

## NOTICE OF GROUNDS FOR OBJECTION

Filed by SIRIUS XM CANADA INC.

In relation to proposed tariff SOCAN Tariff 22.D.1.R – Reproduction of Musical Works Embedded in Audiovisual Works for Transmission by Online Audiovisual Services and User-Generated Content Services (2027-2029)

Filed with the Copyright Board on 2025-12-17 pursuant to Rule 18 of the *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 SOCAN. The tariff in question is entitled “SOCAN Tariff 22.D.1.R – Reproduction of Musical Works Embedded in Audiovisual Works for Transmission by Online Audiovisual Services and User-Generated Content Services (2027-2029)” and will be referred to in this Notice of Grounds for Objection 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.
3. The Objector is not an online audiovisual service. However, since the Tariff appears to target any service that ever communicates even a single audiovisual clip via any method for any reason whatsoever and regardless of its length, 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 reproductions claimed by SOCAN do not trigger liability under the Act, *inter alia* because they:
  - (a) have already been authorized;
  - (b) are not the subject of a valid assignment to SOCAN;
  - (c) are not “substantial” in the meaning of the Act;
  - (d) are not “in a material form” in the meaning of the Act;
  - (e) are not made by the Objector but by other persons without the authorization of the Objector; and/or
  - (f) are made outside of Canada.
5. In the event that some or all of the reproductions fall within the exclusive rights protected by the Act, can be administered by SOCAN, and are attributable to the Objector, all of which is specifically denied, such copies

are non-compensable pursuant to the user rights contained in the Act and available to the Objector and/or other persons, including those contained in ss. 29, 29.1, 29.2, 29.22, 29.23, 29.24, 30.71, 30.8, 30.9, and 31.1 of the Act.

6. Any fair and equitable Tariff should also contain a “free trial” provision on economic and fair dealing grounds. The Tariff does not account for free trial periods, which have been recognized by the Copyright Board as mutually beneficial for creators and users in a number of contexts. The Objector submits that a three-month royalty-free trial period should be allocated over the course of a calendar year, be made applicable both to new subscribers and “win-back” subscribers”, and not be made subject to minimum fee mechanisms.
7. Furthermore, the reproductions made by other persons described in paragraphs 4 to 5 are capable of being made lawfully. The Objector does not countenance or sanction infringing acts, and is not liable for their authorization pursuant to the Act.

### **SOCAN Lacks the Necessary Rights to Collect Royalties under the Tariff**

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

### **The Tariff Is Potentially Duplicative**

9. The Objector objects to the Tariff to the extent that it is duplicative of other SOCAN tariffs, such as Tariff 22.A, 22.B (Satellite Radio) or 25, or separate agreements with SOCAN. Activities (if any) that are found by the Copyright Board to be covered by another tariff for a given year cannot be re-claimed under the guise of a different tariff, as they would constitute “double-dipping” in violation of the principles set out by the Supreme Court in *ESA v. SOCAN*, 2012 SCC 34 and *SOCAN v. ESA*, 2022 SCC 30 (“**ESA I** and **ESA II**”).

### **The Royalties Sought Are Neither Fair Nor Equitable**

10. SOCAN’s does not explain the methodology supporting its rate claims. The rates requested are neither fair nor equitable, including because they ignores the criteria set out in the Act and the jurisprudence, fail to offer a low use rate basis, and grossly overvalue the rights in SOCAN’s repertoire as applied to audiovisual services.
11. The proposed royalties and minima are neither fair nor equitable when applied to the Objector’s enterprise, if indeed some or all of the reproductions fall within the exclusive rights protected by the Act, can be administered by SOCAN, and are attributable to the Objector, all of which is specifically denied.

12. In particular, the proposed rates, rate base, and minima do not reflect a fair, reasonable and appropriate value of SOCAN'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.
13. The rate base for the Tariff contained within its revenue definitions captures revenues that are irrelevant to the rights administered by SOCAN.
14. The hybrid between revenue-based royalties and per play royalties proposed in the Tariff provides no certainty for calculating royalties due as part of the necessary budgetary planning for any service.
15. The minima, including the free stream rate, are commercially unreasonable and inequitable. The "greater of" minimum rate model is commercially unreasonable, inherently inequitable and provides no certainty for calculating royalties.

### **The Administrative Provisions Are Unfair and Onerous**

16. The Objector contends that the administrative provisions set out in ss. 5 to 11 of the Proposed Tariff are impractical and unduly onerous, do not track information in the forms held by the Objector, require the overbroad disclosure of sensitive confidential information, create unreasonable audit rights, and place a disproportionate burden on the Objector, including because:
  - (a) in most instances, they do not impose an "if available" carve-out for provision of information to SOCAN;
  - (b) they require counting of plays in a revenue-based royalty model, with the purpose of the counting being to support an inequitable "greater of" minimum fee rate structure and "free streams" model;
  - (c) their reporting requirements are unduly detailed and unduly frequent;
  - (d) they require an unreasonably long retention period of six years; and
  - (e) they require breakdown of revenues in a manner that is not tracked by the Objector.
17. The section 7 payment provisions have been unfairly accelerated.
18. The section 8 audit provisions are inequitable, in part because they do not restrict the number of audits that may be carried out and do not provide for an independent auditor or a process to challenge any audit conclusions.

19. The proposed confidentiality clause at section 9 provides SOCAN the right to use and share confidential information in an unduly broadly manner, including with other collective societies and with anyone who is *presumed* to know confidential information received pursuant to the tariff. There is a carveout that removes confidentiality provisions to information that must be provided pursuant to the *Copyright Act*, which could be read to include confidential information supplied pursuant to interrogatories. Section 9 could allow for the release of sensitive confidential information to uninvolved third parties, or to others who should not possess that sensitive confidential information.
20. The section 10 adjustments clause does not permit set off of royalties or fees owed to SOCAN despite the availability of such set off at law and in equity. It also appears to favour adjustments based on SOCAN audits over adjustments based on other discoveries.
21. SOCAN 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). These provisions cross the line into liability and remedies. They should be struck from any certified tariff.

### **Reservation of Rights**

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

All of which is respectfully submitted this 17<sup>th</sup> day of December, 2025.

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