

**COPYRIGHT BOARD OF CANADA**

BETWEEN :

**TOTEM MÉDIAS INC.**

Applicant

– and –

**CONNECT MUSIC LICENSING SERVICE INC.**

Respondent

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**AGREED STATEMENT OF FACTS**

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The parties to this Application to Fix Royalty Rates and Related Terms and Conditions agree on the following facts.

**I. The Parties**

1. The Applicant, Totem Médias Inc. (“Totem”), is a corporation that provides background music services, primarily in Quebec.
2. Totem is a “user” as defined in ss. 71(6)(a) of the *Copyright Act*. Specifically, Totem is a background music supplier that provides services to commercial establishments that publicly perform recorded music. Totem provides each customer with copies of sound recordings of musical works that are stored on a hard drive at the customer’s premises.
3. The Respondent, CONNECT Music Licensing Service Inc. (“CONNECT”), is a “collective society” within the meaning of s. 2 of the *Copyright Act*. CONNECT collectively administers its members’ copyright in sound recordings produced and/or distributed in Canada. CONNECT’s members include major record labels, independent labels, artists and producers.
4. On behalf of its members, CONNECT issues licences to users—including background music suppliers like Totem, as well as digital service providers, video roadshows and exhibitions, video pools, and radio broadcasters—for the right to reproduce published sound recordings and collects royalties from those users under those licences.

5. For licences relating to the reproduction of sound recordings for background music suppliers, CONNECT represents the rights of its members on a non-exclusive basis. Background music suppliers may negotiate directly with rights holders if they prefer.

## **II. The CONNECT Music Supply Service Hard Drive Licence Agreement**

6. CONNECT, formerly AVLA Audiovisual Licensing Agency (AVLA), has administered its Music Supply Service Hard Drive Licence Agreement (the “MSS HD Licence Agreement”) under the same rates and terms since 2006, subject only to some modifications made in 2019 and 2022 to modernize the language used in the licence.<sup>1</sup> A copy of the 2006 standard MSS HD Licence Agreement is attached as Confidential **Exhibit A**. A copy of the 2019 standard MSS HD Licence Agreement is attached as Confidential **Exhibit B**. A copy of the 2022 standard MSS HD Licence Agreement is attached as Confidential **Exhibit C**.
7. The rates established in each of the 2006, 2019, and 2022 standard MSS HD Licence Agreements are the greater of (a) 15% of gross revenue<sup>2</sup> from digital programs without In-Store Advertising, plus 20% of gross revenue from digital programs with In-Store Advertising,<sup>3</sup> or (b) a minimum fee calculated by multiplying the total number of current and anticipated Digital Programs<sup>4</sup> during each Reporting Month<sup>5</sup> by:
  - (a) \$6.00 CDN per month if there is no In-Store Advertising; and
  - (b) \$8.00 CDN per month if there is In-Store Advertising.
8. Each of the 2006, 2019, and 2022 standard MSS HD Licence Agreements is for a one-year term, renewable automatically for two subsequent one-year terms if no

<sup>1</sup> See Confidential **Exhibit A** and **B** for definitions used in earlier licencing agreements.

<sup>2</sup> Defined in the 2022 Standard MSS HD Licence Agreements as “all income that relates to the Music Supply Service including but not limited to software, hardware, and any related services, or servicing thereof. For greater certainty, Gross Revenue includes, but is not limited to, the aggregate of all of Licensee's income before deductions for any purpose (e.g. deductions for fixed and variable costs of production, any and all rights payments for the reproduction of underlying musical works and such other copyrighted subject matter, any public performance rights royalties), but excludes applicable taxes (i.e. G.S.T and H.S.T.) from lease or other distribution of Digital Programs to any Commercial Subscriber without regard to the length or duration of Licensee's Lease and notwithstanding whether Licensee has invoiced or not invoiced or received payment or not received payment for the Lease of Digital Programs.”

<sup>3</sup> Defined in the 2022 Standard MSS HD Licence Agreements as “promotional messages included in Licensee products or services that are produced specifically by or for Licensee's Commercial Subscribers promoting the Commercial Subscriber's business or services.”

<sup>4</sup> Defined in the 2022 Standard MSS HD Licence Agreements as “the entire digitally recorded and encrypted program of Sound Recordings Copied by Licensee and embodied on or accessible via a CONNECT approved medium to facilitate playback.”

