

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Citation *SOCAN Tariffs 22.B and 22.C (2007-2018)*, 2023 CB 6

Members The Honourable Luc Martineau
René Côté
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Proposed Tariffs Considered Tariff 22.2 – Audio Webcasts (2007, 2008)
Tariff 22.B – Audio Webcasts (2009, 2010, 2011, 2012, 2013);
Tariff 22.B – Commercial Radio, Satellite Radio and Pay Audio (2014, 2015, 2016, 2017, 2018)
Tariff 22.7 – Other Sites (2007, 2008); 22.G (2009, 2010); 22.H (2011, 2012); 22.I (2013)
Tariff 22.C – Other Audio Websites (2014-2018)

Approval of Proposed Tariffs

As

SOCAN Tariff 22.B – Commercial Radio and Satellite Radio (2007-2018)

And

SOCAN Tariff 22.C – Other Audio Websites (2007-2018)

REASONS FOR DECISION

I. OVERVIEW

[1] The Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed for approval the following sets of proposed tariffs:

- *Tariff 22.2 – Audio Webcasts (2007,2008)*;
- *Tariff 22.B – Audio Webcasts (2009, 2010, 2011, 2012, 2013)*;
- *Tariff 22.B – Commercial Radio, Satellite Radio and Pay Audio (2014, 2015, 2016, 2017, 2018)*;
- *Tariff 22.7 (2007, 2008); 22.G (2009, 2010); 22.H (2011, 2012); 22.I (2013) – Other Sites;*
and
- *Tariff 22.C – Other Audio Websites (2014-2018)*.

[2] For ease of reference, Tariff 22.2 and 22.B are collectively referred to as “Tariff 22.B” and Tariff 22.7, 22.G, 22.H, 22.I and 22.C are collectively referred to as “Tariff 22.C.”

[3] Tariff 22.B covers online music offered by a broadcaster that is subject to Tariff 1.A (Commercial Radio Tariff), a satellite radio service that is subject to Tariff 25 (Satellite Radio Services Tariff), and a pay audio service that is subject to the Pay Audio Tariff during 2007 to 2018.

[4] Tariff 22.C covers websites ordinarily accessed to listen to non-interactive, audio-only content, from 2007 to 2018.

[5] In the course of the proceeding, SOCAN filed a “Request for Certification Tariff” (the “RFC”): a document containing royalty rates (the “RFC Rates”), and terms and conditions, that it submits the Board should approve. Of note is the fact that the RFC does not include the Tariff 22.B portion concerning online music offered by a pay audio service provider. In fact, SOCAN confirmed that it did not expect that this portion of Tariff 22.B be approved.¹

[6] The RFC includes royalties that are lesser than or equivalent to the corresponding royalties set out in the proposed Tariff 22.B and 22.C. Compared to the proposed tariffs, the RFC’s terms and conditions are more streamlined and more consistent with recently approved tariff language.

[7] The RFC includes royalties that— in effect—are higher than the corresponding last approved royalties. It also proposes terms and conditions that are—to a certain extent—more onerous compared to the corresponding last approved terms and conditions.

Approved Rates

[8] Other than targeted adjustments for inflation, the rates that we approve for Internet services offered by satellite radio and commercial radio operators are unchanged from the corresponding last approved tariffs. The same applies to non-interactive, audio-only websites.

[9] We do so for reasons tied to the lack of evidence that would otherwise warrant a higher rate. In addition, some proposed reporting obligations were either unfeasible or unfair.

[10] In terms of online music offered by a pay audio service provider, we do not approve a tariff. We chose to do so because the only known user has an agreement with SOCAN that covers the effective period, and because a tariff does not apply to a user that has an agreement with the relevant collective; therefore, we conclude that the matter is moot.

¹ Letter from SOCAN in response to Notice CB-CDA 2023-022, at p 2, May 18, 2023 [Response from SOCAN to Notice CB-CDA 2023-022]

II. BACKGROUND

[11] The last approved tariff is *SOCAN – Tariffs 22.B to 22.G (Internet - Other Uses of Music), 1996-2006*.² (“*SOCAN 22.B-G 1996-2006*”)

[12] Under that tariff, pay audio services, satellite radio services and commercial radio services provided over the Internet are subject to the rate paid under the conventional tariff (respectively, 12.35%, 4.26%, and 4.2%), applied to their Internet-related revenues, subject to an audio page-impression ratio with a default of 0.5. For reference, Page Impressions (“PIs”) are the number of times a particular webpage or an item on a webpage has been viewed or accessed by a customer. Only SOCAN music-related PIs trigger royalties.

[13] For ease of reference, we call this the “Home Tariff” approach where the Internet tariff is based on the non-Internet rates applicable to the service providers’ conventional activities (namely, over-the-air radio, satellite radio and pay audio services).

[14] In addition, under that tariff, sites ordinarily accessed to listen to non-interactive, audio-only content, other than a site subject to another SOCAN tariff, pay standalone rates (in other words, rates not based on a distinct tariff).

[15] In terms of Tariff 22.B, the only remaining participant is SiriusXM. It first participated as an objector, then as an intervener, and only with respect to its own online activities related to satellite radio. There were no participants with respect to Tariff 22.C.

[16] The proposed tariffs were part of a larger proposal that included a tariff for interactive and semi-interactive online music services (*SOCAN Tariff 22.A – Online Music Services* (“OMS”) for the years 2014, 2015, 2016, 2017 and 2018). (“*Tariff 22.A*”)

[17] Proposed Tariff 22.A, 22.B and Tariff 22.C were the subject-matter of an oral hearing that took place in the fall of 2022.

[18] After the hearing, SOCAN filed an application (the “Application”) to exclude from the approved tariff certain acts set out in proposed Tariff 22.A. The Application was approved by the Board.³

[19] The following tables (1 and 2) compare the last approved rates, the RFC rates and the approved rates:

² *SOCAN – Tarifs 22.B à G (Internet – other uses of music), 1996-2006 (reasons)* (October 24, 2008.(reasons) (October 24, 2008). [Reasons of October 24, 2008]

³ *SOCAN Tariff 22.A – Online music Services (2014-2018)* 2023 CB 5 (September 8, 2023).

Table 1: 22.B Rates

TARIFF 22.B – Commercial Radio and Satellite Radio (2007–2018)			
SERVICE	LAST APPROVED	RFC	APPROVED
RADIO	2.10%	4.20 %	2.10%
SATELLITE	2.13%	7.6% (on-demand) 5.3% (semi-interactive)	2.13%

Table 2: 22.C Rates

TARIFF 22.C – Other Audio Websites (2007-2018)			
REPertoire USE	LAST APPROVED	RFC	APPROVED
≤ 20%	0.75% \$28 minimum fee	1.5% \$34 minimum fee	0.75% \$33.48 minimum fee
> 20% to < 80%	2.10% \$79 minimum fee	4.2% \$96 minimum fee	2.10% \$94.45 minimum fee
≥ 80%	2.65% \$100 minimum fee	5.3% \$122 minimum fee	2.65% \$119.56 minimum fee

Note 1: the % rate base is “gross applicable revenues, including advertising” throughout.

Note 2: 22.B and 22.C last approved and RFC rates are effective rates.

Note 3: 22.C RFC rates are subject to a 1.0 ratio, which can be less if users report page impressions.

