



December 14, 2017

[*CB-CDA 2017-164*]

File: SODRAC Tariff 5 – Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition (2009-2014, 2015, 2016)

NOTICE OF THE BOARD

The public version of SODRAC's response to the Board's questions set out in Notice 2017-095, filed on October 17, 2017, refers to distributors which are not CAFDE members. Among those non-members, SODRAC identifies 2 sub-categories: (i) those who have reached an agreement with SODRAC, and (ii) those with whom SODRAC wishes to reach an agreement.

Regarding sub-category (i), SODRAC provides that it [TRANSLATION] "has accepted, with distributors who have signed agreements, that there would not be retroactive effects where the tariff is certified." The Board is not certain that it can conclude that those agreements have been modified *a posteriori* so as to cover the entire tariff term (2009-2016). Indeed, none of the highly confidential agreements provided cover the entire term and no amended agreement was filed with the Board.

Regarding sub-category (ii), to the extent that the tariff structure adopted in the SODRAC-CAFDE agreement is different from the proposed tariffs published in the *Canada Gazette* and, as such, was not subject to submissions by certain potential users, the Board must inquire whether the agreement takes into account the interest of the targeted industry as a whole.

Given that the SODRAC-CAFDE agreement is according to SODRAC [TRANSLATION] "initially *specifically* for the benefit of CAFDE members" and that non-CAFDE distributors have reached agreements that include "*per-minute* rates" for a term different from the tariff term, the Board is of the view that procedural fairness requires that non-CAFDE distributors be consulted on the SODRAC-CAFDE agreement, which – if certified as a tariff – would otherwise bind them without affording them the opportunity to being heard (see *Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2015 FCA 289).

In light of the above, the Board requests from SODRAC the following information:

1. What is the status of SODRAC's discussions with distributors that do not have agreements with it?

2. Who are the distributors who do not have agreements with SODRAC? Please provide their name, mailing address, electronic address and contact information, if available.
3. Please also confirm the name, mailing address, electronic address and contact information, if available, of non-CAFDE distributors with whom SODRAC has an agreement.
4. Were non-CAFDE distributors provided with the opportunity to comment on the SODRAC-CAFDE agreement?

SODRAC shall answer the questions above by no later than **Friday, January 5, 2018**.



Gilles McDougall
Secretary General