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	Copyright Board Canada	Commission du droit d'auteur du Canada
Filed by / Déposé par: <u>CBC</u>		
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Re: Notice of Grounds for Objection to SOCAN Proposed Tariff 22.E, Internet - CBC (2024-2026)
(File no: CT2023-00844)

Pursuant to the Copyright Board of Canada's Practice Notice PN 2022-007, CBC/Radio-Canada ("**CBC**") files this Notice of Grounds for Objection to SOCAN proposed Tariff 22.E for the years 2024-2026.

1. Background

This section first sets out the Copyright Board's general approach to tariff-setting (subsection 1.1), and then summarizes the history of SOCAN Tariff 22.E (subsection 1.2). This contextual information will be helpful for SOCAN and the Board to understand the nature of CBC's objections, which are provided in section 2.

1.1 The Board's General Approach to Tariff-setting

As the Board stated in *Stingray Pay Audio and Ancillary Services Tariff (2007–2016)*:

[7] The Board has used the following formula for determining royalties in many previous tariffs:

Rate Base (\$) x Gross Royalty Rate (%) x Repertoire-Use Adjustment (%) = Royalties (\$)¹

This formula can be generalized as follows:

Initial Royalties (\$ or %) x Repertoire-Use Adjustment (%) x Chain-of-title Adjustment (%) x Adjustment for Exceptions/Users' Rights (%) x Other Adjustments (%) = Final Royalties (\$ or %)

In the above formula:

Initial Royalties refers to the total value of music with respect to the activities covered by the tariff. This amount may be expressed as a dollar value or as a percentage rate, depending on the tariff in question.

¹ *Re: Sound and SOCAN – Stingray Pay Audio and Ancillary Services Tariff (2007–2016)*, 2021 CB 5 ¶7.

Repertoire-Use Adjustment reflects the discount which is required to account for the share of the relevant copyrights actually held by the collective proposing the tariff. If a collective claims to hold only 50% of the relevant copyrights, then the collective should receive at most 50% of the royalties. The applicable discount is generally calculated via a repertoire study.

Chain-of-title Adjustment reflects the discount which is required due to defective chains of title for works allegedly in the collective's repertoire. Works with defective chains of title are not truly under the control of the collective and thus not covered by the statutory licence. As such, there is no justification for asking users to pay for them. A further discount is thus required to account for such works. For example, if 38% of a collective's chains of title are revealed to be defective, then a 38% discount applies. The applicable discount is generally calculated via a chain of title audit on a representative sample of works.

Adjustment for Exceptions/Users' Rights are required because, as the Board has ruled many times, the creation of new users' rights requires a corresponding reduction in royalties. The applicable discount is calculated using the methodology first developed in *Commercial Radio (2011-2017)* and applied in *SODRAC 2003 Inc v CBC (2012-2018)*.²

Other Adjustments may be required on a case-by-case basis. For example, the Board adjusted numerous tariffs on a temporary basis to account for the COVID-19 pandemic. In other cases, it has applied infant industry or declining industry adjustments. The new statutory factors added by the 2019 amendments to the *Copyright Act* may require further discounts beyond those outlined above, notably to reflect public interest considerations.

Final Royalties are the result of applying all applicable discounts to the Initial Royalties.

1.2 The History of SOCAN Tariff 22.E

In 2008, the Board certified SOCAN Tariff 22.E for 1996-2006³. This decision reflected the Board's consideration that a user-based tariff was more appropriate than a use-based tariff. To set the royalty for audio and audiovisual webcasting, the Board used CBC's conventional radio and television royalties as a proxy. It then applied discounts of 90% for the lower value of content on the Internet and 85% for the lower use of music on the Internet. Therefore, the royalty was set at 1.5% of the amount CBC paid to SOCAN under Tariff 1.C (radio) and Tariff 2.D (television).

In 2017, the Board approved CBC and SOCAN Settlement Tariff 22.E for 2007-2013⁴ (the "**2007-2013 Settlement Tariff**"), which was substantially similar to the previous certified tariff. For this period, the parties had agreed to two payment formulas: one for the French online audiovisual service tou.tv, and one for the other online services, but excluding cbcmusic.ca and espace.mu.

² *SOCAN, Re:Sound, CSI, Connect/SOPROQ, Artisti - Tariff for Commercial Radio, 2011-2017*, 2016 CanLII 156141 ¶¶75-84, 95-97, 128-219, 295-347; *SODRAC 2003 Inc v CBC*, 2021 CB 1 ¶¶189-277, 278-314.