III. ISSUES

[20] Based on the arguments and evidence filed, we identify the following key issues for each targeted online use:

Tariff 22.B: Commercial Radio

[21] The issue is whether it would be appropriate to approve a tariff based on the RFC even though the RFC is not consistent with rates, and terms and conditions negotiated by SOCAN and a majority of the industry for the effective period. That agreement applies the last approved tariff to the effective period (2007-2018).

Tariff 22.B: Satellite Radio Service

[22] The issue is whether it would be appropriate to approve a different rate structure. The rate would no longer be based on the “Home Tariff.” The last approved tariff for satellite radio Internet services used the “Home Tariff” approach on the basis that the Internet branch of the service was not sufficiently independent from its core, conventional activity.

[23] Alternatively, if the “Home Tariff” approach is maintained, the issue revolves around its page impression (PI) component. A PI occurs each time a particular webpage or an item on a webpage has been viewed or accessed by a customer. Only webpages or items on a webpage containing music count towards royalties. Previously, half of all accessed webpages were deemed to include music. As a result, the tariff included a default 0.5 PI ratio, which in effect cut the royalty rate in half. Should this default ratio be changed from 0.5 to 1 on the basis that access to content is no longer provided through multi-paged websites?

Tariff 22.B: Pay Audio Service

[24] The issue is whether or not the Board should approve the Pay Audio portion of the proposed 22.B tariffs, as requested by SOCAN, given that the only known user has an agreement with SOCAN for the effective period that legally overrides any otherwise applicable tariff.

Tariff 22.C: Non-interactive websites

[25] The first issue is whether the computation of page impressions should be changed such that the ratio only concerns pages containing advertising. The second issue is whether the default page-impression ratio should be changed from 0.5 to 1 on the basis that access to content is no longer provided through multi-paged websites. The third issue is whether the minimum fee should be adjusted for inflation and, if so, whether SOCAN’s calculations are correct.

IV. ANALYSIS OF SOCAN 22.B

[26] SOCAN is asking that the Home Tariff approach and default PI ratio be reviewed.

[27] We analyze SOCAN’s proposals for each service.

ISSUE #1 – COMMERCIAL RADIO: SHOULD AN INDUSTRY AGREEMENT INFORM THE RATE?

[28] The answer is positive.

Background

[29] SOCAN claims that counting PIs reflects an antiquated way of delivering music online and is no longer appropriate, especially for the period 2014 to 2018.⁴

[30] According to SOCAN, the default value of 0.5 has operated as a disincentive for licensees to report the actual ratio to SOCAN in cases where that ratio exceeded the default value.⁵ The default ratio should instead be 1.

⁴ Exhibit SOCAN-7 (Leacock) at paras 140-149. [SOCAN-7]

⁵ *Ibid* at para 147.

[31] Furthermore, SOCAN has proposed to change the computation of the page impression ratio adjustment from “ratio of audio page impressions to all page impressions” to “ratio of audio page impressions containing advertising to all page impressions containing advertising.” SOCAN refers to the decision in *Tariff 22.B-G (1996-2006)* decision, in which the Board recognized that commercial radio stations are only required to include advertising revenues in the calculation of copyright royalties because advertising revenues are a proxy for audience; other sources of revenue (for example, production revenue) are not.

[32] In the same vein, SOCAN argues, webpages with advertising are the relevant metric for assessing the monetization of the site, and traffic to the portion of those webpages with audio content is the best metric to assess the revenues associated with music.

[33] There are no commercial radio stations participating in this proceeding.

Considerations

[34] The last approved rate is 4.2% of Internet-related revenues subject to a default 50% discount to account for non-audio PIs. The discount operated by default, since there was no requirement to report PIs to SOCAN.

[35] The RFC changes this approach. Instead, it provides that actual PI ratios must be reported in order to claim any discount for non-audio webpages.

[36] This is inconsistent with licences negotiated with SOCAN by the majority of commercial radio stations, as represented by the Canadian Association of Broadcasters (CAB)⁶ for the effective period.⁷ SOCAN informed the Board that the licence agreement maintains the last approved tariff. As such, it provides for an effective 2.1% rate.

[37] The RFC is also inconsistent with SOCAN’s representations that “SOCAN and the CAB request that the Board to approve Tariff 22B for the period (2007-2018) in the same form as was approved for (1996-2006). [...] There is no issue of unfairness to any other parties (i.e., radio stations who are not members of CAB) because the rates in 22B as previously approved by the Board are lower than the rates in the proposed Radio Station Webcast Tariffs which will be withdrawn or not approved.”⁸

⁶ CSI, Connect/SOPROQ, Artisti – Tariff for Commercial Radio Stations – Application to Vary 2012-2017, CB-CDA 2018-225 (December 14, 2018) at paras 43-44 (CAB members represent an estimated 95% of the industry : *Statement of Royalties to be collected for the reproduction, in Canada, of musical works, of sound recordings, and of performers’ performances*).

⁷ Email from SOCAN, August 10, 2018 (SOCAN informed the Board that “[...] SOCAN and CAB have recently entered into a settlement agreement that covers Tariffs 1.A and 22.B though to the end of 2018. A copy is attached for the Board’s reference.”).

⁸ *Ibid.*

[38] Since the SOCAN-CAB agreement perpetuates the status quo for 2007-2018 and SOCAN describes the status quo as fair to users who are not members of the CAB, there is little justification for approving a tariff modification that in effect doubles the previous rate, is inconsistent with an agreement with the “great majority” of the market, and even raises fairness issues, according to SOCAN itself.

[39] In particular, fairness would be significantly strained, since it may be required yet unfeasible for some users to provide retroactively an actual ratio of music pages (or else be subject to a 1.0 default ratio). CAB members would not be subject to this constraint. The Board has discussed and addressed similar situations, where approving a proposed tariff would mean that some users may be subject to higher royalties and more onerous reporting obligations compared to competitors who operate under more favourable conditions.⁹

[40] Accordingly, we approve the portion of the proposed tariff that relates to commercial radio stations, unchanged from the last-approved.

ISSUE #2 – SATELLITE RADIO: SHOULD THE RATE OR (ALTERNATIVELY) THE RATE BASE APPLICABLE TO SIRIUSXM’S WEBCASTING SERVICE BE CHANGED?

[41] The answer is negative.

Background

[42] SiriusXM is the only Canadian satellite radio service provider and thus the only service provider to be affected by this proposal.¹⁰

[43] The last approved royalty rate for webcasting by a broadcaster that is subject to the Satellite Radio Tariff was set by reference to the Home Tariff. For the years 2010-2018, this was 4.26 percent.¹¹ The tariff also estimated the appropriate revenue base to which this rate applies, based on a page impression formula. Essentially, pages with music count towards the revenue base, pages without music do not.

[44] In 2008, when the Board approved the predecessor tariff to 22.B (Satellite Radio) it explained its approach as follows:

- First, the nature of music uses on the Internet continues to evolve. The list of uses SOCAN sought to target is incomplete; new ones will inevitably surface. A use-based tariff might not adapt to the constantly evolving Internet environment, at least for now.

⁹ *Non-Commercial Radio Reproduction Tariff (2003-2017)* 2022 CB 12 (September 2, 2022) at paras 15-17.

