

Copyright Board
Canada



Commission du droit d'auteur
Canada

[CB-CDA 2022-048]

ORDER OF THE BOARD

File: Online Music Services (SOCAN: 2007–2018)

August 9, 2022

[1] Following receipt of the Parties' Statements of Case, the Board has identified certain issues that may not be adequately addressed by the submissions or evidence filed to-date.

[2] As such, the Board directs the following questions and requests for evidence to SOCAN and Pandora.

[3] Interveners Apple, SiriusXM, and CMRRA may respond to the series of questions "III. Question to All Parties and Interveners."

[4] For the purpose of this Order, the "22.B Series" of proposed tariffs refers to

- Tariffs 22.2 – Audio Webcasts (2007, 2008) and 22.3 – Webcasts of Radio Station Signals (2007, 2008)
- Tariffs 22.B – Audio Webcasts (2009, 2010, 2011, 2012, 2013)
- Tariffs 22.B – *Commercial Radio, Satellite Radio and Pay Audio* (2014, 2015, 2016, 2017, 2018)

[5] The "22.C Series" of proposed tariffs refers to

- Tariffs 22.C – Other Audio Websites (2014, 2015, 2016, 2017, 2018)

I. QUESTIONS TO SOCAN

A. REVENUE ALLOCATION

[6] As summarized in paragraph 61 of SOCAN's Statement of Case, SOCAN submits that the wording in the *Online Music Services Tariff (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)* (the *OMS Tariff (2011-2013)*) regarding the applicability of the hybrid-tier royalty rates leads to undesirable (and perhaps unintended) interpretations.

i. File evidence that demonstrates

- a. the application of the hybrid-tier rate to non-hybrid services; and
- b. the nature and the magnitude of such a problem.

ii. Describe, in detail, how revenues should be allocated when an entity provides several services. In so doing, identify what royalty base should be

- a. if an entity provides multiple services and charges for them separately; and
- b. if an entity provides multiple services and charges a single fee for them combined.

iii. What language would best achieve the method of revenue allocation described in 2?

In responding to this question, address any issues with the definition of “webcast service” and with the language used to allocate revenue (“gross revenues attributable to the operation of that service”) in the *OMS Tariff (2011–2013)*.

B. MINIMUM FEES

[7] In SOCAN’s Statement of Case, para 99, SOCAN submits that the minimum fees established in the *OMS Tariff (2011–2013)* have the effect of “creators end up subsidizing the service’s chosen business model, while those services are building their customer base and listenership.”

Did any entity paying pursuant to the OMS Tariff, or a continuation of rights pursuant to that tariff (i.e., not pursuant to a different agreement with SOCAN), report revenues that suggest the entities were not engaged in profit maximization in relation to the service they provided? If so, provide details.

[8] In its Statement of Case, Pandora refers to minimum fees as “disguised rate increases” noting that the minimum fee ‘prong’ of SOCAN’s proposed royalty formula in SOCAN’s Request for Certification tariff (Exhibit SOCAN-4) “would be the operative part of the formula for two out of three services in each year” (at para 68).

[9] In Exhibit SOCAN-7, Appendices P, Q, and R, Mr. Leacock calculates, for three particular OMSs, the impact of the various “prongs” of the minimum fee provisions in the agreements applicable to each of those OMSs.

[10] In Exhibit Pandora-3, the calculations addendum in the form of a PDF file, Drs. Asoni and Reitman use the data in appendices P, Q, and R to compute the royalties that would have been owed, had those OMSs been subject to, from 2014–2017, the royalty rates, terms, and conditions contained in the Request for Certification tariff (Exhibit SOCAN-4).

Perform the same the calculations by Mr. Leacock and by Drs. Asoni and Reitman in Exhibit SOCAN-7, paragraph 11, with respect to the other OMSs not covered by the calculations in

Appendices P, Q, and R. Provide any data used and describe any assumptions made in making those calculations.

C. PAGE IMPRESSIONS

[11] In SOCAN's Statement of Case, para 105, SOCAN states that a page impression ratio "is no longer applicable, and has not been so for many years."

To the extent that SOCAN received page-impression reports from users relating to the Tariff 22.B Series or the Tariff 22.C Series (or both) during the period 2007-2018, SOCAN shall supply the following for each year in which such filings were received:

- i. Name of user filing report [may be highly confidential]
- ii. Year of filing
- iii. Average page-impression ratio for the year
- iv. Standard deviation of the page-impression ratio for the year

If a user did not file a report in a particular year where it paid royalties pursuant to a Board tariff or the continuation thereof, please indicate this.

