

NOTICE OF GROUNDS FOR OBJECTION

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

In relation to proposed tariff *CMRRA Audiovisual Services 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 CMRRA, 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 that arise from the Board's ruling in prior or related cases, such as CMRRA Tariff 6.
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 all of CMRRA's proposed royalty rates. This objection is based on at least the following reasons:
 - a. CMRRA's Notice of Grounds does not set out any intelligible explanation for the royalty rates being proposed. The section entitled "*II. Basis for the Proposed Rates (Paragraph 16(b) of the Rules)*" in fact consists of a summary of the rates being proposed, rather than an explanation for the proposed rates. For this reason alone, CMRRA's tariff should be rejected.
 - b. To the extent that any basis for the rates is present, it must be found in the run-on sentence masquerading as the final paragraph of section II. That sentence cryptically asserts that CMRRA's proposed rates "take into consideration" various pending (and currently unapproved) tariffs, as well as a 1:1 ratio approach to performance and reproduction royalties. Both bases are fundamentally flawed.
 - c. With respect to pending tariffs, they are an unreliable basis for rate-setting – in marked contrast to approved tariffs. An approved tariff for a similar right applied to a similar activity can be relevant to royalty-setting. An unapproved tariff for a different right in

- a different context (i.e. SOCAN's pending performance royalty request under 22.D.1) is simply not a reliable basis for rate setting.
- d. With respect to the proposed ratio approach, it has been rejected by both the Supreme Court and the Board (*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 ¶¶18-21, 47. CMRRA's Notice of Grounds provides no basis to resurrect this discredited theory.
 - e. Worse still, CMRRA's ratio approach departs from the 1:3.2 ratio used in all prior proceedings, and purports to establish a 1:1 ratio. This is inconsistent even with the cases that had once used a ratio approach to royalty-setting.
 - f. Indeed, CMRRA's proposal leads to higher royalties for CMRRA's rights alone than were awarded for the combination of CMRRA and SODRAC's rights in the *Online Music Services (2010-2013)* proceeding. For example, CMRRA seeks a 3% royalty for streaming services. Yet in *Online Music Services*, the combined CMRRA-SODRAC rate was 1.49% – less than half of what CMRRA seeks here. And that 1.49% rate was for services which made much more intense use of music, since they were purely audio services rather than audiovisual services.
 - g. The extravagant and speculative royalty claims advanced by CMRRA in these proceedings are precisely the kind of predatory behaviour that the Copyright Board was created to police and prevent.
 - h. In the context of streaming, CMRRA's rights are used in a purely accessory fashion, to make broadcast-incidental copies. These copies have no independent economic value. Even if CMRRA 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, CMRRA has no right to obtain an increase in its royalty rate.
 - i. If any royalty for these copies is set, it should be a minimal one. The 2012-2018 *SODRAC v CBC* litigation set royalties for analogous copies at \$10,400/year (*SODRAC 2003 Inc v CBC*, 2021 CB 1 ¶¶6, Internet TV BICs).
 - j. Unlike SODRAC or SOCAN, CMRRA operates on an agency model. As such, its members can (and do) licence the same rights directly to users. CBC has direct licences with a large number of CMRRA members, many of which are “through to the viewer” licences which include the right to make BICs. As such, CBC should not pay twice for the same rights. The simplest way to handle this issue would likely be a count of the specific licences which provide direct rights, although a sampling approach might also

be effective. Either way, if, for example, 20% of CMRRA music is licensed directly by the relevant rightsholders, and those licences cover BICs, then this must be reflected in a corresponding decrease in royalties. A modified blanket licence provision will also need to be included in the tariff for future royalties.