¹⁰ *SOCAN, Re:Sound – Tariff for Satellite radio Services, 2010-2018*, CB-CDA 2017-064 at para 11 (This fact is undisputed). [CB-CDA 2017-064]

¹¹ *Ibid.*

- Second, it might be difficult to match the uses that SOCAN describes to what actually occurs over the Internet. For instance, would someone who transmits an audio signal containing mostly music and some spoken word be similar to pay audio or to commercial radio? Yet the tariffs SOCAN proposed for these items are significantly different.
- Third, those who already require a SOCAN licence for their primary activity tend to use music on the Internet essentially to support that activity. The main purpose of the website of a radio station is not to generate revenues, but to stimulate interest in the station's broadcasts.¹²

[45] The Board however noted:

Our decision to certify a user-based Internet tariff is not to be taken as the approach that we will use for all tariffs in the future. We expect that the relative importance of websites in the overall business strategy of some music users will increase; in time, websites will become for some an independent, significant source of revenue. Existing monitoring tools that already allow a precise assessment of music consumption will be further refined; better, cheaper tools will be developed. We will re-examine this issue in the future. As other developments occur, a use-based approach may prove to be more appropriate.¹³

[46] The Board also explained that

some account must be taken of the fact that while sound is omnipresent in a radio station's over-the-air signal, this is not true of the same station's website: a significant number of page impressions deliver no audio content. Therefore, if the Tariff 1.A rate is to be used as a starting point to set the tariff for a commercial radio station's Internet activities, then the portion of Internet-related revenues that are subject to the tariff should be a function of audio content to all other content, measured by the number of page impressions.¹⁴

[47] The Board's approach was explained as follows:

We will thus establish that the rate base will consist at most of 50 percent of the station's Internet-related revenues. Radio broadcasters will be allowed to *further* discount the rate base by monitoring and reporting the ratio of audio page impressions to all page impressions on their site. We do not wish to force all stations to monitor their Internet activity, hence our

¹² Reasons of October 24, 2023, *supra* note 2 at paras 4-6.

¹³ *Ibid* at para 7; In *Re: Sound – Tariff 8 (Non-Interactive and Semi-Interactive Webcasts), 2009-2012*, (reasons) (May 16, 2014) [Reasons of May 16, 2014] (the Board abandoned the user-based approach) see para 95: “We have already dealt with simulcasts. As for the rest, we find that the time has come to move from user-based to use-based tariffs for most forms of webcasting under examination. The developments we anticipated that would lead to such a shift have largely occurred. [Referring to SOCAN 22.B-G 1996-2006] Internet transmissions now are an integral part of the overall business strategy of many music users; for some, it is their only source of revenue. Better, cheaper monitoring tools have been developed. Business models have diversified; to allow certain users (radio stations for example) to shelter behind their main business model could lead to the creation of unintended competitive advantages over new entrants.”

¹⁴ *Ibid* at para 37.

decision to remove some of the revenues from the rate base. On the other hand, we did not wish to set too large a discount and thereby risk that no radio station would have benefited from further shrinking its rate base. Removing half of the revenues from the rate base should relieve many stations from monitoring their Internet activity, while allowing SOCAN and the Board to learn more about the importance of these different types of uses.¹⁵ [Emphasis added]

[48] In other words, the approach was to excuse users from monitoring their content by means of a pre-emptive adjustment to the rate base to account for non-musical content.

[49] The foregoing approach also applied to the satellite service provider's online activities and meant that "[j]ust as commercial radio, [satellite and pay audio] service[s] [providers] should pay at the same rate as for their main SOCAN tariff, subject to further discounting upon adequate monitoring and reporting."¹⁶

[50] SOCAN is now questioning the status quo and is seeking an increase both through a higher rate and through a larger revenue base to which the rate would apply.

[51] Given that the limited evidence in this matter suggests that SiriusXM's webcasting service is ancillary, consisting of "spillovers" from its main regulated activity, we are of the view that it is appropriate to maintain the status quo, linking the royalty rate to the tariff rate applicable to the conventional activity, for this class of service providers. SOCAN did not submit evidence that would lead us to think otherwise.

[52] With respect to the default ratio to account for non-musical content streamed, there is also a lack of evidence to support a change in the rate base.

[53] Our detailed analysis follows the description of the parties' positions.

SOCAN's position

[54] SOCAN submits that SiriusXM webcasting services should be subject to the 22.A rates (7.6% of the service provider's Internet-related revenues if the service provider offers on-demand streams, 5.3% if the service provider only offers semi-interactive streams).

[55] According to SOCAN, SiriusXM offered standalone online music services¹⁷, and specifically streams with "limited interactivity."¹⁸

[56] Alternatively, there should be one key change: the removal of the page impression (PI) ratio from the tariff formula, or—alternatively—an adjustment to the default ratio from 0.5 to 1.0.

¹⁵ *Ibid* at para 38.

¹⁶ *Ibid* at para 63.

¹⁷ Exhibit SOCAN-10 in response to Order CB-CDA 2022-048, Q.11. [SOCAN-10]

¹⁸ Exhibit SiriusXM-2 in response to Order CB-CDA 2022-048, Q.10. [SiriusXM-2]; Exhibit SOCAN-1 at para 17.

[57] SOCAN submits that PIs, which measure the number of webpages where a visitor can hear a “sound” against the number of all webpages on a website, may have reflected how websites may have been set up by radio stations or other service providers in the 1990s and 2000s. However, according to SOCAN, PIs are an antiquated way of measuring music use since access to content has increasingly been provided through a single webpage or an app for mobile devices (vs. multiple webpages on a given website).¹⁹

[58] SOCAN’s evidence is that when a 0.5 default is available, service providers simply apply the default. According to SOCAN, this implies that the actual PI ratio is higher.²⁰ SOCAN also claims that this is also true of SiriusXM: it has been carrying out its online webcasting activities in the same manner as Tariff 22.A users have been operating their services. Yet SiriusXM has been applying the default PIs ratio in its reporting.²¹

[59] Without proper reporting, SOCAN submits, the Board has no information with which to determine the appropriateness of page impression ratios. The Board should follow the model set out in its *Tariff 22.G – Game Sites (2007-2019)* decision (with a default ratio of 1), which involved nearly identical circumstances.²²

[60] Finally, SOCAN takes issue with SiriusXM’s unsupported and untested factual assertions since SiriusXM had a limited intervenor status. SOCAN argues that they are inadmissible and contrary to procedural fairness: SiriusXM cannot escape interrogatories and yet adduce evidence.

SiriusXM’s position

[61] SiriusXM argues that its online music services are different from those online music services to which SOCAN 22.A applies.²³ Namely that:

- a. SiriusXM’s content is regulated, which entails costs not borne by Tariff 22.A users;
- b. SiriusXM’s content has a lower use of music than the content of Tariff 22.A users;
- c. SiriusXM’s infrastructure investment is greater than that of Tariff 22.A users;
- d. SiriusXM’s ancillary streaming service should not be presumed to differ from its main satellite service.

¹⁹ SOCAN-7, *supra* note 4, at paras 140-149; see Board expertise in: Reasons of May 16, 2014, *supra* note 13 at para 112; *SOCAN Tariff 22.G – Game Sites (2007-2019)* 2022 CB 7 (August 5, 2022) at paras 16-19 [Reasons 2022 CB 7].

²⁰ SOCAN-10, *supra* note 17, Appendix 7 (See 22.B data).

²¹ SOCAN-7, *supra* note 4, at para 148.

²² Reasons 2022 CB 7, *supra* note 19

²³ SiriusXM-2, *supra* note 18, Q.11.