³ *SOCAN - Tariffs 22.B to 22.G (Internet - Other Uses of Music)*, 1996-2006, 2008 CanLII 93266 (CA CB).

⁴ *SOCAN - Tarif 1.C (Radio SRC), 2012-2014; Tarif 22.E (Internet SRC), 2007-2013*, 2017 CanLII 152889 (CA CDA).

For tou.tv, the formula was 1.9% of tou.tv's Internet-related revenues multiplied by the ratio of audio-page impressions to all page impressions relating to tou.tv, if the ratio was available, and 0.75 if not.

For all other Internet services, the formula was 10% of the total amount payable by CBC to SOCAN under tariffs 1.C and 2.D or by agreement between the parties, multiplied by the ratio of audio-page impressions to all page impressions, if the ratio was available, and 0.15 if not.

In 2022, CBC and SOCAN agreed on Settlement Tariff 22.E for 2014-2018 (the "**2014-2018 Settlement Tariff**"). The 2014-2018 Settlement Tariff, which the parties are submitting to the Board for certification, remains substantially similar the 2007-2013 Settlement Tariff, but integrates CBC's audio services (cbcmusic.ca and icimusique.ca (previously espace.mu)). The parties have agreed to the following formulas:

- For tou.tv, GEM (CBC's English online audiovisual service) and other similar audiovisual services, the formula is 1.9% of the service's Internet-related revenues multiplied by the ratio of audio-page impressions to all page impressions relating to the online audiovisual service, if that ratio is available, and 1.0 if not;
- For cbcmusic.ca, icimusique.ca and other similar online audio services, the formula is 5.3% of the Internet-related revenues;
- For all other online programming, the formula remains 10% of the total amount payable by CBC to SOCAN under tariffs 1.C and 2.D or by agreement between the parties, multiplied by the ratio of audio-page impressions to all page impressions relating to online programming, if that ratio is available, and 0.15 if not.

2. Grounds of Objection

This section sets out the grounds for CBC's objections to the royalty rate or royalty-rate structure (sub-section 2.1, below), the scope or clarity of the activities covered by the tariff (2.2), and the terms and conditions of the tariff (2.3).

2.1 Royalty Rate or Royalty-rate Structure

This section covers the determination of the Initial Royalties (2.1.1), as well as the following adjustments: Repertoire-share Adjustments (2.1.2), Chain of Title Adjustments (2.1.3), Adjustments for Exceptions/users' Rights (2.1.4), and Other Adjustments (2.1.5).

2.1.1 Initial Royalties

CBC objects to SOCAN's proposed increase in the Initial Royalties and changes in royalty-rate structures.

For both online audiovisual and audio services SOCAN has proposed to substantially increase the royalties and change the royalty-rate structure without providing any tangible justification. In its Notice of Grounds, SOCAN explains that the structure of the proposed tariff has been modified to reflect the terms of the 2014-2018 Settlement Tariff. However, this explanation does not reflect the royalty-rate structure the parties agreed on in the 2014-2018 Settlement Tariff (nor in the certified 2007-2013 Settlement Tariff) and that they have been consistently applying for more than a decade.

This point is more clearly demonstrated when SOCAN adds that the new structure “more closely tracks the tariffs for online uses by services *other than the CBC*. In particular, the royalty rates for CBC’s online music services and online audiovisual services are now proposed to *match those proposed for other online music services and online audiovisual services*” (our italics).

Indeed, SOCAN proposes virtually the same rates and royalty-rate structures for online audiovisual services targeted by proposed Tariffs 22.D.1 and 22.D.3, and for online music services targeted by proposed Tariffs 22.A, 22.B and 22.C, for the same period. However, in its submissions SOCAN does not provide a rationale for aligning Tariff 22.E with the commercial services tariffs.

First, by attempting to replicate the rates applicable to other members of the industry, SOCAN circumvents the Board’s 2008 decision⁵ which stated that rates under Tariff 22 should not be use-based, but user-based. SOCAN and CBC’s previous settlement tariffs have reflected that reality with the parties considering the evolving uses of music on CBC’s emerging Internet platforms tou.tv, GEM, cbcmusic.ca and icimusique.ca. Therefore, by imposing a rate structure created “to track online uses by services other than the CBC”, SOCAN’s proposed tariff is not consistent with the previously cited Board decision.