D. MARKET TRANSACTIONS

- (a) Identify the number of all existing agreements covering the period under consideration between SOCAN and any potential user of the 22.B or 22.C series of proposed tariffs. If the number is less than 7, please provide all the agreements in their entirety, including any appendices, annexes, and addendums. If the number is 7 or greater, please provide the 3 agreements that generated the largest total royalties, and the 3 agreements that generated the lowest total royalties.
- (b) If SOCAN's request-for-approval tariffs for the 22.B or 22.C series are based on any agreement, SOCAN shall file these agreements with the Board and provide
 - i. a description of the extent parties to the agreement can represent the interests of all users affected by the tariff;
 - ii. a description of the extent to which the agreement addresses any objections to the proposed tariff; and
 - iii. a description of any differences among the request-for-approval tariffs and the identified agreements, and any justifications for these.

[12] In Exhibit SOCAN-1, Iceberg Radio is described as the only participant in the 2007 rate hearing that would have been subject to *SOCAN - Tariffs 22.B to 22.G (Internet - Other Uses of Music), 1996-2006* [part 22.F only]

Has any user, during the years 2007–2018, paid under a continuation of rights of this approved tariff?

- a. If so, SOCAN shall, for all such users, supply the following information:
 - (a) Name of user;

- (b) Year(s); and
- (c) Royalties paid, by Year.

b. If there are no such users, SOCAN will explain why the Board should approve the proposed tariffs in the 22.C series.

E. APPROVAL OF PORTIONS OF 22.B

Indicate whether the Board should approve those portions of the 22.B series of proposed tariffs for which SOCAN has already entered into agreements? If so, why?

II. QUESTIONS TO PANDORA/SIRIUSXM (SIRIUSXM IS THE PARENT CORPORATION OF PANDORA¹)

A. MEASUREMENT OF PAGE IMPRESSIONS

[13] In SOCAN's Statement of Case, para 105, SOCAN states that a page impression ratio "is no longer applicable, and has not been so for many years."

If SiriusXM provided any of the following services at any time during 2007–2018, provide the years during which it did so, and indicate during which of these years—if any—SiriusXM measured "page impressions" (as the term is defined in SOCAN's Proposed Tariff 22.B (2018))

- a. simulcasts;
- b. internet simulcasts of its satellite channels;
- c. non-interactive webcasts, other than an Internet simulcast of its satellite channels;
- d. semi-interactive webcasting based on its satellite channels (without offline listening);
- e. semi-interactive webcasting based on its satellite channels (with offline listening);

III. QUESTION TO ALL PARTIES AND INTERVENERS

[14] SOCAN submits that webcasts with content similar to the primary tariffable activity should be subject to the same rates as those SOCAN proposes for other online music services (SOCAN Statement of Case, at paras 116, 118). Sirius submits that such ancillary services are distinguishable from stand-alone online music services (Sirius, Intervention at para 25)

Consider two online music services, one whose activities are targeted by proposed tariff SOCAN 22.A (2018) and one whose activities are targeted by proposed tariff SOCAN 22.B (2018). Both services have the same number of listener-hours streamed per month and the same amount of revenue in dollar terms. Is there any justification for these two services to face

¹ Exhibit CSI-01 at para 12.

different percentage rates for the royalties they pay to SOCAN? Elaborate any such justification.

[15] SOCAN submits that the users with whom it reached agreements related to uses targeted by the 22.A series of proposed tariffs were “sophisticated entities with aggregated resources” and were not in a disadvantageous bargaining position when they each entered into agreements (e.g., SOCAN, Reply Statement of Case at para 14). In contrast, Pandora submits that it is SOCAN who had substantial bargaining power, as it is the monopolist for an essential right (Pandora, Statement of Case at para 43)

If SOCAN and an OMS bargain as how to share the profits generated by an activity to which they both provide inputs, what relationship is there between the OMS’s market share as a seller in a downstream market and its bargaining power when dealing with SOCAN?

IV. DEADLINES

[16] SOCAN and Pandora shall respond to the questions in this Order by no later than **September 6, 2022**.

[17] Interveners Apple, CMRRA, and SiriusXM may respond to the set of questions “3. Questions to All Parties and Interveners” by **September 6, 2022**.

[18] Parties may reply to each other’s responses by no later than **September 13, 2022**.

Esther Bonin for
Lara Taylor
Secretary General