[62] SiriusXM claims that its online service cannot be disentangled from its primary satellite service from either a revenue or a cost perspective. On the revenue side, the dominant service offering of SiriusXM has been, for many years, a bundled offer with streaming and satellite radio in the same package for one fee. On the cost side, numerous of the infrastructural and regulatory contributions discussed above apply both to the dominant satellite radio service and to the ancillary streaming service. As such, it concludes, both revenues and costs are “commingled” for the two kinds of service.

[63] SiriusXM further argues that there is no factual basis to justify deviating from the status quo, that is, the last-approved Tariff 22.B.

[64] According to SiriusXM, even if the last-approved rate were used as a point of reference, it should be revisited and adjusted downwards to account for (a) the much heavier proportion (compared to the main 22.A tariff users) of talk, news, sports and other low-music-use channels on SiriusXM Canada’s online streaming service during the tariff period; and (b) the continued existence of non-music pages on its service during the tariff period.

[65] Also, according to SiriusXM, SOCAN’s own data for 2018 suggests that PIs are still relevant as some actual PI reporting by another class of users is taking place.²⁴ There are no data for 22.B on the record other than 2018.²⁵

[66] SiriusXM submits that the *Sirius Canada*, *XM Canada* and *SiriusXM Canada* websites during the 2007 to 2018 period all had numerous webpages that did not involve the playback of music, a fact that can be verified by using the Wayback Machine at archive.org. Accordingly, (i) there remained non-audio-based PIs during the tariff period; and (ii) even if the opinion expressed by SOCAN were admissible, it is difficult given the passage of time to reconstitute information on which the Board could reasonably conclude when or to what extent the page impression ratio became antiquated or outdated.

[67] With respect to SOCAN’s allegations of improperly adduced factual evidence, SiriusXM states that it merely brought the Board’s attention to SOCAN’s lack of evidence or answered the Board’s questions (as per Order CB-CDA 2022-048).

Considerations

[68] While moving away from the “Home Tariff” approach may be appropriate after a careful review of the target business model,²⁶ here, there is no evidence that would support deviating from that approach.

²⁴ SOCAN-10, *supra* note 17, Appendix 7 (See 22.B data).

²⁵ *Ibid* Q.6.

²⁶ See e.g., *Re: Sound and SOCAN – Stingray Pay Audio and Ancillary Services Tariff (2007-2016)* 2021 CB 5

[69] SiriusXM's submissions suggest that the revised proposed 22.B formula is not suited to its business model in terms of the nature of the content streamed. SiriusXM also claims that its ancillary webcasting service is closely integrated with its main regulated activity.²⁷

[70] If the "Home Tariff" approach is maintained, the question is whether the default ratio should be changed from 0.5 to 1. The limited evidence provided by SiriusXM (at the Board's request) suggests that there remained non-audio-based page impressions during the tariff effective period. Even if the portion of such page impressions was in fact insufficient to warrant a 50% discount, it may be infeasible for a user who has not monitored their page impressions to retroactively provide an actual ratio of music pages (or else be subject to a 1.0 default ratio).

[71] In this respect, SOCAN has not stated that SiriusXM can track retroactively page impressions (nor how it could do so).

[72] SiriusXM, in response to Order CB-CDA 2022-048, indicated that "SiriusXM Canada is consulting internally regarding an answer to the 'page impressions' question and will revert to the Board if it is able to obtain or engineer accurate information relating to the measurement of page impressions from 2007 to 2018."²⁸ SiriusXM has not communicated with the Board on this subject; as such, we find that it was not able to find this information.

[73] Furthermore, the question remains whether users such as SiriusXM should have been alerted to monitoring page impressions during the proposed tariff period. One can answer this question by looking at the proposed tariffs and the last approved tariffs.

[74] With respect to the proposed tariffs, none explicitly covered the online activities of satellite radio service providers until 2014. There was no reference to PIs until the 2014 proposed tariff. For 2014-2018, the proposed published SOCAN tariffs provided that the default page impression ratio would be 1. It was not mandatory to count page impressions, although the proposed scheme would provide an incentive to do so.

[75] The analysis of the last-approved tariff takes us to the same answer. From 2007 to 2018, users, such as SiriusXM, operated under the continuation of rights of the last-approved tariff, which did not make PI reporting compulsory. As such, users were not alerted to this issue. As mentioned above, that tariff implemented a no-monitoring policy based on the assumption that the rate base reflected the "normal" ratio of audio to non-audio content. As a result, a material change in

(May 28, 2021) at paras 239-249.

²⁷ See SiriusXM response to Order CB-CDA 2022-048, September 9, 2022, at p 8-9; See SOCAN's Reply to SiriusXM's Responses to Board Questions, September 16, 2022.

²⁸ SiriusXM-2, *supra* note 18, at p 3.

circumstances would have been required to warrant a change in policy and to this point, none has been filed in evidence.

[76] Without a clear factual background or obligation to monitor page impressions, it is unfair to expect SiriusXM to count page impressions retroactively.²⁹

[77] In the current proceeding, the very limited evidence available weighs in favour of retaining the status quo, both with respect to the rate and to the rate base.

[78] It would have been useful to have evidence on several points to support the choice of a given proxy or tariff formula and the appropriate rate base, including:

- The way the content is consumed (for example, by apps on mobile devices; single or multiple webpages);
- Whether there is any issue of revenues from webcasting blending with the conventional service or equivalently, whether revenues generated for the conventional service and the webcasting business jointly can be disentangled from one another;
- The nature of the business model (for example, ad-based or subscription-based or mixed; ancillary or not);
- The available tools to monitor content use and their costs; and
- The nature and relative proportion of the content streamed (for example, music vs. talk), and the appropriate revenue allocation mechanism, where applicable.

[79] Accordingly, we approve this portion of the tariff, unchanged from the last-approved.

ISSUE #3 – PAY AUDIO: SHOULD WE APPROVE THE PAY AUDIO PORTION OF THE PROPOSED 22.B TARIFFS?

[80] The answer is negative.

Summary

[81] When a decision will not have the effect of resolving a matter which affects the rights of any persons targeted by the proposed tariff, the matter is moot.

[82] Because approved tariffs do not apply to activities that are the subject of an agreement between a user and a collective society, approval of the pay audio portion of the Proposed 22.B Tariffs would have no direct legal effect on the rights of that user and collective society.

²⁹ Reasons 2022 CB 7, *supra* note 19 at paras 16-19.

[83] SOCAN has informed the Board that all known activities covered by the pay audio portion of the Proposed 22.B Tariffs under consideration in this proceeding are the subject of a licence by SOCAN.

[84] In this case, all issues in respect of the pay audio portions of the Proposed 22.B Tariffs, including deciding whether they are fair and equitable, are moot.

[85] Even if a matter is moot, a decision maker may exercise their discretion to consider the matter. Consideration of the factors identified by the Supreme Court in *Borowski v. Canada (Attorney General)* (*Borowski*),³⁰ as to whether to exercise this discretion leads us to decline to determine the matter.

[86] Therefore, our decision is to not approve the Pay Audio portion of the Proposed 22.B Tariffs under consideration in this proceeding.

Issues

[87] To decide whether the Board should approve the pay audio portion of the Proposed 22.B Tariffs, we determine

1. whether all activities covered by the proposed tariff are already the subject of an agreement;
2. if so, whether the pay audio portion of the 22.B Proposed Tariffs before us is moot; and
3. whether the Board should exercise its discretion to determine the matter anyhow.

Analysis

i. Are all covered activities the subject of an agreement?

