

NOTICE OF GROUNDS FOR PROPOSED TARIFF

Filed with the Copyright Board by SOCAN on 2024-02-22 pursuant to Rule 15 of the Copyright Board Rules of Practice and Procedure and Copyright Board Order CB-CDA 2024-007.

SOCAN Tariff 22.D.2 – User-Generated Content Services (2014-2026)

1. Consolidated Request for Approval

As directed by the Board, SOCAN is filing together with this Notice of Grounds a consolidated request for approval (the “**Consolidated RFA**”) in relation to the following proposed tariffs:

- SOCAN Tariff 22.D – Audiovisual Content (2014, 2015) [user-generated content services only];
- SOCAN Tariff 22.D.2 – Internet - Other Uses of Music - User Generated Content (2016, 2017, 2018, 2019, 2020); and
- SOCAN Tariff 22.D.2 – User-Generated Content Services (2024-2026)

(collectively, the “**Proposed Tariff**”).

Further to the case management conference held December 18, 2023, SOCAN has prepared the Consolidated RFA on a best-efforts basis to attempt to reduce complexity in the proceeding. However, as discussed during the case management conference, SOCAN reserves the right to file a revised RFA as part of its statement of case.

2. Description of Users Covered by the Proposed Tariff

The Proposed Tariff is expected to apply to user-generated content services, which are services that predominantly transmit user-generated content. User-generated content is audiovisual content posted to a website, software application or platform by a person other than the operator of the web site, software application or platform and available for free viewing by end users.

The Proposed Tariff does not apply to an online music video service, which is an online service that predominantly offers music videos.

3. Description of Uses Covered by the Proposed Tariff

The Proposed Tariff applies to the communication to the public by telecommunication (including, where applicable, the making available) of works in SOCAN’s repertoire in

connection with the operation of a user-generated content service, including the use of a musical work in a music or concert video.

The application of the Proposed Tariff is subject to certain limitations, as set out in the Consolidated RFA.

4. The Rate Base and Clarification of Pay Content

The proposed rate base is a service's "relevant revenues". Relevant revenues means all revenues generated by all visits to watch pages on a website or to a software application or platform by end users having Canadian IP addresses, irrespective of whether the content that is subject to those visits contains any musical works or other audio content, subject to certain exclusions, including revenue generated from pay content.

The Consolidated RFA adds clarity by defining "pay content" as,

- (a) an audiovisual program produced and intended for release or initial exhibition other than on a user-generated content service;
- (b) similar content produced by or for the operator of a user-generated content service for release or exhibition on that service; or
- (c) a music video,

that is offered to end users for a fee or charge, including pursuant to a subscription.

The definition above has the meaning intended in the settlement agreement for SOCAN Tariff 22.D.2 (2007-2013) (the "**Settlement Agreement**"),¹ which formed the basis for SOCAN Tariff 22.D.2 (2007-2013) as approved by the Board (the "**Settlement Tariff**").² In particular, it captures "traditional" forms of general entertainment content, such as movies and television programs, that a user-generated content service might offer to end users for a fee (including pursuant to a subscription),³ as opposed to content that is essentially user-generated content but which is offered pursuant to a subscription, such as behind a paywall.

¹ A copy of the Settlement Agreement was filed with the Board in the hearing of *SOCAN - Tariffs 22.D.1 – Internet - Online Audiovisual Services & 22.D.2 – Internet User-Generated Content (2007-2013)*.

² [Tariff No. 22.D.2 Internet – User-Generated Content \(2007-2013\), Erratum](#), Published in the Supplement to the Canada Gazette on November 29, 2014 ("**Settlement Tariff**").

³ For greater clarity, if such content is offered to end users free of charge subject to the requirement that advertising be viewed or listened to, the advertising revenue for such content would be included in the service's "relevant revenues" (i.e., the general rate base).

In addition, consistent with the Settlement Agreement, the Consolidated RFA also clarifies that a user-generated content service that offers pay content would pay the same royalties on the resulting revenue that would be paid for a general online audiovisual service (i.e., not a user-generated content service) under Tariff 22.D.1. This clarification is not only in line with the Settlement Agreement, but it also ensures parity in the market by ensuring that a user-generated content service that offers general entertainment content for a fee does not gain a competitive advantage over a general online audiovisual service in relation to the same type of content.

5. Explanation of How Royalties are Determined

This section of this Notice of Grounds addresses the general basis for the royalty rates and royalty structure in the Consolidated RFA. However, SOCAN may advance additional or alternative valuation methodologies and adjustments for inflation and other externalities in the course of the proceeding. Without limitation, SOCAN reserves the right to seek information and documents from other parties to the proceeding, and to put forward expert evidence to support a detailed valuation analysis, to permit the Copyright Board to set fair and equitable royalties for the activities covered by the Proposed Tariffs.

A. The Basic Royalty Rate

The proposed royalties for the communication of audiovisual content, excluding pay content, by a user-generated content service, are,

(a) for 2016, 2.1% of its relevant revenues; and

(b) for all other years (2014, 2015, and 2017 to 2026), 3.0 per cent of its relevant revenues.⁴

For 2016, the proposed percentage rate of 2.1% is lower than the rate that SOCAN had proposed for 2011 to 2013, as described in the Copyright Board decision dated July 18, 2014 certifying the Settlement Tariff.⁵ It is slightly higher, however, than the percentage rate approved by the Board for 2011 through 2013 in the Settlement Tariff, which represented a compromise by SOCAN.

