

NOTICE OF GROUNDS FOR OBJECTION

BY

SIRIUS XM CANADA INC.
TO SOCAN TARIFF 16 (BACKGROUND MUSIC SUPPLIERS) (2025-2027)

Filed with the Copyright Board on 2023-12-15 pursuant to Rule 18 of
Copyright Board Rules of Practice and Procedure

1. This Notice of Grounds for Objection is filed on behalf of Sirius XM Canada Inc. (the “**Objector**”) in response to the statement of proposed royalties to be collected by the Society of Composers, Authors and Music Publishers of Canada (SOCAN). The tariff in question is entitled “SOCAN Tariff 16, Background Music Suppliers (2025-2027)” and will be referred to in this Notice of Grounds for Objection as the “Tariff”.
2. Without admitting that it is liable for the payment of royalties pursuant to the Tariff, the Objector objects to the Tariff in its entirety.
3. The Objector provides background music supplier services. As the Tariff purports to target such services, the Objector has the necessary standing to object to the Tariff pursuant to the *Copyright Act* (the “**Act**”).

The Activities Do Not Trigger Copyright Liability

4. Some or all of the communications claimed by SOCAN to justify its proposed rate do not trigger liability under the Act, *inter alia* because they:
 - (a) have already been authorized;
 - (b) are not “substantial” in the meaning of the Act;
 - (c) are not made by the Objector but by other persons without the authorization of the Objector; and/or
 - (d) do not have a real and substantial connection to Canada.
5. Some or all of the communications claimed by SOCAN to justify its proposed rate are non-compensable pursuant to the user rights contained in the Act and available to the Objector, its subscribers and/or other persons associated with multi-channel subscription satellite radio services and/or streaming services using satellite radio content, including those contained in ss. 2.4, 29, 29.1, 29.2, 30.7, 31.1 and 41.27 of the Act.
6. For example, the Tariff’s “fair dealing preview” provisions have not adequately been considered in the context of prior certifications. In 2016, SOCAN asked the Copyright Board to certify an audiovisual tariff in which, “In the case of a single,

initial free trial of no more than one month's duration in any 12 month period offered to induce a prospective subscriber to enter into a paid subscription, there shall be no royalty fee payable". SOCAN's request gave minimal recognition to the s. 29 "fair dealing for the purpose of research" right reviewed by the Supreme Court in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36. The Objector submits that in the circumstances, allowing a three-month trial period to be allocated over the course of a calendar year would represent a "win-win" for users and collectives. This trial period should be applicable both to new subscribers and "win-back" subscribers". In the Objector's experience, the three-month free trial period associated with its services has been the most effective time span for converting trial subscribers into paying subscribers for the long term. Free trials should be accounted for in at least the minimum fees section of any certified tariff.

7. The Objector denies that it engages in any acts of making available of copyright works in the meaning of s. 2.4(1.1) of the Act.

SOCAN Lacks the Necessary Rights to Collect Royalties under the Tariff

8. The Objector denies that SOCAN has legal entitlement to collect royalties for the uses covered by the Tariff, and puts SOCAN to the strict proof thereof.
9. In the alternative, any purported agreements relied on by SOCAN are void, unenforceable, and/or do not transfer sufficient rights to SOCAN.
10. In the further alternative, SOCAN does not have as large of a repertoire as it has claimed in past proceedings in respect of the activities covered by the Tariff.

The Royalties and Administrative Provisions Are Neither Fair Nor Equitable

11. SOCAN's proposed royalties and minima are neither fair nor equitable when applied to the Objector's enterprise. The proposed revenue definitions, rates and minima do not reflect a fair, reasonable and appropriate value of SOCAN's enforceable repertoire, and do not reflect the risks taken or investments made by the Objector. The proposed rates are also excessive compared to rates charged in other jurisdictions for similar uses and do not reasonably reflect the amount, type or impact of music use by the Objector, nor the significant non-music uses made by the Objector.
12. The proposed revenue definition contains claims to revenue sources that have nothing to do with SOCAN's entitlement as a communication rights collective. For example, SOCAN has no reasonable claim to revenues generated from the sale of equipment to a subscriber, which have never been payable under prior certified versions of the Tariff (or any other tariff). Such claims fly in the face of the doctrine of technological neutrality as expressed by the Supreme Court in the 2015 *SODRAC* case. Only relevant revenues should be included in the rate base.

13. Regard should be had to revenue definitions used in other jurisdictions, which exclude, *inter alia*:
- (a) Monies or other consideration attributable to the sale and/or license of equipment and/or other technology, including but not limited to bandwidth, sales of devices that receive satellite radio transmissions and any shipping and handling fees therefor;
 - (b) Royalties paid to the Objector for its owned or licensed intellectual property rights;
 - (c) Consideration received from the sale of copies of music;
 - (d) Sales and use taxes;
 - (e) Credit card, invoice, activation, swap and early termination fees charged to subscribers;
 - (f) Bad debt expenses;
 - (g) Revenues associated with the provision of:
 - (i) Current and future data services offered for a separate charge (e.g., weather, traffic, destination information, messaging, sports scores, stock ticker information, extended program associated data, video and photographic images, and such other telematics and/or data services as may exist from time to time);
 - (ii) Channels, programming, products and/or other services offered for a separate charge where such channels use only incidental performances of music;
 - (iii) Channels, programming, products and/or other services provided outside of Canada;
 - (iv) Channels, programming, products and/or other services for which the performance of music is exempt from any licence requirement or is separately licensed, including by a statutory licence.
14. The increased minimum fees are excessive, in particular as they fail to account for the importance of free previews and free trials in order to drive up paying subscriptions to the mutual benefit of services and collectives. The lack of a definition for the term “relevant premises” also creates ambiguity as to which premises are “relevant” and which premises are not. Premises that are under a free trial or free preview should be expressly excluded from the calculation of minimum fees.

15. The administrative provisions set out in the Proposed Tariff are impractical and unduly onerous, do not track information in the forms held by the Objector, insufficiently protect sensitive confidential information, and place a disproportionate burden on the Objector.
16. SOCAN also creates punitive late payment mechanisms in the Tariff despite the Board's guidance that it will not certify terms and conditions that "touch[] on the area of liability and the provisions of the Act applicable to remedies against users governed by a tariff" (SOCAN Tariff 18 – Recorded Music for Dancing (2018-2022) at ¶43). These provisions cross the line into liability and remedies. They should be struck from any certified tariff.

Reservation of Rights

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

All of which is respectfully submitted this 15th day of December, 2023.

Daniel Glover
per: McCarthy Tétrault LLP
66 Wellington Street West,
Box 48, Suite 5300, TD Bank Tower
Toronto, Ontario, M5K 1E6
Telephone: (416) 601-8069
Facsimile: (416) 868-0673
E-mail: dglover@mccarthy.ca

Of Counsel to the Objector
MT MTDOS 49472117