Notice of Grounds for Objection by Sirius XM Canada Inc.
in Relation to the Proposed Tariff
Artisti – Online Music Services (2026-2028)
Filed with the Copyright Board on 2024-12-16 pursuant to
Rule 18 of *Copyright Board Rules of Practice and Procedure*

1. This Notice of Grounds for Objection is filed on behalf of Sirius XM Canada Inc. (the "**Objector**") in response to the Statement of Proposed Royalties to Be Collected by Artisti from Online Music Services. The tariff in question is entitled ARTISTI Online Music Services Tariff (2026-2028) and will be referred to in this Statement of Objections as the "Tariff".

2. Without admitting that it is liable for the payment of royalties pursuant to the Tariff, the Objector objects to the Tariff in its entirety, including for the reasons set out below.

3. The Objector offers online music services that are bundled together with its primary offering of satellite radio services. As the Tariff purports to target online music services in respect of making available to the public, communicating to the public by telecommunication, and reproducing of performances fixed on sound recordings (collectively, the "**activities**"), the Objector has the necessary standing to object to the Tariff pursuant to the *Copyright Act* (the "**Act**").

The Activities Do Not Trigger Copyright Liability

4. The activities associated with the Objector's service do not fall within the rights protected by the Act, cannot be administered by Artisti, and/or are not attributable to the Objector, *inter alia* because, in whole or in part, such activities:

   (a) have already been authorized or are controlled by other rights holders, their licensees, or other collective societies;

   (b) are not "substantial" in the meaning of the Act;

   (c) are not "in a material form" in the meaning of the Act;

   (d) are not "to the public" in the meaning of the Act;

   (e) do not constitute a "making available" in the meaning of the Act;

   (f) are not authorized or carried out by the Objector but by other persons, such as subscribers, storage providers, or connectivity providers, without the authorization of the Objector;

   (g) are subject to exemptions under the Act, as described more fully in paragraph 5;

(h) are in the public domain or are ineligible for remuneration under the Act; and/or

(i) trigger foreign copyright laws, not Canadian copyright law, as in the case of a programming copy or cache copy made in another jurisdiction.

5. In the event that some or all of the activities associated with the Objector's service fall within the exclusive rights protected by the Act, can be administered by Artisti, and are attributable to the Objector, all of which is specifically denied, such activities are non-compensable pursuant to the user rights contained in the Act and available to the Objector and/or other persons associated with the provision or consumption of satellite radio services or online music services, including those contained in ss. 2.3, 2.4, 29, 29.1, 29.2, 29.22, 29.23, 29.24, 30.71, 30.8, 30.9, and 31.1 of the Act as well as the Supreme Court jurisprudence interpreting user rights and demanding that that they be given a large and liberal interpretation (the "**User Rights**").

6. Some or all of the activities are capable of being performed lawfully by service providers, intermediaries or end-users pursuant to the User Rights. The Objector does not countenance or sanction other persons' carrying out of activities, and is not liable for their authorization pursuant to the Act.

Artisti Lacks the Necessary Rights to Collect Royalties under the Tariff

7. The Objector denies that Artisti has legal entitlement to collect royalties for the uses covered by the Tariff, and puts Artisti to the strict proof thereof.

8. Among other issues, Artisti's entitlement to online music service royalties was previously challenged by ADISQ, Music Canada and CIMA. On June 28, 2019, Artisti and those other organizations notified the Board of an agreement that resulted in Artisti making an application to the Board requesting the withdrawal of Artisti's Online Music Tariffs from 2016 to 2021. The Board granted this request.[1]

9. The contents and background of this dispute and the agreement to withdraw are not fully known to the Objector, but are fully known to Artisti. The Objector relies on the basis for the dispute and Artisti's prior withdrawal in denying Artisti's right to claim royalties under the Tariff.

10. Additionally, throughout Canada, performers assign to makers of sound recordings the exclusive right to use the fixation of their performances for "all purposes". The Objector pleads that all underlying assignments from performers to makers are valid both at law and in equity. Accordingly, the performers no longer have any rights that they are capable of granting to Artisti.

