



November 7, 2017

[*CB-CDA 2017-138*]

NOTICE OF THE BOARD

Files: Online Music Services / Services de musique en ligne
[SOCAN: 2007-2018; Re:Sound: 2013-2018; CSI: 2014-2018; CMRRA: 2014-2018;
SODRAC: 2014-2018; Artisti: 2016-2018]

Internet – Audiovisual Content and User Generated Content / Internet – Contenu audiovisuel et contenu généré par les utilisateurs [SOCAN: 2014-2018; CMRRA: 2016-2018; SODRAC: 2015-2018]

On October 27, 2017, CMRRA wrote to the Board stating that it withdraws its proposed Tariff 7 – Audiovisual Services for the years 2016, 2017, and 2018. On the same day, CSI wrote to the Board stating that it withdraws its proposed Online Music Services Tariff for the year 2018. Finally, on October 31, 2017, CMRRA wrote to the Board stating that it withdraws its proposed Tariff 4 – Online Music Services, Music Videos for the year 2018. CSI and CMRRA (the “Collectives”) do not state whether or not they have reached an agreement with any person subject to the proposed tariffs identified in the letters (the “Proposed Tariffs”). The Collectives are of the view that the Proposed Tariffs have been withdrawn as a result of the filing of these letters.

The Board does not share the Collectives’ view of the effect of the letters. As a general rule, collective societies may not, unilaterally, withdraw a proposed tariff from the Board’s consideration.

Even were these letters expressed as requests to the Board for it to refrain from ever considering a tariff on the basis of the Proposed Tariffs, the Board expresses significant doubt as to whether the Board can, or should, grant such requests, for the following reasons.

First, the scheme set forth in section 70.13 of the *Copyright Act*, does not, unlike the scheme envisaged for applications under section 70.2, contain a provision to the effect that, under certain conditions, the Board shall not proceed with a matter. Moreover, the consideration of a proposed tariff (s. 67.1(5), as encompassed by s. 70.14) and its eventual variance and certification (s. 70.15 (1)), are both worded in the mandatory “shall”. Thus, there is a strong indication that once the Board receives a proposed tariff, it must—wherever possible—consider and certify a tariff based on this proposal.

Second, to the extent it is within the Board’s jurisdiction to grant a request to refrain from ever considering a proposed tariff, it is not clear how procedural fairness would be maintained for

users and prospective users of the Proposed Tariffs. This is not a case where a tariff effectively targets a very limited number of persons, and where those persons have reached an agreement with the proposing collective for the activities and periods covered by proposed tariffs. On the contrary, the Proposed Tariffs may have very broad application. All users and prospective users, whether objectors or not, had a reasonable expectation that a certified tariff would eventually be issued in relation to each of the Proposed Tariffs, licensing the activities covered thereby.

Any concerns regarding potential unfairness are heightened where the Proposed Tariffs are in relation to acts that have already occurred and where affected users would not have had any advance notice of the proposed withdrawal.

Given the above, the Board is of the preliminary view that if no person who is a user or prospective user of the Proposed Tariffs raises any objections to the withdrawal of a proposed tariff, each such tariff will effectively become abandoned. As such, the Board will suspend consideration of that tariff *sine die*. This would avoid disrupting the application of provisions of the *Copyright Act* that refer to situations where a collective has filed a proposed tariff, and would permit a non-objecting user that relied in good-faith on a particular proposed tariff to ask the Board to certify that proposed tariff. That being said, as per the directions below, the Board welcomes other options that would address the concerns raised by the Board.

Any party, user, or prospective user of any of the Proposed Tariffs may comment on the Board's concerns by no later than **Wednesday, November 15, 2017**. Comments should address the following:

- The legal effect of the letters purporting to withdraw the Proposed Tariffs;
- The Board's jurisdiction to grant a request for a withdrawal;
- The legal status of past acts that would have been covered by the Proposed Tariffs;
- Whether the Collectives have issued any licences, or reached any agreements, that apply to any of the activities and periods covered by the Proposed Tariffs; and
- Steps that may be taken, by the Collectives, by the Board, or by others, to ensure that users and prospective users do not suffer prejudice as a result of the purported withdrawals (e.g., a zero-rated tariff; a notice of proposed withdrawal and its effect to be published in the *Canada Gazette* and/or by correspondence to all previous licensees of these tariffs or similar tariffs; suspension of consideration of the Proposed Tariffs *sine die*).

Pending receipt of these comments and the Board's consideration thereof, the Board will continue to consider the Proposed Tariffs in the above-mentioned proceedings.



Secretary General
Gilles McDougall