- k. 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.
 - l. 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. CMRRA does not own all or substantially all of the relevant copyrights. A repertoire use adjustment will be required.
 - b. In some cases, CMRRA may own just part of a work, in which case royalties for that work should be fractional and reduced using a formula similar to that applied to SODRAC works in *Online Music Services (2010-2013)*.
 - 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 an audit of CMRRA’s rights to represent works claimed to be in its repertoire, and will seek a corresponding discount on 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. With respect to broadcast-incidental copies made in support of streaming operations, 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 Internet 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. In *SODRAC 2003 Inc v CBC*, 2021 CB 1, Internet Radio BICs received roughly 25% discount on this basis. 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 internet radio operations to be protected by the exceptions, but not the streaming and downloading services targeted by CMRRA's tariff.
 - d. This adjustment will apply to the entire tariff period.
8. CBC objects to the minimum royalties proposed by CMRRA, notably for the following reasons:
- a. Section II of the Notice of Grounds fails to provide any basis for the minimum royalties.
 - b. The minimums used by CMRRA are wildly inflated relative to minimums used on other tariffs. For example CMRRA is requesting minimum streaming royalties of 1.3¢ per play and 19.5¢ per subscriber per month (\$2.34 per year). By contrast, the minimums in *Online Music Services (2010-2013)* were a flat \$100 per year (and even this amount was divided between CMRRA and SODRAC). Here, CMRRA's proposed approach will generate minimum payments that are orders of magnitude higher than those in comparable approved tariffs. For example, a streaming service will exceed the *Online Music Services (2010-2013)* annual minimum at just 43 year-long subscribers ($\$100/\$2.34 = 43$).
 - c. The proposed minimum fees for music video downloads are 6.79¢ per permanent download in a bundle that contains 12 or more files and 81.43¢ for all other downloads. The comparable rates obtained by SODRAC in *Online Music Services (2010-2013)* were 2.6¢ and 6.6¢. These are, respectively, one-third and one-tenth of the values being sought by CMRRA here.
 - d. An additional factor leading to inflated minimums is CMRRA's reliance on "greater of" minimums that use the higher of two possible values. The use of "greater of" royalty structures has been repeatedly discouraged by the Board, and should not be used here.

- e. Similar problems arise from the “deeming” rules for limited downloads and generally vitiate all of CMRRA’s other proposed minimums.
9. CBC objects to CMRRA’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 10 (adjustments) is drafted in a confusing manner. CBC’s statutory set-off provision should be used instead (see below at paragraph 10.b).
 - c. Clause 11 (audits) should be amended to remove the requirement that CBC pay audit costs, which is not standard. Additionally, the auditor should be required to be independent of CMRRA, and to be working on a non-contingency basis. The clause should also be made symmetric, so that users receive an immediate refund if the audit reveals an overpayment.
 - d. Clause 12 (termination) should be removed. The Board has repeatedly commented that it does not look favorably on “termination” provisions in tariffs and has removed them systematically in recent years. Even SOCAN has responded to the Board’s jurisprudence by removing such provisions from its proposed tariffs. It is most surprising that CMRRA has continued to include such provisions here.
 - e. Clause 13 (confidentiality) permits overly-wide and unjustified sharing of confidential information obtained under the tariff. It should be narrowed substantially, notably to remove to addition of “business” advisors and to delete sharing with persons “presumed” to know the confidential information.
 - f. Clause 14(1) (interest) 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.
 - g. Clause 14(1) should state that interest should be calculated on a monthly basis, and not a daily basis. This is to allow the statutory set-off provision (below) 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, while allowing interest to accrue if such prompt correction is not made.

- h. Clause 14(1) is also problematic because it states that interest is triggered, not only by late payments, but by late delivery of information required under the tariff. This makes a mockery of the notion of "interest." This is not standard under any tariff and is inappropriate here. CMRRA's Notice of Grounds does not even disclose, let alone attempt to justify, such a surprising provision.
- i. Clause 14(2) includes a \$50/day penalty if documents are delivered late. Such provisions are not standard, deal with enforcement, and are inappropriate here. Once again, CMRRA's Notice of Grounds does not even attempt to justify them. They should be removed.

10. 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 many other tariffs. Since CMRRA operates via an agency model, its members can and do directly licence their musical works. CMRRA would be double-dipping on royalties unless a modified blanket licence provision is incorporated into this tariff.
- b. A statutory set-off provision should also be added to this tariff to allow CBC to set off overpayments made in a given month against future payments under this tariff. Indeed, a great many certified tariffs include such mechanisms already. As a matter of fairness, a similar provision needs to be included here. CBC proposes the following language, which is modelled on existing tariffs:

(1) Subject to subsection (2), adjustments in the amount of royalties owed by an audiovisual service 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) For clarity, set-off under this provision shall be deducted from future

(1) Sous réserve du paragraphe (2), les ajustements du montant des redevances dues par un service audiovisuel 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) Il est entendu que la compensation

royalty payments under this tariff as necessary until no money remains owing. In the event that there are no future royalty payments under this tariff, set-off may be made against future royalty payments under other CMRRA tariffs.

opérée en vertu de cette disposition sera déduite d'abord des paiements futurs de redevances en vertu de présent tarif, jusqu'à concurrence du le montant dû. Au cas où il n'y a pas de paiements futurs en vertu de ce tarif, la compensation peut être effectuée sur les paiements de redevances dues en vertu d'autres tarifs de la CMRRA.

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



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