[88] In order to be able to determine whether all activities covered by the Proposed 22.B Tariffs are covered by an agreement, we first have to identify those activities.

The Scope of the Proposed 22.B Tariffs

[89] The following proposed tariffs (the “Proposed 22.B Tariffs”) are under consideration in this proceeding

- *SOCAN Tariff 22.2 – Audio Webcasts (2007, 2008)*
- *SOCAN Tariff 22.B – Audio Webcasts (2009, 2010, 2011, 2012, 2013)*
- *SOCAN Tariff 22.B – Commercial Radio, Satellite Radio and Pay Audio (2014, 2015, 2016, 2017, 2018)*

³⁰ *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CanLII 123.

[90] Each of the Proposed 22.B Tariffs each has several components, one of which relates to pay audio.

[91] For the years 2007 and 2008, the pay audio portion of *Tariff 22.2 – Audio Webcasts* covered the “communications from Sites or Services whose content is similar to that of a pay audio service subject to the SOCAN-NRCC Pay Audio Services Tariff.”

[92] For the years 2009 through to 2013, while the relevant portion of SOCAN’s proposed tariffs was now labelled *Tariff 22.B – Audio Webcasts*, the pay audio portion covered the same activities.

[93] Subsequently, from 2014 to 2018, the scope of the proposed tariffs was changed. The pay audio portion of the proposed tariffs for those years apply to “the communication of audio works on the Internet by a broadcaster that is subject to [...] the Pay Audio Tariff.” Thus, the similarity of the content was no longer a requirement. Instead, the tariffs applied to any user that was already subject to the Pay Audio Tariff.

[94] In summary, the pay audio portion of the Proposed 22.B Tariffs

- for the years 2008-2013, cover webcasts with pay-audio-like content; and
- for the years 2014-2018, cover webcasts done by “broadcasters” that are already subject to the Pay Audio Tariff.

[95] Stingray is the only licenced provider of pay audio programming during the relevant period. In addition to pay audio programming, Stingray also provides semi-interactive webcasts, with content similar to that of pay audio programming (known as “Stingray Mobile”).

[96] This service is within the scope of the Proposed 22.B Tariffs, whether for 2008-2012 or for 2013-2018: it is a webcast service with pay-audio-like content and is done by a “broadcaster” that is subject to the Pay Audio Tariff.

[97] Therefore, the pay audio portion of Proposed 22.B Tariffs would cover the Stingray Mobile service.

The scope of the Proposed 22.B Tariff under consideration in this proceeding

[98] However, due to a complex procedural history the Proposed 22.B Tariffs are not in this proceeding in their entirety. In particular, “near-simulcasts” provided by Stingray have been excluded from consideration in this proceeding.

[99] Stingray provides the Stingray Mobile service in Canada in two ways:

1. to subscribers of broadcasting distribution undertakings (BDUs) as part of a cable package that includes pay audio channels; and

2. to consumers who subscribe to the service with Stingray directly (specifically, in the absence of any BDU).

[100] The former (that is, when Stingray Mobile is provided through BDUs to cable subscribers) have been referred to as “near-simulcasts,” and are an activity that was removed from this proceeding by Ruling CB-CDA 2018-205.

[101] It is worth noting that Stingray Mobile only operated as of 2014.³¹

[102] For the years 2007-2016, near-simulcasts are covered by the approved *Re:Sound and SOCAN – Stingray Pay Audio and Ancillary Services Tariff (2007-2016)*.³² For the years 2017-2018, near-simulcasts are to be considered with the main pay audio proposed tariff.³³

[103] What therefore remains in this proceeding are uses other than near-simulcasts. We are aware of only one service that would be covered by this remaining portion: Stingray Mobile, when it was provided directly to individuals during the years 2014-2018.

The SOCAN-Stingray Agreement

[104] In spring of 2023, SOCAN informed the Board that

- it has reached an agreement with Stingray on the licensing of Stingray Mobile for the audio-only activities covered by the Proposed Tariff for the Tariff Period;³⁴ and
- SOCAN is not aware of any acts covered by the pay audio portion of the Proposed 22.B Tariffs that are not covered by their agreement.³⁵

[105] While SOCAN leaves open the theoretical possibility that there may be acts that are not covered by their agreement,³⁶ it does not expect the Board to approve the pay audio portion of the Proposed 22.B Tariffs.³⁷

Conclusion

³¹ Response from SOCAN to Notice CB-CDA 2023-022, *supra* note 1.

³² *Re:Sound and SOCAN - Stingray Pay Audio and Ancillary Services Tariff (2007-2016)* 2021 CB 5-T (May 29, 2021) C Gaz Supplement Vol. 155, No 22.

³³ Notice of the Board CB-CDA 2018-207, October 26, 2018.

³⁴ Application of SOCAN to Amend the Proposed Tariffs, April 12, 2023 (see footnote 17 of the application).

³⁵ Response from SOCAN to Notice CB-CDA 2023-022, *supra* note 1, at p 2.

³⁶ *Ibid* at p 3.

³⁷ *Ibid* at p 2 (SOCAN did not believe that it was necessary to formally withdraw the Pay Audio portion of proposed Tariff 22.B. SOCAN also refers to the Board’s decision of SOCAN Tariff 22 (Internet – Other Uses of Music – Other Sites), 2007-2013 (CB-CDA 2018-214), in which the Board declined to approve certain proposed tariffs and concluded that it was not necessary to address SOCAN’s willingness to withdraw those tariffs. However, if the Board prefers a formal application to withdraw that portion of the tariff, SOCAN would be prepared to file such an application”).

[106] Given SOCAN's statements and our own conclusions that only the direct-to-consumer version of Stingray Mobile would be covered by the remaining portion of the pay audio portion of the Proposed 22.B Tariffs, we conclude that all activities under consideration in this proceeding are the subject of an agreement with a collective.

ii. Are the pay audio portions of Proposed 22.B Tariffs moot?

[107] The Supreme Court in *Borowski* described mootness as the practice that a decision-maker will decline to decide a matter when the decision will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.

[108] We conclude that the principle of mootness can apply to matters before the Board. Furthermore, the concept of "parties" cannot be restricted to those that decide to participate in the consideration of a proposed tariff. Rather, it must be understood as encompassing all persons whose activities are targeted by the proposed tariff. Indeed, their rights may be affected by the Board's decision.

[109] Even with this expanded notion of "parties," we conclude that all issues in relation to the portions of the Proposed 22.B Tariffs are moot.

The doctrine of mootness can apply to matters before the Board

[110] The common law applies to the Copyright Board unless changed by legislation.

[111] There are two portions of the *Copyright Act* that one could identify as potentially changing the common law.

[112] The first is the use of the term "shall" in subsection 70(1), which provides that

"The Board *shall* [...] approve the proposed tariff after making any alterations to the royalty rates and the related terms and conditions, or fixing any new related terms and conditions, that the Board considers appropriate."

[113] The second is the possibility for a collective society to withdraw a proposed tariff in certain circumstances (section 69 of the Act). From this, one could argue (*a contrario*) that this explicit process of concluding the consideration of a matter implicitly means that other means, such as mootness, might not be available.

[114] Do either, or both of these provisions, have the effect of making the doctrine of mootness unavailable in relation to matters before the Board?

[115] For the following three grounds, we conclude that they do not.