[1] Artisti - Tariffs for Online Music Services and Phonograms, 2016-2021 (December 11, 2019).

11. Further, the tariff amounts sought by Artisti are to be added to the amounts already paid by producers to artists to produce and exploit an album, which include the exclusive right to use the fixation of their performances for "all purposes". Artisti is in effect seeking a second payment for an activity that has already been cleared by producers through to the user, or which belongs to persons other than the performers represented by Artisti.

12. Any purported agreements between Artisti and individual artists are void, unenforceable, and/or do not transfer sufficient rights to Artisti.

13. The scheme of the neighbouring rights sections of the Act, in particular ss. 19(2)-(3), envisions a single collective society acting to collect remuneration associated with performance and communication rights in sound recordings and performer's performances. The Act does not empower multiple collective societies to carry out such collections. By reason of Re:Sound's prior long-standing collection of royalties under Tariff 8, Artisti is not empowered to act as a collective society authorized under Part VII.1 to collect additional or duplicative royalties.

14. The Objector denies that Artisti filed its Tariff proposal by the date required under s. 68 of the Act. If filed out of time, the Tariff proposal is void.

15. The Objector denies that Artisti has the necessary rights in some or all of its purported repertoire to collect royalties pursuant to the Tariff.

The Tariff Is Potentially Duplicative

16. The Objector objects to the Tariff to the extent that it is duplicative of Artisti's *Satellite Radio Tariff* (2024-2026) (**"Satellite Radio Tariff"**) or fails to achieve a comprehensive carve out via s. 3(2)(a) of the Tariff.

17. The Tariff at s. 3(2)(a) states that it does not:

> apply to activities subject to a tariff that could be certified in connection with the reproduction of performances made by … the satellite radio services within the framework of their Internet activities (in particular … the Artisti Satellite Radio Tariff, 2018-2020, 2021-2023 and 2024-2026).

18. At face value, s. 3(2)(a) appears to be intended to exempt the Objector completely from liability under the Tariff, with all of the Objector's online activities to be addressed under the Satellite Radio Tariff. This outcome would be welcomed by the Objector.

19. However, the cross-referenced tariffs do not expressly and comprehensively authorize online activities. By way of example only, a production copy authorized by the Satellite Radio Tariff is not expressly authorized for streaming uses despite the carve-out in s. 3(2) of the Tariff implying that Artisti's satellite radio tariff covers reproductions made by "satellite radio services within the framework of

their Internet activities". Indeed, the Satellite Radio Tariff for 2024 to 2026 does not use the words "online" or "Internet" anywhere within its text.

20. Additionally, even if s. 3(2)(a) of the Tariff provided a complete exemption for satellite radio services from 2018 to 2026, Artisti has not made Satellite Radio Tariff proposals for the years 2027 and 2028. It is therefore not yet clear whether the proposed 2027 or 2028 Satellite Radio Tariff would authorize all online activities of a satellite radio service so as to achieve an effective carve out.

21. Unless Artisti commits to an irrevocable waiver of its right to claim royalties from the Objector through the Tariff for all of its online activities for 2018 to 2028, s. 3(2)(a) of the Tariff would appear to be an ineffective carve out.

22. Furthermore, Artisti appears to be claiming rights that are already administered by Re:Sound in regard to communication to the public and making available of sound recordings and performers' performances under Tariff 8.

23. Activities that are found by the Board to be covered by another tariff for a given year cannot be re-claimed under the guise of the Tariff, as they would constitute "double-dipping" in violation of the principles set out by the Supreme Court in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada,* 2012 SCC 34 and *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association,* 2022 SCC 30 (*"**ESA I** and **ESA II**")*.

24. The Objector reserves its right to seek a consolidated proceeding establishing a single, user-based tariff specific to the satellite radio environment. Such consolidation would recognize the unique character and context of the Objector and ensure that no double-dipping occurs via overlapping claims by Artisti or other collective societies. Such consolidation would avoid inefficiencies for the Board, the relevant collectives and the Objector alike.

