

NOTICE OF GROUNDS FOR OBJECTION

BY

SIRIUS XM CANADA INC.  
TO RE:SOUND TARIFF 4 – SATELLITE RADIO (2025-2029)

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 Re:Sound. The tariff in question is entitled “Re:Sound Satellite Radio Tariff (2025-2029)” 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 offers satellite radio 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 Re:Sound 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 Re:Sound 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 simulcasting services using satellite radio content.
6. For example, the Tariff contains no “fair dealing preview” provisions, but rather seeks to charge full rates for free trials and previews. Regard must be had s. 29 “fair dealing for the purpose of research” right reviewed by the Supreme Court in *SOCAN v. Bell Canada*, 2012 SCC 36. In the newly released Re:Sound Tariff 8, an annual one-month free trial period was certified by the Board. 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, thus maximizing durable benefits to Re:Sound and the Objector for paid music uses. Under no circumstances should such free trials form part of the tariff rate or the minimum fee calculation

### **Re:Sound Lacks the Necessary Rights to Collect Royalties under the Tariff**

7. The Objector denies that Re:Sound has legal entitlement to collect royalties for the uses covered by the Tariff, and puts Re:Sound to the strict proof thereof.
8. In the alternative, any purported agreements relied on by Re:Sound are void, unenforceable, and/or do not transfer sufficient rights to Re:Sound.
9. In the further alternative, Re:Sound 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 Tariff Is Potentially Duplicative with Tariff 8**

10. The Objector objects to the Tariff to the extent that it is duplicative of other tariffs that are applicable to the Objector. Activities (if any) that are found by the Copyright Board to be covered by another tariff for a given year cannot be re-claimed under the guise of a different tariff, as they would constitute “double-dipping” that violates the principles set out by the Supreme Court in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 and *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30 (“*ESA I and ESA II*”).
11. In this case, hiving off “simulcasting” from other online uses unreasonably risks duplication with the “non-interactive” and “semi-interactive” components of Re:Sound Tariff 8, with a grossly excessive rate proposed for simulcasting in Tariff 4. This is especially unnecessary in the present era, where simulcasts have been defined narrowly by the Board, raising doubts as to whether any communication offered by the Objector could in fact qualify as a simulcast.
12. The Objector reserves its right to seek a consolidated proceeding establishing a single, user-based tariff specific to the satellite radio environment. Such consolidation would recognize the unique character and context of the Objector and help ensure that no double-dipping occurs via overlapping claims by collective societies including Re:Sound. Such consolidation would also avoid inefficiencies for the Copyright Board, the relevant collectives and the Objector alike.

## The Royalties and Administrative Provisions Sought Are Neither Fair Nor Equitable

13. Re:Sound's proposed satellite radio royalties and minima are neither fair nor equitable when applied to the Objector's enterprise. Their proposal of 15.5% is grossly in excess of the rates certified to date by the Copyright Board. More crucially, it is premised on a misleading comparison with a rate charged for far more comprehensive uses (including the making of ephemeral recordings) on a different revenue base in a different market with a dissimilar legal structure and different deductions. The proposed revenue definitions, rates and minima do not reflect a fair, reasonable and appropriate value of Re:Sound'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.
14. The Objector objects to the royalty structure of the simulcasting component of the Tariff, which is a greater of a percentage of revenue or a per play fees. The proposed royalty amounts that would be payable under the simulcasting component of the Tariff do not reflect a fair, reasonable and appropriate value of Re:Sound'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.
15. The proposed revenue definition is inequitable and contains countless claims to revenue sources that have nothing to do with Re:Sound's entitlement as a neighbouring rights collective. For example, Re:Sound has no reasonable claim to revenues generated from sale of hardware and accessories used in the reception of the service, 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. 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 sound recordings;

- (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 sound recordings;
    - (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 sound recordings is exempt from any licence requirement or is separately licensed, including by a statutory licence.
16. Re:Sound claims entitlement based on the revised definition of “file”, which is extended to sound recordings or performances which Re:Sound does not control or administer, or which are in the public domain or are ineligible for equitable remuneration. This definition should be significantly narrowed to files in which Re:Sound holds a legitimate interest.
17. Re:Sound’s revenue definitions also result in double-counting of revenues between the “service revenues” and “simulcasting income” categories.
18. Additionally, Re:Sound’s new minimum fee formula is vague and unworkable. Among other things, the definition of “channel” is completely subjective and seems constructed only to maximize Re:Sound’s minimum fee calculations.
19. The administrative provisions set out in the Tariff are impractical and unduly onerous, do not track information in the forms held by the Objector, require the disclosure of sensitive confidential information, and place a disproportionate burden on the Objector.
20. Re:Sound also creates punitive enforcement mechanisms in the Tariff. These provisions cross the line into liability and remedies. They should be struck from any certified tariff.

## **Reservation of Rights**

21. 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 15<sup>th</sup> day of December, 2023.

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