[116] First, it is a settled principle of statutory interpretation that the legislature is assumed not to have intended to change the common law unless it has done so clearly and unambiguously.³⁸

[117] In our opinion, neither the language in subsection 70(1), nor an implicit *a contrario* argument with respect to the existence of the possibility to withdraw a proposed tariff under s. 69, is sufficiently clear and unambiguous as to change the common law.

[118] We contrast these provisions with a clear and unambiguous example within the *Copyright Act* itself, which legislated an end to common law copyright:

“No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.”³⁹

[119] Second, the *Copyright Act* requires the Board to deal with all matters “as informally and expeditiously as the circumstances and considerations of fairness permit.”⁴⁰

[120] Given this requirement, it would be incongruous to interpret section 69 or subsection 70(1) as removing the possibility for the Board to rely on a common law doctrine that would enable it to deal expeditiously with moot matters before it.

[121] Last, the Federal Court of Appeal has recognized that the use of the term shall in a previous version of subsection 70(1)—with almost the same language—did not require the Board to approve an “unapprovable tariff.”⁴¹ Therefore, the use of the term “shall” in subsection 70(1) does not create an absolute obligation on the Board to approve all proposed tariffs before it.

[122] We therefore conclude that the doctrine of mootness can and should apply to matters before the Board.

All issues raised by the remaining portions of Proposed 22.B Tariffs are moot

[123] The Supreme Court in *Borowski* and other decisions use the term “parties” to refer to those persons that could have been – had the matter not been moot – affected by a decision of the court.

[124] The term “parties” as used in *Borowski* and other cases has to be understood more expansively in the context of proposed tariffs. The potentially affected parties include all persons

³⁸ *Heritage Capital Corp. v Equitable Trust Co.*, 2016 SCC 19 at paras 29-30.

³⁹ *Copyright Act*, RSC, 1985, c. C-42, s. 89. [Act]

⁴⁰ *Ibid*, s. 66.502.

⁴¹ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2010 FCA 139 at para 29 (The provisions at the time read: “The Board shall certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions related thereto as the Board considers necessary, having regard to [...]”).

whose activities are targeted by the proposed tariff as well as the collective society that proposed the tariff.

[125] We have already concluded that all activities under consideration in this proceeding are the subject of an agreement with a collective society. (See para 106)

[126] An approved tariff does not apply to a person in respect of the subject matter covered by an agreement with a collective.⁴² Were the Board to approve a tariff whose activities are all the subjects of agreements with a collective society, that approved tariff would not apply to any person.

[127] Therefore, even with a broad understanding of “parties,” our determination of the Proposed 22.B Tariffs would not affect the rights of any parties.

[128] As such, all issues in relation to the portions of the Proposed 22.B Tariffs – in particular what royalty rates, terms and conditions would be fair and equitable – are moot.

iii. Should the Board determine the matters nevertheless?

[129] The doctrine of mootness states that moot cases should not be determined unless the decision maker exercises its discretion to decide the matter nevertheless.

[130] *Borowski* enunciates the following factors that must be considered by a decision maker before exercising their discretion to decide a matter that is moot:

- i) presence of adversarial context: will the matter be robustly argued?
- ii) Judicial economy: is it worthwhile to allocate scarce judicial resources to resolve the moot issue?
- iii) Unnecessary rule/law making: since lawmaking in the abstract is a task reserved for Parliament, is this an intrusion into that sphere?

[131] In this proceeding, there is little weighing in favour of deciding the matter.

[132] In our evaluation of the presence of an adversarial context, we do note that SOCAN made representations in respect of the pay audio portions of the Proposed 22.B Tariffs. On the other hand, there were no active objecting parties that could robustly argue the matter.

[133] In respect of the factors of judicial economy and unnecessary rulemaking, we note both

- i) the Board’s statutory obligation that it determines matters “as informally and expeditiously as the circumstances and considerations of fairness permit”;

⁴² *Act, supra note 39, s. 74.*

- ii) SOCAN’s statement that it does not expect the Board to approve the remaining pay audio portions of the Proposed 22.B Tariffs; and
- iii) SOCAN is not aware of any acts covered by the pay audio portion of the Proposed 22.B Tariffs that are not covered by their agreement.

[134] The presence of these elements makes our evaluation of the factors of judicial economy and unnecessary rule-making weigh against the Board deciding the matter.

Conclusion

[135] All issues in relation to the remaining portions of the Proposed 22.B Tariffs are moot. Given our consideration of the *Borowski* factors, we decline to exercise our discretion to determine the matter nevertheless.

[136] We do not approve the pay audio portions of the Proposed 22.B Tariffs.

V. ANALYSIS OF THE SOCAN 22.C RFC

[137] SOCAN proposes for 2007-2018 the same rates as last approved but with a default ratio of 1 on account of page impressions (PIs), on the basis that access to protected content is done through a single webpage (vs. multiple webpages).

[138] For the reasons previously noted by SOCAN, a 0.5 default ratio disincentives tariff users from reporting actual value to SOCAN and in any event, the concept itself has not been relevant or applicable for many years.⁴³

[139] Furthermore, SOCAN has proposed to change the computation of the page impression ratio adjustment from “ratio of audio page impressions to all page impressions” to “ratio of audio page impressions containing advertising to all page impressions containing advertising.”⁴⁴

[140] SOCAN notes that the minimum fees have not been adjusted for inflation since 2006, which is the last year covered by the approved tariff. It argues that a 121.9% inflationary adjustment is appropriate.⁴⁵

[141] The following table compares the last approved, the proposed and requested (as per the RFC) minimum fees for this category of users.

Table 3: Comparison of Minimum Fees

SOCAN Repertoire Use	22.F Minimum Fee	Proposed	Requested
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⁴³ SOCAN-7, *supra* note 4, at para 151.

⁴⁴ Exhibit SOCAN-5 at p 7.

⁴⁵ SOCAN-7, *supra* note 4, at paras 152-155.

		Minimum Fee	Minimum Fee
≤ 20%	\$28	\$37	\$34
> 20% to < 80%	\$79	\$104	\$96
≥ 80%	\$100	\$132	\$122

[142] While there are no objectors or representatives of users participating in this aspect of the proposed tariff, Exhibit SOCAN-10, Appendix 8, identifies users for the tariff period.

Considerations

[143] There are three issues in respect of the Other Sites proposed tariffs:

- Should the computation of page impressions be changed such that the ratio only concerns pages containing advertising?
- Should the default page impression ratio be changed from 0.5 to 1? And
- Should the minimum fee be adjusted for inflation?

ISSUE #1: SHOULD PAGE IMPRESSIONS BE LIMITED TO PAGES WITH ADVERTISING?

[144] Our answer is negative.

[145] SOCAN explains that webpages with advertising are the relevant metric for assessing the monetization of a site, and traffic to the portion of those webpages with audio content is the best metric to assess the revenues associated with music.

[146] This change conflates two different concepts: the use of music and the rate base. The PI ratio measures the former. The rate base is set as “Internet-related revenues.” This term is precisely defined in the RFC.

[147] Merging the two concepts may have unintended effect. Will this change tend to increase royalties payable, decrease royalties payable, or leave them unchanged? The answer probably depends on the users. If an advertiser pays a fee for an estimated number of times that their advertisement is displayed, and if the 22.C user allocates the advertisement randomly to the pages of its website, this should not change the PI ratio at all. But if the allocation is non-random, for example, if the agreement between the advertiser and the 22.C user provides that the advertisement is only to be displayed on audio pages, the consequence of this seemingly small change could be profound. We have no data to predict the impact of this proposal.