The Royalties Provisions and Administrative Terms Are Neither Fair Nor Equitable

25. The proposed royalties, minima, inflationary adjustments, and administrative terms are neither fair nor equitable when applied to the Objector's enterprise, if indeed some or all of the activities fall within the exclusive rights protected by the Act, can be administered by Artisti, and are attributable to the Objector, all of which is specifically denied.

26. The proposed rates and minima do not reflect a fair, reasonable and appropriate value of Artisti's enforceable repertoire, and do not reflect the risks taken or investments made by the Objector. The proposed rates and minima are also excessive compared to those charged in other jurisdictions for similar uses and do not reasonably reflect the amount, type or impact of music use by the Objector.

27. Among many other concerns is the flawed conceptual basis behind the rates claimed by Artisti. In its notice of grounds, Artisti explains that its rate combines

the 2007-2010 SOCAN Tariff 22.A rate and the 2007-2010 CSI Online Music Services rate.

28. Artisti's methodology is erroneous in numerous respects, including because it ignores the criteria set out in the Act and the jurisprudence, grossly overvalues the rights it allegedly holds, puts a burden on the user to determine which works might be in Artisti's repertoire, and seeks excessive inflation adjustments.

29. By way of example only, its use of the 2007-2010 SOCAN and CSI tariffs as proxies grossly overvalues its rights. These are outdated tariffs based on stale evidence relating to old technologies and business models, stale definitions of services, an outdated version of the Act, and were based on case law that is no longer accurate with regard to the factors that must be considered by the board. These tariffs are an inflated and outdated proxy for the value of Artisti's repertoire.

30. As applied to the Objector, SOCAN Tariff 22.B has been recently certified through 2018 at a much lower percentage of 2.1% to 2.13% of streaming revenues. Since SOCAN withdrew Tariff 22.A (2014-2018) following a contested hearing, it should be inferred that Tariff 22.A is no longer a reliable proxy for the value of communication rights in copyright works, let alone for the rights Artisti claims to represent. If Artisti is modelling its Tariff based on Board certifications of SOCAN online tariffs, Tariff 22.B is the most recent proxy available.

31. Artisti has based its reproduction valuations based on rates obtained by CSI for copyright works in its online music services tariff from 2007 to 2010, which was based on technological evidence from a long-past period, prior to the passage of the *Copyright Modernization Act* with its numerous user rights, and deliberately did not account for the Supreme Court's landmark decisions in *ESA I* and *ESA II*.[2] The rate certified in that proceeding greatly overvalues the reproduction right in the online setting. As in the case of SOCAN, the old CSI tariff has been superseded by private settlements throughout the industry.

32. The ratio of 1.75 used by Artisti to boost the combined SOCAN and CSI rate lacks any cogent rationale, is not supported by evidence, and is unjustified. It is drawn from a radically different private copying tariff (focusing on recording industry royalty practices for physical albums applied to the sale of recordable CDs and MiniDiscs) that is in no way suitable for use in a streaming dominant online setting. In 2009, the Board commented that the market for digital downloads was "potentially a better proxy" but that the parties had not provided enough information to depart from the pre-recorded CD proxy. This statement is no longer tenable as it is no longer remotely safe to assume that a private copying proxy has a bearing on an online music services formula for the years 2026 to 2028.

[2] See CSI Online Music Services (2007-2010) at paras. 12-15.

33. Artisti's categorization of services is no longer reflective of the ever evolving online music services marketplace. It also is flawed in respect of the method of calculating to be applied when a given organization offers multiple methods of consuming music, it being unclear whether the organization must pay multiple times under different formulas for its different activities. Furthermore, its categorization of services conflicts with its carveout in s. 3(3)(b) – storing and retrieving of performances fixed in sound recordings being an inherent necessity for the vast majority of (if not all) online music services.

34. Artisti also seeks to maximize its royalties through a "greater of" formula tracking to an arbitrary percentage and/or minimum rate per subscriber. Such formulas are inherently inequitable, but even more so for a collective with no proven repertoire. These formulas also are unfair and inequitable because they ignore the benefits to rights holders and users alike of free trials, which have been recognized by the Board in multiple decisions and which are a fair dealing under the Act. Any tariff certified must create exemption spaces for free trials.