<sup>5</sup> The 2022 Standard MSS HD Licence Agreements states that licensees' reports of their Digital Programs are “due on or before the 10th day following the end of each full or partial calendar month (“Reporting Month”) of the Term.”

written intention to terminate is given. After the end of the renewal period, the licence terminates automatically. Under the terms of the licence, the licensee agrees upon termination to immediately terminate all leases to Commercial Subscribers (as defined in the MSS HD licence agreement) or end users of its service and request the return (if applicable) of any copies of sound recordings that it had provided to such Commercial Subscribers or end users. To continue using the sound recordings, the licensee must sign a new licence with CONNECT.

### **III. Totem's Licensing History with CONNECT**

9. Totem, and its predecessor PJJ Productions ("PJJ"), held a MSS HD Licence Agreement from September 1, 2006 to June 30, 2022. During that time, Totem consistently renewed and extended its MSS HD Licence Agreement with CONNECT.
10. From September 1, 2006, to February 29, 2008, PJJ held its first MSS HD Licence with CONNECT (then known as AVLA). A copy of PJJ's MSS HD Licence Agreement dated September 1, 2006, is attached as Confidential **Exhibit D**.
11. PJJ renewed and extended its licence with AVLA on three subsequent occasions, remaining licensed through June 30, 2011. A copy of the notice of extension sent to PJJ, extending the licence to February 29, 2008, is attached as Confidential **Exhibit E**. A copy of PJJ's licence agreement dated March 1, 2008, is attached as Confidential **Exhibit F**. A copy of PJJ's signed notice of extension to June 30, 2011, is attached as Confidential **Exhibit G**.
12. From July 1, 2011, to June 30, 2013, Totem had its first licence with CONNECT (then AVLA). A copy of the 2011 MSS HD Licence is attached as Confidential **Exhibit H**. Totem then renewed that licence on five subsequent occasions, signing the following agreements:
  - (1) a notice of extension to June 30, 2013, attached as Confidential **Exhibit I**;
  - (2) an MSS HD Licence Agreement dated July 1, 2013 (but executed May 10, 2015), attached as Confidential **Exhibit J**, which was twice renewed automatically until it expired on June 30, 2016, including by way of a notice of extension to July 1, 2014, attached as Confidential **Exhibit K**;
  - (3) an MSS HD Licence Agreement dated July 1, 2016, attached as Confidential **Exhibit L**, which was twice renewed automatically until it expired on June 30, 2019; and
  - (4) an MSS HD Licence Agreement dated July 1, 2019, attached as Confidential **Exhibit M**.

Although the language of the MSS HD Licence Agreement was modernized in 2019, as noted above, the rates and terms were the same under each of Totem's three agreements.

13. On March 18, 2020, Totem requested temporary financial relief to assist with pressures created by business closures caused by the COVID-19 pandemic. A copy of Totem's request is attached as Confidential **Exhibit N**.
14. On March 25, 2020, CONNECT wrote to its licensees, including Totem under the MSS HD Licence Agreement, offering to waive its minimum fees for March and April 2020 to account for the effects of the COVID-19 pandemic. A copy of CONNECT's notice to Totem is attached as Confidential **Exhibit O**.
15. On April 14, 2020, CONNECT wrote to Totem, advising that it had waived Totem's minimum fees for March and April 2020. A copy of CONNECT's April 14, 2020 correspondence is attached as Confidential **Exhibit P**.
16. On June 5, 2020, CONNECT confirmed that it would continue to waive minimum fees for Totem until further notice. A copy of that correspondence is attached as Confidential **Exhibit Q**.
17. As a result of those waivers, Totem paid reduced fees to CONNECT under its MSS HD Licence Agreement for March through July 2020. Thereafter, CONNECT advised Totem that it had returned to standard invoicing practices. A copy of that correspondence to Totem, dated September 11, 2020, is attached as Confidential **Exhibit R**.
18. Totem extended the application of its 2019 licence with CONNECT for the period of July 1, 2020 to June 30, 2022. A copy of Totem's signed notices of extension for the years 2020-2021 and 2021-2022 is attached as Confidential **Exhibit S**.
19. Totem's MSS HD Licence Agreement expired on June 30, 2022.
20. Totem continued to make payments at the rates set out in the expired agreement until December 29, 2023.
21. From October 2016 through December 2023, Totem paid a total of [REDACTED] in royalties, before taxes, to CONNECT under the MSS HD Licence. More specifically, it paid
  - (1) [REDACTED] from October 2016 through June 2017;
  - (2) [REDACTED] from July 2017 through June 2018;
  - (3) [REDACTED] from July 2018 through June 2019;
  - (4) [REDACTED] from July 2019 through June 2020;
  - (5) [REDACTED] from July 2020 through June 2021;
  - (6) [REDACTED] from July 2021 through June 2022;
  - (7) [REDACTED] from July 2022 through June 2023; and

(8) [REDACTED] from July 2023 through December 2023.