Second, SOCAN states that Tariff 22.E is intended to “match those [tariffs] proposed for other online music services and online audiovisual services”. However, the requested increases and changes to the royalty-rate structure are made without factual justification specific to the proposed tariff. In comparison, in its Notices of Grounds for commercial users’ tariffs for other online music and audiovisual services, SOCAN justifies the proposed rates as follows:

“The proposed rate is intended *to reflect changes in the market, including increased efficiencies and expanded uses of music*. It is anticipated that as part of the 2024-2026 tariff proceeding, objectors will produce information and documents that will assist in establishing the value and monetization of online (...) services during the relevant period. The anticipated information and documents are highly confidential and not otherwise available to SOCAN. As in prior tariff proceedings, it is expected that this relevant information and expert analysis will enable SOCAN to provide a detailed valuation analysis to permit the Copyright Board to set an equitable royalty rate (...).”⁶ (Our italics)

By aligning proposed Tariff 22.E to these other proposed tariffs without providing the same justifications (or any justification) SOCAN puts CBC at a disadvantage. Nevertheless, the above underscores SOCAN’s lack of factual basis for its proposed rates. Accordingly, CBC submits that it is reasonable to conclude that SOCAN’s position is entirely speculative and, for this reason alone, SOCAN’s claim to increased royalties ought to fail.

2.1.2 Repertoire-share Adjustment

Up until 2019, participating in a SOCAN tariff effectively provided protection from infringement lawsuits by non-SOCAN works.⁷ As a result, the exact size of SOCAN’s repertoire was less relevant to users, since paying tariff

⁵ SOCAN - Tariffs 22.B to 22.G (*Internet - Other Uses of Music*), 1996-2006, 2008 ¶ 3 to 8.

⁶ See SOCAN’s Notices of Grounds for proposed tariffs 22.A, 22.B, 22.C, 22.D.1 and 22.D.3.

⁷ *Copyright Act*, RSC 1985, c C-42, s 67.1(4) (now repealed).

royalties provided a benefit even with respect to non-SOCAN works. Since the 2019 reforms, that is no longer the case.

As a result of the above, CBC will be requesting a repertoire audit. CBC anticipates that it uses less protected music than conventional broadcasters, justifying a separate repertoire-share adjustment for the years 2024-2026.

2.1.3 Chain of Title Adjustment

CBC's recent experience in the *SODRAC v CBC (2012-2018)* arbitration revealed deficiency rates on the order of 38%.⁸ CBC will thus be requesting a chain of title audit of SOCAN's works, and will seek a corresponding discount on Tariff 22.E royalties based on the results of that audit. The chain of title adjustment will apply to the entire tariff period (2024-2026).

2.1.4 Other Adjustments

CBC will be seeking a public interest discount as an additional to Tariff 22.E royalties. Section 66.501 of the *Copyright Act* now directs the Board to consider "the public interest" when deciding whether a tariff is fair and equitable. As Canada's national public broadcaster, many of CBC's activities are undertaken in the public interest rather than as part of a commercial or profit-seeking activity. Pursuant to 66.501, CBC deserves credit for its public-interest mission and activities, many of which contribute directly to the promotion of Canadian musical talent. Drawing inspiration from the infant-industry/declining-industry cases⁹, CBC proposes a 10% discount.

2.2 Scope or Clarity of Activities Covered

There is a variation in the scope of the 2014-2018 Settlement Tariff and SOCAN's proposed Tariff 22.E (2024-2026). CBC objects to the decrease in the scope of the tariff without any corresponding decrease in royalty rates.

Scope of 2014-2018 Settlement Tariff: "As used in this tariff, the term "licence" means a licence to communicate to the public by telecommunication or to authorize the communication to the public by telecommunication, including the right to make works available to the public by telecommunication in a way that allows a member of the public to have access to them from a place and at a time individually chosen by that member of the public.

Scope of Proposed Tariff 22.E (2024-2026): The paragraph stated above has been retrieved and the preamble states that the proposed tariff is: "in compensation for the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works forming part of its repertoire, which, where applicable, includes the making available of such works to the public by telecommunication in a way that allows a member of the public to have access to them from a place and at a time individually chosen by that member of the public."

The underlined language from the 2014-2018 Settlement Tariff is not included in the 2024-2026 tariff, decreasing

⁸ *SODRAC 2003 Inc v CBC (2012-2018)*, 2021 CB 1 ¶188.

