



## NOTICE OF GROUNDS FOR OBJECTION

BY

SIRIUS XM CANADA INC.  
TO SOCAN TARIFF 22.B, INTERNET – COMMERCIAL RADIO  
AND SATELLITE RADIO (2024-2026)

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 22.B, Internet - Commercial Radio and Satellite Radio (2024-2026)” 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 is a satellite radio service that also communicates audio works by means of Internet transmissions or similar transmission facilities. 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 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 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 contains no “fair dealing preview” provisions. In 2016, SOCAN asked the Copyright Board to certify an audiovisual tariff in which, “In

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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.

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.
11. The Objector denies that SOCAN filed its Tariff proposal by the date required under s. 68 of the Act. If filed out of time, a Tariff proposal is void. The Objector has reason to believe that SOCAN's effective Tariff filing date was Monday, October 17, 2022. SOCAN's Tariff proposal is therefore void and ineffective.

### **The Tariff Is Potentially Duplicative**

12. 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*").
13. The Objector reserves its right to seek a consolidated proceeding establishing a single, user-based tariff specific to the satellite radio environment. Such

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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 SOCAN. 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, and Cross the Line into Remedies**

14. SOCAN has never established a rational economic basis for the value it seeks in the Satellite Radio branch of Tariff 22.B. The only rational proxy is the actual rate of 2.13% set by the Copyright Board in the inaugural proceeding relating to streaming activities of a CRTC-regulated satellite radio service. In the subsequent 2007-2018 Tariff 22.B hearing, SOCAN delivered no evidence pertaining to a Tariff 22.B service apart from a few unsupported opinion statements in an affidavit from a SOCAN employee.
15. SOCAN's methodology is erroneous in numerous respects, including because it grossly overvalues the rights in its repertoire in relation to the Objector's actual uses, fails to differentiate the value of on-demand and semi-interactive streams, and fails to explain any basis for its decision to harmonize its Tariff 22.B rate with rates charged by online-only music services of a markedly different nature from the Objector.
16. The proposed royalties are neither fair nor equitable when applied to the Objector's enterprise. In particular, the proposed 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.
17. 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, require the disclosure of sensitive confidential information, and place a disproportionate burden on the Objector.
18. SOCAN also creates punitive enforcement 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**

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19. The Objector reserves the right to vary or supplement the positions set out above at any stage of the within proceedings, particularly with reference to the Copyright Board's pending decisions relating to Tariff 22.B (2007-2018), Tariff 22.A (2014-2018), any decisions made in relation to subsequent tariff periods, and any judicial reviews therefrom.

All of which is respectfully submitted this 16<sup>th</sup> day of January, 2023.

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Of Counsel to the Objector

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