A report containing further information about Totem's royalty payments to CONNECT from October 2016 through December 2023 is attached as Confidential **Exhibit T**.

#### **IV. Present Application**

22. On December 2, 2022, CONNECT provided Totem with a proposal to renew the MSS HD Licence Agreement. On that date, CONNECT provided a ready-to-sign electronic agreement to renew the MSS HD Licence Agreement as of July 1, 2022, with *status quo* rates and terms effective retroactively to that date (the "**Proposed Renewed Licence Agreement**"). A copy of the Proposed Renewed Licence Agreement is attached as Confidential **Exhibit U**.
23. On December 5, 2022, Totem responded, indicating that it acknowledged receipt of the Proposed Renewed Licence Agreement and would discuss with its team.
24. Throughout that month, CONNECT and Totem periodically exchanged communications about the Proposed Renewed Licence Agreement. On December 19, 2022, Totem indicated that it would be meeting with its legal team on December 21, 2022 and would update CONNECT after the meeting.
25. On January 10, 2023, CONNECT sent the Proposed Renewed Licence Agreement to Totem again to reflect an update to the signatory. Totem replied the same day, indicating that it was waiting for its legal team to review the agreement.
26. On March 3, 2023, CONNECT followed up again with Totem, asking when it could expect a signed copy of the Proposed Renewed Licence Agreement. Totem replied the same day, indicating that its counsel was still analyzing the agreement.
27. Copies of the communications between Totem and CONNECT between December 2, 2022 and March 3, 2023 are attached as Confidential **Exhibit V**.
28. On March 9, 2023, Totem's counsel wrote to CONNECT to continue negotiations as to a rate and likewise notified CONNECT that it was reserving its rights to apply to the Board under s. 71(1) of the *Copyright Act* if no agreement could be reached between the parties.
29. On April 11, 2023, CONNECT responded, indicating that, since the prior agreement had expired, it was imperative that the parties either renew or terminate the agreement as soon as possible. CONNECT indicated that the fees contained in the Proposed Renewed Licence Agreement were standard for all licensees and that, while it would discuss Totem's request at its next members meeting, it did not anticipate that its members would agree to decreased fees. It also requested that Totem advise if it preferred to negotiate licensing agreements directly with its members going forward. A copy of this letter is attached as **Exhibit W**.

30. On May 5, 2023, Totem's counsel indicated that Totem would be applying to the Copyright Board for an order fixing the rates and terms for its continued use of the CONNECT repertoire, and 36 minutes later, Totem filed an application with the Board under subsection 71(1) of the *Copyright Act*.
31. On June 16, 2023, CONNECT sent a letter to its licensees, including Totem, indicating that 10 record labels were no longer members of CONNECT and therefore the sound recordings owned by those record labels were no longer represented by CONNECT. A copy of this letter is attached as Confidential **Exhibit X**.
32. On July 14, 2023, Totem wrote to the Copyright Board, revising its application to reduce the royalty rate to [REDACTED] of revenues to reflect that change in repertoire.

## **V. Other Copyright Requirements**

33. In addition to a licence to reproduce sound recordings in CONNECT's repertoire, Totem is required to obtain licences to publicly perform and reproduce musical works, to publicly perform published sound recordings, and to reproduce sound recordings that are not in CONNECT's repertoire.
34. Under SOCAN Tariff 16 (Background Music Suppliers), last certified on June 29, 2011, Totem is permitted to pay 7.5% of revenues per premises per quarter, subject to a minimum fee of \$5 per premises, for the right to publicly perform musical works in SOCAN's repertoire.
35. Under Re:Sound Tariff 3.A (Background Music), last certified August 2, 2017, Totem is permitted to pay 3.2% of subscriber revenues per quarter, subject to a minimum fee of \$2.15 per subscriber per establishment per quarter, for the right to publicly perform sound recordings in Re:Sound's repertoire..
36. There are no tariffs for the rights to reproduce musical works or sound recordings for the purposes of background music supply. However, licences for those uses are available directly from CMRRA and SOCAN/SODRAC (musical works) and from CONNECT and SOPROQ (sound recordings).