[148] Furthermore, if 22.C users have been collecting PI information, there is nothing to suggest that they collected this information with respect to whether the page contained advertising or not. The tariff dates back to 2007; the records needed to perform the calculation requested by SOCAN are likely long destroyed. So even if we believed that there was a statistical or economic

justification for the change proposed by SOCAN, we would nevertheless be concerned about implementing it retroactively.

ISSUE #2: SHOULD THE DEFAULT PAGE IMPRESSION RATIO BE CHANGED FROM 0.5 TO 1?

[149] Our answer is negative.

[150] The last approved rates (1996-2006) are subject to a 50% default discount and the rate base is the Internet-related revenues, as follows:

- 1.5% (x 0.5) if music use is 20% or less, subject to an annual minimum fee of \$28
- 4.2% (x 0.5) if music use is more than 20% and less than 80%, subject to an annual minimum fee of \$79
- 5.3% (x 0.5) if music use is 80% or more, subject to an annual minimum fee of \$100

[151] SOCAN filed evidence for 2007-2018, showing that some service providers are reporting actual, specific page-impression ratios in line with the last-approved tariff.⁴⁶

[152] The same reasoning in our analysis of *Tariff 22.B – Satellite Services* applies here: it may be unfeasible for users who have not monitored their page impressions to retroactively provide an actual ratio of music pages (or else be subject to a 1.0 default ratio); SOCAN has not stated that counting is possible; there was no obligation to monitor page impressions (there was none under the last-approved tariff); there is no evidence on how content is provided and what the “normal” ratio (if any) between audio and non-audio content streamed through 22.C services is.

[153] Furthermore, here too, it is likely unfair to expect users to count page impressions retroactively.⁴⁷

[154] The balance of convenience here favours the status quo. To support its position, it would have been helpful to the Board if SOCAN were able to provide the same kind of evidence described above under 22.B – Satellite Services, including:

- The way the content is consumed (for example, by apps on mobile devices, single or multiple webpages);
- Whether there is any issue of revenues from webcasting blending with the conventional service or equivalently, whether revenues generated for the conventional service and the webcasting business jointly can be disentangled from one another;

⁴⁶ SOCAN-10, *supra* note 17, Appendix 8.

⁴⁷ Reasons 2022 CB 7, *supra* note 19 at paras 16-19.

- The nature of the business model (for example, ad-based or subscription-based or mixed; ancillary or not);
- The available tools to monitor content use and their costs; and
- The nature and relative proportion of the content streamed (for example, music vs. talk), and the appropriate revenue allocation mechanism where applicable.

[155] Accordingly, we approve a tariff rate, unchanged from the last approved, subject to the following regarding the minimum fee.

ISSUE #3: SHOULD THE MINIMUM FEE BE ADJUSTED FOR INFLATION?

[156] The answer is positive.

[157] We are of the view that an inflationary adjustment of 19.56 % from January 2007 to December 2017 is appropriate because inflationary adjustments preserve the purchasing power of rights owners. Furthermore, the requested rates do not exceed the rates from the Proposed Tariffs (as initially published in the *Canada Gazette*), and, as such, do not raise procedural fairness issues.

[158] The Board generally measures inflation as the percentage change in the CPI (consumer price index) between January of the first year and December of the last full year of the period for which data is available.⁴⁸

[159] SOCAN asks for an inflationary adjustment of 21.9% using the monthly CPI growth from January 2007 to December 2018 to calculate this. We have verified SOCAN's method of calculation in Exhibit SOCAN-7 (at para 153) and found that the proposed adjustment calculation is consistent with the Board's usual method in calculating inflation.

[160] However, the issue at hand is whether to apply the inflation increase starting in January 2018, given that all of 2018 (January-December) is used in the year of calculation. The Board has frequently said that it will not forecast inflation; however, in 2023, inflation for the period of 2018 is known.

[161] Nonetheless, allowing all of 2018 to be included in the adjustment starting January 2018 would not be fair or equitable. In such a case, users paying royalties for the period of January 2018 would be paying a higher rate based on an inflationary increase that had not yet occurred. For these reasons, an inflationary adjustment using the period between January 2007-December 2017 is more appropriate.

⁴⁸ See e.g., *SOCAN Tariff 3.C – Adult Entertainment Clubs (2023-2025)*, 2022 CB 13 (September 23, 2022) at paras 10-17; *SOCAN – Various Tariffs, 2007-2017*, CB-CDA 2017-038 (May 5, 2017) at para 7.

[162] According to Statistics Canada, the CPI in January 2007 was 109.4 and the CPI in December 2017 was 130.8. This results in a 19.56% inflationary increase. This results in minimum fees of \$33.48, \$94.45, and \$119.56 respectively.

VI. ADMINISTRATIVE TERMS

[163] The Board consulted the parties and some non-parties (namely the Canadian Association of Broadcasters or “CAB”) on the RFC’s administrative terms.⁴⁹

[164] Indeed, the Board had noted that the RFC includes administrative terms that are new compared to the last-approved corresponding tariff (*SOCAN 22.B-G 1996-2006*).⁵⁰

[165] The Board had also noted, however, that several of the RFC’s administrative terms can be found in the last-approved *CSI, SOCAN, SODRAC – Tariff for Online Music Services, 2010-2013* (OMS 2011-2013).⁵¹

[166] We address each proposed tariff provision that required consulting. We also address some changes to enhance tariff clarity where appropriate.

A. REPORTING UNDER TARIFF 22.B AND 22.C

[167] The RFC of Tariff 22.B and 22.C sets out new reporting requirements (compared to the last-approved corresponding tariff OMS 1996-2006), particularly with respect to the “additional information.”

[168] It was unclear whether this information can be provided retroactively and why the qualifier “where available” (and associated definition of “available”) found in OMS 2011-2013 is not included.

[169] All consulted agree that a “where available” qualifier is appropriate. SOCAN, however, requested that a “for certainty” provision similar to subsection 6(1.1) of OMS 2011-2013 should be included. According to SOCAN, the qualifier and this provision provide certainty to the collectives and users regarding when music use information is considered to be available.

[170] We agree and include both the qualifier and a “for certainty” provision in the tariff that we approve.

⁴⁹ Notice of the Board CB-CDA 2023-022, April 28, 2023.

⁵⁰ *Statement of Royalties to Be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works: SOCAN Tariffs 22.B to G – Internet Other Uses of Music* (1996-2006) (approved tariff) (October 25, 2008) C Gaz Supplement vol. 142, No. 43.

⁵¹ *Statement of Royalties to Be Collected for the Communication to the Public by Telecommunication or the Reproduction, in Canada, of Musical Works: CSI, SOCAN, SODRAC – Tariff for online Music Services (2010-2013)* (approved tariff) (August 26, 2017) C Gaz vol. 151, No. 34.

[171] The RFC for 22.B also provides at subsection 5(2) that “[I]f the service claims that a SOCAN licence is not required for a file, the service shall provide information that establishes why the licence is not required.” Since the rate—a blanket rate—already accounts for works not included in SOCAN’s repertoire and will not change if a work does not require a licence, we find this subsection unnecessary. Accordingly we do not include it.

[172] Regarding Tariff 22.C users, it was observed that while some users may only pay the minimum, relatively low, fee, which could suggest a possible disproportionate administrative burden, it is important for SOCAN to obtain this information for the purpose of accurate royalty-distribution and understanding trends in usage and in revenue generation. SOCAN notes that without this information it could not make observations on business models that make very low revenues yet streamed a very large number of musical works on a monthly basis.

