



Copyright Board
Canada

Commission du droit
d'auteur du Canada

Filed by / Déposé par: Stingray Group Inc

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Copyright Board of Canada
800-56 Sparks Street
Ottawa, ON K1A 0C9

Filed via: email to registry-greffe@cb-cda.gc.ca

Re: Proposed Tariff Title: SOCAN Tariff 22.D.1.R – Reproduction of Musical Works Embedded in Audiovisual Works for Transmission by a Service (2024-2026)

NOTICE OF GROUNDS FOR OBJECTION

The following Notice of Grounds for Objection (the “Notice”) is filed on behalf of Stingray Group Inc. (Stingray) in respect of Proposed *Tariff 22.D.1.R – Reproduction of Musical Works Embedded in Audiovisual Works for Transmission by a Service (2024-2026)* which was published by the Copyright Board on 2022-11-14 pursuant to subsection 67(1) of the *Copyright Act*. This Notice is filed in accordance with PN 2022-007.

Stingray contends that the proposed tariff is not fair or equitable because the proposal does not appear to factor in pre-existing licences that may be applicable to some or all of the types of reproductions made by online audiovisual services and because the proposal does not factor in the reproduction right exceptions in the *Copyright Act*. The result is an unjustified and unsubstantiated proposal for a first-time tariff.

1. Any grounds for why the Board should not approve the proposed tariff despite any alteration of royalties or levies or fixation of terms and conditions

The proposed tariff applies to the reproduction of works in SOCAN’s repertoire by a service that delivers on-demand streams, limited downloads and permanent downloads of an audiovisual work to end-users by any means whatsoever. This proposed tariff replaces Proposed SODRAC Tariff 7, last filed for the year 2019, which was the last year SODRAC filed tariffs on its own before becoming part of SOCAN. Stingray has objected to proposed SODRAC 7 and has objected to proposed SOCAN Tariff 22.D.1.R. Together, these proposed tariffs represent the first time that a tariff applicable to reproduction rights is sought in the audiovisual context, so there are fundamental issues to be considered.

First, it is unclear to Stingray what types of copies are included in the proposed tariffs. The history of the CBC and SODRAC litigation involved extensive evidence and analysis relating to synchronization and post-synchronization copies, including various types of incidental copies, broadcasting copies and production related copies. There was extensive evidence about through-to-the-viewer licences and their impact on any residual rights remaining with SODRAC (now SOCAN). The litigation on this issue has shown that, at least in the context of the CBC and SODRAC, broadcast-incidental copies (BICs) could

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have value.¹ The evidence gathered in this proceeding will demonstrate the extent to which that bears true in the online audiovisual context.

Second, SOCAN notes that the proposed tariff should be “adjusted by a factor to represent SOCAN’s repertoire percentage.” SOCAN is silent as to the extent to which any reproductions made are already covered by existing licences and therefore, excluded from their own authority to collect royalties. Stingray objects to the application of the proposed tariff to the entire universe of copies made by online audiovisual services and notes that evidence will be required to clarify the scope of reproductions that could be eligible under the proposed tariff.

2. Any grounds for objecting to any royalty or levy rates in the proposed tariff

SOCAN notes that the proposed rates are derived from the performing right for online audiovisual services but provides no further explanation as to how they were derived or justification for the method of derivation chosen. SOCAN represents the reproduction rights of only an undefined fraction of works, and while SOCAN’s Notice of Grounds for Proposed Tariff refers to the rate being “adjusted by a factor to represent SOCAN’s repertoire percentage”, it offers no basis for a user to perform that adjustment.

Assuming the proposed tariff is only applicable to broadcast-incidental copies not already covered by existing licence agreements, Stingray notes that the extent to which incidental copies have an independent economic value is very unclear, and that a nominal rate for any unaccounted for incidental copies is the most appropriate approach. Even if incidental copies have an independent economic value, that value cannot be established without taking into account the other royalties paid under the reproduction right, and because incidental copies are “incidental” by nature, their value to the user must be lower than that of non-incidental copies.²

Further, SOCAN has failed to account for reproduction right exceptions in the *Copyright Act*, which have been applied by the Copyright Board in the context of commercial radio,³ and in the context of the *CBC v SODRAC* licence arbitration,⁴ and which will operate to reduce the amount of royalties payable to SOCAN in this case. The reproduction right exceptions should be applied in this tariff.

3. Any grounds for objecting to any terms or conditions in the proposed tariff

The terms and conditions should be fair and reasonable and not place undue burden on the payors of the tariff. To the fullest extent possible Stingray requests harmonization on the terms and conditions between the proposed tariff and any other certified tariffs applicable to the same users for the same use. Ensuring consistency in the reporting obligations and administrative provisions across collectives will maximize efficiency and reduce the possibility for error.

¹ Canadian Broadcasting Corp. v. SODRAC 2003 Inc., 2015 SCC 57, [2015] 3 S.C.R. 615 at para 55 <<https://www.canlii.org/en/ca/scc/doc/2015/2015scc57/2015scc57.html>>.

² *Ibid* at para 155

³ *Statement of Royalties to be collected by SOCAN, Re:Sound, CSI, connect/SOPROQ and Artisti in respect of commercial radio stations*, 2016-04-21, <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366778/index.do?q=%22commercial+radio%22>>.

⁴ *SODRAC 2003 Inc. v CBC*, 2021 CB 1.

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With respect to music use reporting requirements, the tariff should note that information and documentation shall be provided to the extent it is available to the service paying the tariff. Not all the specific types and formats of requested information are always provided to Stingray and therefore cannot be provided by Stingray to the collectives. Where requested information is available it should be provided, but the tariff should include this “where available” language.

In addition, proposed section 10(4) is prejudicial to users of this proposed tariff, in that it specifically limits correcting for errors discovered in audit only to errors made by the user of the tariff and expressly states that if SOCAN makes an error that is discovered in an audit, those errors need not be corrected. This is unfair. If there is an audit, all discovered errors be subject to correction and compliance with the terms of the tariff.

4. Any grounds not identified above

Stingray expects SOCAN to prove its eligible reproduction right repertoire through a comprehensive repertoire use study including a robust audit right for the objectors. As this is the first time a reproduction right tariff will be applicable to online audiovisual services, it is essential for Stingray to understand the extent to which the SOCAN reproduction right repertoire is engaged and to ensure there is no overlap with the CMRRA repertoire.

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