⁹ The Board has historically applied discounts ranging from 10% to 25% for "infant industries." In *Re:Sound and SOCAN - Stingray Pay Audio and Ancillary Services Tariff (2007-2016)* (2021 CB 5), the Board generalized this approach and applied a 20% "declining industry" discount that reflected increased competition and declining profitability in the relevant sector.

the scope of the rights granted. No explanation for this difference is provided in SOCAN's Notice of Grounds.

CBC objects to any decrease in the scope of rights granted under the tariff in 2024-2026, especially since SOCAN has not offered any corresponding decrease in royalties; SOCAN in fact proposes to increase its royalties for the 2024-2026 period. A collective should not be allowed to decrease the scope of rights offered to users without offering a corresponding decrease in royalties. Attempting to offer fewer rights at a higher price is exactly the kind of monopolistic behaviour that the Copyright Board was created to prevent. A "willing buyer and a willing seller acting in a competitive market" would never agree to pay more royalties for fewer rights.

2.3 Terms and Conditions

CBC has the following objections to the terms and conditions of proposed Tariff 22.E (2024-2026):

- **Reporting Requirements:** The reporting requirements, particularly those stated in clause 5, are overly onerous and require information beyond that which is reasonably necessary for tariff administration.
- **Interests Rate and Adjustments (Overpayments):** The interest rate and adjustment provisions of this tariff should be symmetric with respect to overpayments and underpayments. The Board has said many times that it is unfair and inequitable for collectives to request interest on underpayments but refuse interest on overpayments. Users and collectives should be treated equally with respect to the interest provisions of tariffs. Moreover, overpayments should be settled with the set-off provision described below.
- **Interest Payments (Frequency):** CBC objects to clause 6 which states that interests should be calculated on a daily basis. Interests should be calculated on a monthly basis. This is to allow the statutory set-off provision (below) to be applied in an efficient manner. By making interest payable monthly, a \$100 overpayment can be offset by simply deducting \$100 from the next month's payment. By contrast, if interest is payable daily, then the \$100 overpayment must be offset by more than \$100 on the next month's royalty payment to account for interest accrued in the meantime. This requires excessive calculation and is likely to lead to confusion or disputes in administration. By contrast, monthly interest payments allow one month's overpayment or underpayment to be easily deducted or added to the next month's payment without further adjustment, while allowing interest to accrue if such prompt correction is not made.
- **Set-off and Overpayments:** A statutory set-off provision should also be added to this tariff to allow CBC to set off overpayments made in a given month against future payments under this tariff. Indeed, a great many certified tariffs include such mechanisms already. As a matter of fairness, a similar provision needs to be included in SOCAN Tariff 22.E. CBC proposes the following language, which is modelled on existing tariffs:

(1) Subject to subsection (2), adjustments in the amount of royalties owed by CBC under this tariff (including adjustments as a result of excess payments), whether as a result of the discovery of an error or otherwise, may be made via set-off against future royalties owing under

(1) Sous réserve du paragraphe (2), les ajustements du montant des redevances dues par la SRC en vertu du présent tarif (y compris les ajustements résultant de paiements excédentaires), que ce soit à la suite de la découverte d'une erreur ou autrement, peuvent être effectués par compensation avec les

this Tariff 22.E.

(2) For clarity, set-off under this provision shall be deducted from future royalty payments under Tariff 22.E as necessary until no money remains owing. In the event that there are no future royalty payments under Tariff 22.E, set-off may be made against future royalty payments under other SOCAN tariffs.

futures redevances dues en vertu du présent tarif 22.E.

(2) Il est entendu que la compensation opérée en vertu de cette disposition sera déduite d'abord des paiements futurs de redevances en vertu du tarif 22.E, jusqu'à concurrence du le montant dû. Au cas où il n'y a pas de paiements futurs en vertu du tarif 22.E, la compensation peut être effectuée sur les paiements de redevances dues en vertu d'autres tarifs de la SOCAN.

- **Audit Requirements:** CBC objects to the requirement in clause 9 that it pay audit costs, which is not standard. Additionally, the auditor should be required to be independent of both SOCAN and CBC, and to be working on a non-contingency basis. Finally, clause 9(4) should be removed altogether.
- **Information-sharing Provisions:** Clause 10 permits overly-wide and unjustified sharing of confidential information obtained under the tariff.

3. Official Languages

As Canada's national public broadcaster, CBC will be participating in both official languages. CBC anticipates that its counsel will use both English and French, and that its witnesses and supporting documents will be in both official languages.

CBC confirms that its counsel does not require simultaneous translation and that there is no need to make any provision for such translation on CBC's behalf.

All of which is respectfully submitted this January 17, 2023.

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