In fact, it is SOCAN's view that even the proposed 2.1% rate does not fully reflect the value of the use of its repertoire by user-generated content services in 2016. That value is more properly reflected in the 3.0% rate proposed for all other years, as discussed more fully below.

⁴ For 2014 and 2015, the Proposed Tariff provided a percentage rate of 7.0%.

⁵ Decision of the Board, [SOCAN - Tariffs 22.D.1 – Internet - Online Audiovisual Services & 22.D.2 – Internet User-Generated Content, 2007-2013, July 18, 2014](#) (the “**2014 Settlement Tariff Decision**”) (modified by [erratum](#) dated November 29, 2014, and [redetermined](#) by reasons dated January 27, 2017).

For all other years (2014, 2015, and 2017 to 2026), although SOCAN's proposed rate is higher than the compromise rate approved by the Board in the Settlement Tariff, it is nevertheless lower than the rate that SOCAN first proposed for 2011 to 2013,⁶ and indeed, lower than the rate that SOCAN first proposed for 2014 and 2015. It is SOCAN's view that the higher rate now proposed better reflects the value of the use of music in SOCAN's repertoire in connection with the operation of an user-generated content service. The rate takes into account, among other things, the development of the market for user-generated content services in Canada and the way those services use and benefit from music in their programming and operations. They also recognize that the rates in the Settlement Tariff reflected a compromise by SOCAN and not the full value that user-generated content services derive from the use of SOCAN's repertoire.

B. The Pay Content Royalty Rate

The proposed royalties for the communication of pay content by a user-generated content service are,

(a) for pay content offered for a fee on a transactional per-program basis:

(i) for 2014 to 2016, 2.1% of the amounts paid by end users for the pay content, subject to a minimum of 1.3¢ per program; and

(ii) for 2017 to 2026, 3.0% of the amounts paid by end users for the pay content, subject to a minimum of 1.3¢ per program;

(b) for pay content offered under a subscription:

(i) for 2014 to 2016, 2.1% of the amounts paid by subscribers for the pay content, subject to a minimum of 7.5¢ per subscriber per month;

(ii) for 2017, 3.0% of the amounts paid by subscribers for the pay content, subject to a minimum of 7.5¢ per subscriber per month;

(iii) for 2018 to 2026, 3.0% of the amounts paid by subscribers for the pay content, subject to a minimum of 19.5¢ per subscriber per month.

No royalties would be payable for a single, initial free trial of up to 31 days in any 12-month period offered to induce a prospective subscriber to enter into a paid subscription.

⁶ As described in the 2014 Settlement Tariff Decision.

The royalty rates and minimum fees proposed for the offering of pay content are the same as those proposed by SOCAN for Tariff 22.D.1 for the corresponding years.

The basis for those rates and fees is explained in the Notice of Grounds for Proposed Tariff for Tariff 22.D.1 (2014-2026) filed by SOCAN together with this Notice. The proposed rates and fees are also consistent with the treatment of pay content under the Settlement Agreement that formed the basis for the Settlement Tariff. Specifically, the Settlement Agreement provided that user-generated content services would pay royalties for pay content under Tariff 22.D.1.

C. Non-Commercial Services with No Revenue

Under the Proposed Tariff, for all years, a non-commercial service with no revenue would pay an annual fee of \$25.00

6. How the Information Collected Would be Used

The Consolidated RFA sets out the information that a user-generated content service would be required to report to SOCAN.

Consistent with the decision of the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, user-generated content services would be required, upon request, to report certain information about all files made available for on-demand streaming and further information about files actually streamed.

The Consolidated RFA also provides that each month services must report information about the number of subscribers that are provided with a free subscription or end users that are provided with an initial free trial, as well as the total number of plays of all files by those end users. This allows SOCAN to properly track the number of users subject to the free trial royalty exception under paragraph 3(1)(b).

The information that would be collected under the Consolidated RFA is needed to identify users, calculate royalties, and distribute those royalties to rights holders.

7. Explanation of Changes from Previously Approved Tariff

1. The Proposed Tariff, as reflected in the Consolidated RFA, proposes different royalty rates from the Settlement Tariff.
2. The Consolidated RFA clarifies the meaning and treatment of pay content.

3. Several definitions have been added or amended in the Consolidated RFA for clarity and consistency. In particular,
 - a. the definition of “online music video service” and “music video” have been amended to reflect the Board’s Ruling CB-CDA 2023-047, which established separate proceedings for Online Audiovisual Services (2014-2026) and Online Music Video Services (2014-2018).
 - b. several definitions, including for “audiovisual program”, “online audiovisual service”, and “pay content” have been added or amended to ensure consistency with proposed SOCAN Tariff 22.D.1 – Online Audiovisual Services (2014-2026).
4. The Proposed Tariff, as reflected in the Consolidated RFA, adjusts the annual fee for a non-commercial service with no revenues from \$15 to \$25.
5. New reporting requirements have been added, as described above.
6. The confidentiality provisions have been adjusted to allow sharing of reporting information with SOCAN’s agents and service providers. SOCAN relies on service providers to facilitate efficient processing of reporting data, among other things.
7. As a necessary clarification in light of recent technological developments, the Consolidated RFA clarifies that the Proposed Tariff does not authorize the use of any works in SOCAN’s repertoire in connection with the training of artificial intelligence systems.