B. PAYMENT OF ROYALTIES UNDER TARIFF 22.B

[173] Section 6 of the RFC for Tariff 22.B provides for monthly payment. This is different from the last-approved corresponding tariff (namely, OMS 1996-2006), which provided for an annual payment or payment on a quarterly basis if the royalties for a year exceed \$350.

[174] SOCAN explains that it has proposed that royalties be due and payable on a monthly basis to harmonize Tariffs 22.B and 22.C with SOCAN Tariffs 1.A (Commercial Radio) and 25 (Satellite Radio), so that all radio or radio-like tariffs operate on the same basis.

[175] CAB does not support a change in payment, implying an increased burden as a result of more regular payment and financial reporting requirements. SiriusXM agrees with the CAB.

[176] Since the rationale for Tariff 22.B is the close integration between the conventional and ancillary service covered by this tariff, it is appropriate to complete this integration by aligning payment and reporting terms. We approve the tariff as per the RFC in this respect.

C. PAYMENT OF ROYALTIES UNDER TARIFF 22.C

[177] SOCAN explained that the change to monthly royalty payments was meant to harmonize reporting and payment obligations under all the radio and radio-like tariffs.

[178] SOCAN also explained the interplay between the payment of monthly royalties and minimum fees paid on an annual basis. SOCAN confirmed that any excess in payment for minimum fees would be a credit to be applied against payment(s) of royalties for subsequent month(s).

[179] In the absence of any apparent mischief, we approve this change as per the RFC.

D. RECORDS AND AUDIT

Background

[180] Subsection 9(1) of the RFC provides that certain information must be kept for a period of six years, for audit purposes:

- The royalties payable, the rate base, and the applicable rate;
- The service provider's identification information; and
- The music use reports, including the additional information and the page impressions.

[181] We note that this standard applies under OMS 2011-2013, to services which would otherwise be covered by the original Tariff 22.A RFC.

[182] SOCAN explains that, similarly, the wording in the RFC of Tariffs 22.B and 22.C aligns with the record retention obligations and audit rights in Tariffs 1.A and 25 (and, as the Board notes in Notice CB-CDA 2023-022, with the OMS 2011-2013 Tariff).

[183] SOCAN adds that, under *SOCAN 22.B-G 1996-2006* approved in 2008, SOCAN had the right to audit a licensee at any time, without any temporal restriction. Under the RFC of Tariffs 22.B and 22.C, the audit right and record retention obligation are limited to six years from the end of the relevant period (that is, the month of use), which is a reduction of a burden, and a benefit to, the licensees.

[184] Lastly, SOCAN notes that licensees are already obligated under the *Income Tax Act* to retain information required for tax purposes (for example, revenues) for a period of six years. From that perspective, the audit rights and record retention obligations in the RFC do not impose an additional burden.

[185] CAB states that it may be able to provide the information that may be audited to the extent it is information it keeps for up to six years under the SOCAN Tariff 1.A (Commercial Radio). It would not be able to provide information not covered by SOCAN Tariff 1.A retroactively. SiriusXM states that it would not be able to comply with the records and audit provisions for the 2007-2018 tariff term.

[186] Beyond the specific compliance issue, SiriusXM submits the following.

[187] The audit provision in the 22.D continuation tariff that SiriusXM has been under since 2006 does not mandate any specific kinds of records to be created or maintained.

[188] There is no limit on the number of audits that can be sought under the Tariff. Other tariffs have audit frequency limitations.

[189] There is no dispute resolution mechanism if the parties disagree on audit findings. SOCAN should not have the last word in a s. 9(3) dispute.

[190] The Board has recently struck proposed SOCAN terms that relate to “a question of compliance and enforcement of the tariff rather than a question of approval” (*Re:Sound - Tariff 3 (Background Music), 2010-2015*, para 85; *SOCAN, Re:Sound, CSI, Connect/SOPROQ, Artisti -*

Tariff for Commercial Radio, 2011-2017, para 405; *Private Copying Tariff Enforcement in 2001, 2002, 2003*). Audit rights are inherently “a question of compliance” that risks going beyond the Board’s jurisdiction.

[191] SiriusXM submits that the Board should consider which of SOCAN’s requested audit terms, if any, can be certified in light of the Board’s expressed jurisdictional concerns.

Considerations

[192] We agree that—as far as the past is considered—the information should be reported and subject to retention only if it is available at the time the tariff is approved and published.

[193] Otherwise we agree with SOCAN for the reasons it provided and approve section 9 as per the RFC (subject to the transitional provision we include in the tariff that we approve).

[194] We disagree with SiriusXM that section 9 is a “tariff enforcement and compliance” issue, which is outside the Board’s jurisdiction. While the Board has stated in several instances that it has no jurisdiction over “questions of compliance and enforcement of a tariff,” what the Board had in mind were “remedies against users governed by a tariff.”

[195] The audit provision is closely related to a percentage of revenue structure, which requires both reporting and audits to operate effectively. It also supports SOCAN in its royalty distribution. It is not a remedy. A provision that sanctioned the refusal to allow an audit would be a remedy and offside; but not the audit itself.

E. MISCELLANEOUS

[196] We have clarified where appropriate the distinction between the service (the activity) and the service provider, such as for example, a site operator (the entity). We have also removed the reference to “licence”, a concept which is not part of the tariff framework set out in the *Copyright Act*. Furthermore, we have standardized certain items in the French and English versions. Finally, we clarify that “audio page impression” means a page impression that allows a person to hear music and not simply a “sound”.

VII. CONCLUSION

[197] In summary, in addition to the administrative terms detailed above, we approve

- The commercial radio and satellite portions of the proposed 22.B tariff based on the last-approved 22.B tariff; (see Table 1 below); and
- The proposed 22.C tariff based on the last-approved 22.C tariff, with an increase to the minimum fee for inflation, bringing it up to \$119.56 if music is used 80% or more of the time. (See Table 2 below.)

Table 1: 22.B Rates

TARIFF 22.B – Commercial Radio and Satellite Radio (2007–2018)			
SERVICE	LAST APPROVED	RFC	APPROVED
RADIO	2.10%	4.20 %	2.10%
SATELLITE	2.13%	7.6% (on-demand) 5.3% (semi-interactive)	2.13%

Table 2: 22.C Rates

TARIFF 22.C – Other Audio Websites (2007-2018)			
REPERTOIRE USE	LAST APPROVED	RFC	APPROVED
≤ 20%	0.75% \$28 minimum fee	1.5% \$34 minimum fee	0.75% \$33.48 minimum fee
> 20% to < 80%	2.10% \$79 minimum fee	4.2% \$96 minimum fee	2.10% \$94.45 minimum fee
≥ 80%	2.65% \$100 minimum fee	5.3% \$122 minimum fee	2.65% \$119.56 minimum fee

Note 1: the % rate base is “gross applicable revenues, including advertising” throughout.

Note 2: 22.B and 22.C last approved and recommended rates are effective rates.

Note 3: 22.C last proposed rates are subject to a 1.0 ratio, which can be less if users report page impressions.

[198] Furthermore, as per standard practice, interest factors (the equivalent of prejudgment interest) are included in the tariff.⁵²

⁵² The Board recognizes the time value of money and, as such, typically provides for interest factors. The latter compensate for opportunity costs incurred during the 2014-2018 period during which any difference in royalties may not have been paid out to SOCAN.