35. Artisti seeks a rate base premised on an unreasonably broad definition of "gross revenues". This definition would sweep in revenues that have nothing to do with the exploitation of any rights that may be represented by Artisti.

36. The administrative provisions set out in the Tariff are impractical and unduly onerous, do not track information in the forms held by the Objector, require the disclosure of sensitive confidential information, and place a disproportionate burden on the Objector.

37. Artisti's use of formulas and reporting obligations factoring in activities "requiring an ARTISTI licence" is unworkable for users, who should not be subjected to endless disputes as to whether Artisti has obtained the necessary rights for each and every play of a performance fixed in a sound recording. These users should not be required to fact-check or dispute an ever-changing calculation of royalties based on whatever Artisti asserts its repertoire constitutes during a given quarter, or whether there are multiple performances associated with a given sound recording.

38. Artisti's repertoire is niche and focused primarily on the French language market. Any facts supporting an item falling into the repertoire are known to Artisti and not known to users. It is unworkable to certify a tariff that is destined to create ongoing disputes as to repertoire percentages throughout the life of the Tariff, with users fixed with the burden of proof and Artisti given the right to act as a judge in such disputes pursuant to ss. 9(1) and 11(2) of the Tariff.

39. Instead, as with other tariffs certified by the Board, following a comprehensive repertoire study, a repertoire adjustment for different kinds of services should be incorporated into any rate formula the Board chooses to set (if it sets any rate at all). These repertoire adjustments are necessary to avoid imposing undue burdens

on users and their subscribers, and will prevent disputes following certification as to whether a given usage requires an Artisti licence.

40. Relatedly, Artisti should not be able to exercise discretion over matters impacting calculation of royalties. If there is a dispute over calculation of royalties, that is a matter for the courts to judge, not a collective society.

41. The audit provisions in the Tariff are also inequitable. They give Artisti access to a user's records impacting rate calculations, but do not give the user access to Artisti's records impacting rate calculations.

42. Artisti demands above-prime interest for an adjustment in its favour but does not appear to offer any interest at all for an adjustment in Objector's favour, including as the result of an error or omission by Artisti. Artisti also arrogates itself the right to hold on to overpayments. These clauses are inequitable and unfair.

43. Artisti also creates punitive enforcement mechanisms in the Tariff despite the Board's guidance that it will not certify terms and conditions that "touch[] on the area of liability and the provisions of the Act applicable to remedies against users governed by a tariff" (SOCAN Tariff 18 – Recorded Music for Dancing (2018-2022) at ¶43). For example, s. 13 creates breach and termination rights that give Artisti the ability to terminate the Tariff for a given user in the instance of a dispute. These provisions cross the line into liability and remedies. They should be struck from any certified tariff.

44. Deeming the Tariff to be nontransferable is incompatible with the concept of tariffs generally. Tariffs may be accepted by any person who wishes to carry out the activity. There is no power to withhold access to a tariff in the manner set out in s. 15.

45. Artisti does not permit notice to it by fax, but reserves the right to notify by fax with a presumption of immediate receipt. This technology is no longer adequate for notifications and should not be a part of the notice provisions under the Tariff.

46. The confidentiality clauses set out in s. 14 of the Tariff are too broad and create an asymmetrical information pooling amongst separate collectives with anticompetitive effects.

Reservation of Rights

47. The Objector reserves the right to vary or supplement the positions set out above at any stage of the within proceedings.

Parallel Challenges

48. At present, Artisti's entitlement to file an online music services tariff before the Board remains unclear given previous court-based challenges by ADISQ, Music Canada and CIMA that resulted in Artisti withdrawing its previous online music services tariff proposals. The Tariff should not be examined until it is clear that there are no further challenges or that any new challenges to Artisti's entitlement are finally resolved or settled.

All of which is respectfully submitted this 16th day of December, 2024.

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