## **VI. Documentary Admissions**

Attached as exhibits to this Agreed Statement of Facts are copies of the following documents:

- As Confidential **Exhibit A**: A copy of CONNECT's 2006 standard MSS HD Licence Agreement
- As Confidential **Exhibit B**: A copy of CONNECT's 2019 standard MSS HD Licence Agreement

- As Confidential **Exhibit C**: A copy of CONNECT's 2022 standard MSS HD Licence Agreement
- As Confidential **Exhibit D**: A copy of CONNECT's (AVLA Audiovisual Licensing Agency's) MSS HD Licence agreement with PJJ Productions dated September 1, 2006.
- As Confidential **Exhibit E**: A copy of the notice of extension sent to PJJ extending the licence agreement to February 29, 2008.
- As Confidential **Exhibit F**: A copy of CONNECT's (AVLA Audiovisual Licensing Agency's) MSS HD agreement with PJJ Productions dated March 1, 2008.
- As Confidential **Exhibit G**: A copy of PJJ's signed notice of extension to June 30, 2011, for their MSS HD Licence.
- As Confidential **Exhibit H**: A copy of Totem's fully executed 2011 MSS HD Licence.
- As Confidential **Exhibit I**: A copy of Totem's signed notice of extension to June 30, 2013.
- As Confidential **Exhibit J**: A copy of Totem's 2013 MSS HD Licence.
- As Confidential **Exhibit K**: A copy of Totem's signed notice of extension to July 1, 2014.
- As Confidential **Exhibit L**: A copy of Totem's fully executed 2016 MSS HD Licence.
- As Confidential **Exhibit M**: A copy of Totem's fully executed 2019 MSS HD Licence.
- As Confidential **Exhibit N**: A copy of Totem's correspondence dated, March 18, 2020, requesting temporary assistance due to the COVID-19 pandemic.
- As Confidential **Exhibit O**: A copy of CONNECT's notice to its licensees, including Totem, waiving minimum fees for March-April 2020 due to the COVID-19 pandemic.
- As Confidential **Exhibit P**: A copy of CONNECT's correspondence with Totem dated April 14, 2020, confirming waiver of minimum fees for the months of March and April 2020.
- As Confidential **Exhibit Q**: A copy of CONNECT's correspondence to Totem dated June 5, 2020, indicating that it would continue to Totem's minimum fees.



- As Confidential **Exhibit R**: A copy of CONNECT's correspondence to Totem dated September 11, 2020, announcing the return to standard invoicing practices.
- As Confidential **Exhibit S**: A copy of Totem's signed notices of extension for the years 2020-2021 and 2021-2022.
- As Confidential **Exhibit T**: A copy of a PDF containing information about Totem's royalty payments to CONNECT from October 2016 to December 2023.
- As Confidential **Exhibit U**: A copy of CONNECT's Proposed Renewed MSS HD Licence Agreement, dated July 1, 2022.
- As Confidential **Exhibit V**: A copy of CONNECT and Totem's communications between the months of December 2022, and March 2023.
- As Confidential **Exhibit W**: A copy of an email from CONNECT to Totem dated April 11, 2023, requesting the MSS HD Licence agreement either be renewed or terminated.
- As Confidential **Exhibit X**: A copy of a letter from CONNECT to its licensees, including Totem, dated June 16, 2023, indicating that 10 record labels were no longer members of CONNECT.

SIGNED AT Ottawa, February 6<sup>th</sup>, 2024

**FASKEN MARTINEAU DuMOULIN LLP**

1300-55 Metcalfe Street  
Ottawa (Ontario) K1P 6L5

**Gerald Kerr-Wilson**

[jkerrwilson@fasken.com](mailto:jkerrwilson@fasken.com)

**Eliane Ellbogen**

[eellbogen@fasken.com](mailto:eellbogen@fasken.com)

**Kiera Boyd**

[kboyd@fasken.com](mailto:kboyd@fasken.com)

T: 613.696.6884

F: 514-397-4700

Lawyers for the Applicant

SIGNED AT Toronto, February 6<sup>th</sup>, 2024

Toronto (Ontario) M5H 0B4

**Casey M. Chisick**

[cchisick@cassels.com](mailto:cchisick@cassels.com)

**Jessica Zagar**

[jzagar@cassels.com](mailto:jzagar@cassels.com)

**Mackenzie Stewart**

[mstewart@cassels.com](mailto:mstewart@cassels.com)

T: 416.869.5300

F: 416.360.8877

Lawyers for the Respondent