



April 18, 2018

[*CB-CDA 2018-079*]

## **RULING OF THE BOARD**

**File: Online Audiovisual Services – Music / Services audiovisuels en ligne – Musique  
[SOCAN: 2007-2018; CMRRA: 2014-2018; SODRAC: 2014-2018]**

### **Introduction**

[1] In this proceeding, Netflix was an objector to the following proposed tariffs:

- CMRRA Tariff 4 – Online Music Services, Music Videos;
- CMRRA Tariff 7 – Audiovisual Services;
- SOCAN 22.D – Audiovisual Webcasts;
- SOCAN 22.D.1 – Internet – Other Uses of Music – Audiovisual Content;
- SODRAC Tariff 6 – Reproduction of musical works embedded in musical audiovisual works for transmission by a service; and
- SODRAC Tariff 7 – Reproduction of musical works embedded in audiovisual works for transmission by a service.

[2] On February 28, 2018, Netflix wrote to the Board in relation to the Online Audiovisual Services – Music proceeding (the “OAS proceeding”), stating that it is “withdrawing as a full participant in this matter.” It also requested that it be granted intervenor status, which would grant it certain procedural rights; in particular, these would include the right to attend pre-hearing conferences, and to make written and oral submissions.

[3] Subsequently, on March 16, 2018, Facebook requested that its intervenor status be amended so that it participates in the OAS proceeding in a more limited way, similar to Netflix.

[4] CMRRA, SOCAN, and SODRAC (the “Opposing Collectives”) made submissions opposing the requests of Netflix, Facebook, or both.

### **The Status of Netflix and Facebook**

#### *Facebook*

[5] Some confusion appears to exist regarding Facebook’s status.

[6] On August 28, 2013, Facebook wrote to the Board, with the following request:

Facebook seeks status as an intervenor with respect to [SOCAN Tariff 22.D(2014)]. As such, Facebook does not propose to participate in the interrogatory process, lead evidence or examine witnesses. It (or its counsel) would receive Board notices and decisions, all communications among participants, and the various filings made by the Parties. Facebook would have the right to attend any hearing, and to make written and oral submissions at the close of the hearing.<sup>1</sup>

[7] On September 18, 2013, the Board granted Facebook's request for intervenor status, as requested.

[8] As such, Facebook was listed as an intervenor in this proceeding as indicated in Order 2017-126 and confirmed in the Directive on Procedure 2017-160.

[9] Order 2017-126 asked all parties listed in the accompanying Annex as either objectors or intervenors to "confirm their intent to fully participate in all procedural steps of the proceedings." This was not an invitation to expand any status or procedural rights that parties had previously been granted. Rather, it was an obligation to confirm whether parties intend on fully participating—to the extent they already had the right to do so.

[10] Facebook's response of October 31, 2017, confirmed that it "intends to fully participate in the [proceeding]."

[11] Based on their submissions, it appears to us that this statement was interpreted by Facebook, SOCAN and SODRAC, as having expanded Facebook's intervention rights, beyond those granted by the Board on September 18, 2013.

[12] The Board does not share this view. Facebook's status as an intervenor was set on September 18, 2013. Its reply of October 31, 2017, merely confirmed to the Board that it intends on fully participating in the proceeding, on the basis of the status it was previously granted.

[13] We see no reason to modify the parameters of Facebook's intervenor status. To the extent Facebook's request of March 16, 2018, constitutes a request to depart from the parameters established by the Board in its ruling of September 18, 2013, such request is denied. If it wishes to do so, Facebook may continue to participate on the basis of the status it received.

### *Netflix*

[14] The Opposing Collectives submit that:

An objector should not be permitted to directly shape the structure of a proceeding, and to pose interrogatories to elicit evidence from the collectives, only to abdicate its own evidentiary obligation at the last minute.

[... A] ruling granting Netflix's request would have drastic ramifications on future proceedings. It risks depriving the Board and the parties, in this and future proceedings, of important evidence from users of copyright, impairing the ability of the Board to render an informed decision, and limiting the ability of Collectives to argue their case fully and fairly.<sup>2</sup>

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<sup>1</sup> Facebook's intervenor request, letter to that Board dated August 28, 2013, at p 1.

<sup>2</sup> CMRRA and SODRAC, letter to the Board dated March 16, 2018, at p 1.

[15] Indeed, the main non-statutory obligations of a party are to respond to interrogatories and to respond to the Board's questions. As such, a proceeding without any participating objector presents challenges in respect of the evidence available for the Board to consider. However, the Board has on occasions considered proposed tariffs where there was no objector.

[16] As such, while we agree that some undesirable effects may materialize when a party ceases its participation, these arguments relate to whether Netflix should cease participating, not whether Netflix should be granted intervenor status.

[17] Generally, any party may cease to participate in the consideration of a proposed tariff. This does not end the Board's consideration of the proposed tariff, nor does it limit that party's obligations, if any, in relation to an eventually certified tariff.

[18] The Opposing Collectives also raise the spectre of future objectors participating without any obligations:

[I]f major players who are sophisticated entities represented by experienced counsel are allowed to abdicate their obligations in the Board's process while still benefiting from their participatory rights, why would any other objector or fully-participating intervenor bear the burden of fulfilling its obligations?<sup>3</sup>

[19] We note that any member of the public may attend a Board hearing, and may file comments, in accordance with paragraph 2 of the Board's Directive on Procedure. Additionally, the Board will provide public versions of documents to members of the public, upon request. As such, the most significant participatory right which Netflix seeks beyond those which are available to the public is the right to make oral submissions, without leave.

[20] There is no dispute that Netflix is a significant user of the proposed tariffs under consideration. Thus, while we are disappointed that Netflix has chosen not to participate as an objector or full intervenor, we conclude that it is appropriate to grant Netflix intervenor status in this proceeding.

[21] Finally, Netflix's participatory rights are thereby significantly limited: its withdrawal as either objector or full intervenor deprives it of the possibility to take significant procedural steps, such as introducing evidence and cross-examining witnesses.

[22] Given the above, Netflix's request to intervene is partially granted.

## **Ruling**

[23] Facebook may continue to participate in the present proceeding on the basis of the September 18, 2013 Ruling.

[24] Netflix is granted intervenor status in the present proceeding with the same procedural rights as Facebook, namely the right to:

1. Receive copies of the Board's communications with other parties and vice-versa;
2. Receive a digital copy of the record as filed by the parties;
3. Attend any hearing; and

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<sup>3</sup> SODRAC and SOCAN, letter to the Board dated March 23, 2018, at p 2.

4. File written submissions and make oral submissions at the close of the hearing.

[25] For completeness, we note that these rights do not allow parties to make submissions on interlocutory aspects of the proceeding, except with leave.

A handwritten signature in black ink, appearing to read "Gilles McDougall". The signature is fluid and cursive, with the first name being more prominent.

Gilles McDougall  
Secretary General