clause 14 is drafted in a confusing manner, and may give rise to litigation if SOCAN claims that it ousts common-law set-off or civil-law compensation (an issue that is currently before the Federal Court). CBC's statutory set-off provision should be used instead (see below at paragraph 9.d).
 - g. Clause 15(2) includes a \$50/day penalty if documents are delivered late. Such provisions are not standard, deal with enforcement, and are inappropriate here. SOCAN's Notice of Grounds does not even attempt to justify them. They should be removed.
9. CBC proposes the following modifications to the terms and conditions of the proposed tariff:
 - a. A modified blanket licence provision should be added to this tariff, modelled on the one included in tariffs 2.A and 17.
 - b. Clause 15(1) of the tariff makes users liable to pay interest, but not SOCAN. The Board

has said many times that it is unfair and inequitable for collectives to request interest on underpayments, but refuse interest on overpayments. The interest rate provisions of this tariff should be symmetric with respect to overpayments and underpayments.

- c. Clause 15(1) of the tariff should also be amended to calculate interest on a monthly basis, and not a daily basis. This is to allow adjustments to be applied in an efficient manner. By making interest payable monthly, a \$100 overpayment can be offset by simply deducting \$100 from the next month's payment. By contrast, if interest is payable daily, then the \$100 overpayment must be offset by more than \$100 on the next month's royalty payment to account for interest accrued in the meantime. This requires excessive calculation and is likely to lead to confusion or disputes in administration. By contrast, monthly interest payments allow one month's overpayment or underpayment to be easily deducted or added to the next month's payment without further adjustment.
- d. A statutory set-off provision should also be added to this tariff to allow users to set off overpayments made in a given month against future payments under this tariff, or against other tariffs if no further payments remain. Indeed, a great many certified tariffs include such mechanisms already. CBC proposes the following language, which is modelled on existing tariffs:

(1) Subject to subsection (2), adjustments in the amount of royalties owed by a station under this tariff (including adjustments as a result of excess payments), whether as a result of the discovery of an error or otherwise, may be made via set-off against future royalties owing under this Tariff 2.A.R.

(2) For clarity, set-off under this provision shall be deducted from future royalty payments under Tariff 2.A.R. as necessary until no money remains owing. In the event that there are no future royalty payments under Tariff 2.A.R., set-off may be made against future royalty payments under other SOCAN tariffs.

(1) Sous réserve du paragraphe (2), les ajustements du montant des redevances dues par une station en vertu du présent tarif (y compris les ajustements résultant de paiements excédentaires), que ce soit à la suite de la découverte d'une erreur ou autrement, peuvent être effectués par compensation avec les futures redevances dues en vertu du présent tarif 2.A.R.

(2) Il est entendu que la compensation opérée en vertu de cette disposition sera déduite d'abord des paiements futurs de redevances en vertu du tarif 2.A.R., jusqu'à concurrence du le montant dû. Au cas où il n'y a pas de paiements futurs en vertu du tarif 2.A.R., la compensation peut être effectuée sur les paiements de redevances dues en vertu d'autres tarifs de la SOCAN.

ALL OF WHICH IS RESPECTFULLY SUBMITTED in Montréal, on 15 December 2023



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