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By Email
REDACTED

Lara Taylor, Secretary General
Copyright Board of Canada

Dear Ms Taylor:

Re: Totem Medias Inc. Application to Fix Royalty Rates for Background Music Supplier.

Introduction and Summary

Totem Medias Inc. (“Totem”) is applying to the Copyright Board pursuant to ss.71(1) of the *Copyright Act*, to fix the royalties that Totem pays to Connect Music Licensing Service Inc. (“Connect”) for the right to reproduce published sound recordings in Connect’s repertoire for the purpose of providing a background music service.

Totem and Connect have engaged in negotiations of a renewal of Totem’s licence but have failed to reach an agreement on the rate and related terms and conditions. Connect has presented Totem with a “take or leave it” licence proposal and has refused to negotiate any of the terms.

The rates that Connect is demanding are far in excess of what could reasonably be considered fair and equitable. These rates are not commercially sustainable and are almost equal to the combined amounts that Totem pays for all other music-related rights.

Totem is requesting that the Board fix the Connect royalty rate at [●] of revenues with no minimum fee.

The Parties

Totem is a background music supplier who 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. In addition to having to license the right to reproduce sound recordings in Connect’s repertoire, Totem also pays copyright royalties to:

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- SOCAN, for the right to publicly perform and reproduce musical works;
- CMRRA, for the right to reproduce musical works;
- SOPROQ for the right to reproduce sound recordings in SOPROQ's repertoire; and
- Re:Sound as equitable remuneration for the public performance of published sound recordings.

Connect is a collective society within the meaning of s. 2 of the *Copyright Act* that administers the copyright in the vast majority of sound recordings produced and/or distributed in Canada owned by the major record labels, independent labels, artists and producers.¹ More specifically, Connect issues licences for the right to reproduce published sound recordings to background music suppliers, digital service providers, and radio broadcasters.

The Licence

Totem has had a licence from Connect for the right to reproduce sound recordings in conjunction with its background music supply operations since July 1, 2011. The most recent licence expired on June 30, 2022. Attached as Highly Confidential Appendix A is the licence that Connect has proposed effective July 1, 2022. The Licence proposes fees equal to the greater of [●]% of Totem's Gross Revenues or \$[●] per establishment, per month. Since Totem charges its customers a monthly fee of \$[●], it would be required to pay Connect the minimum fee of \$[●] per establishment per month, which equates to an effective royalty rate of [●]%, more than double the base rate of [●]%.

Totem notes that as recently as February 24, 2023 the Copyright Board has expressed reservations about tariffs with "greater of" royalty structures, such as the rate structure in Connect's proposed Licence.²

The fees demanded by Connect are unreasonable and not economically sustainable. They would require Totem to pay [●] of its revenue to Connect before it has paid any of its other costs, including other copyright payments. Totem has attempted to negotiate a different fee structure with Connect but Connect has refused to agree to changes to the terms of the proposed Licence.

The proposed Connect fees are completely out of proportion with the other copyright fees that Totem pays. In fact, the proposed Connect fees, by themselves, are almost equal to all other copyright payments combined. The other copyright payments made by Totem are:

¹ <https://connectmusic.ca/about/>

² SOCAN Tariff 22.D.3 - *Audiovisual Services Allied with Programming and Distribution Undertakings* (2007-2013), 2023 CB 1 at para. 49.



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Collective (Tariff)	Rights	Rate	Monthly
SOCAN (Tariff 16)	Public Performance of Musical Works	[●]	[●]
Re:Sound (Tariff 3)	Public Performance of Sound Recordings	[●]	[●]
CMRRA	Reproduction of Musical Works	[●]	[●]
SOCAN/SODRAC	Reproduction of Musical Works	[●]	[●]
SOPROQ	Reproduction of Sound Recordings	[●]	[●]
Subtotal		[●]	[●]
Connect	Reproduction of Sound Recordings	[●]	[●]
Total		[●]	[●]

The Connect rate demand is obviously disproportionately excessive, particularly when compared to the royalties paid for the other music-related rights. Background music is primarily a public performance based use, with the reproduction of the recorded music being incidental to the main purpose. Nevertheless, Connect is demanding fees for the reproduction of sound recordings that are almost [●] times as much as the fees paid to Re:Sound for the public performance of those same sound recordings. In fact, Connect is demanding fees that are approximately [●] times the fees paid for the public performance of both sound recordings and musical works combined. Neither of these comparisons take into account that Totem also pays SOPROQ for the right to reproduce the sound recordings that it represents. If you consider both payments to SOPROQ and to Connect, the amount Totem would be required to pay to reproduce sound recordings would be more than [●] times the amount payable to publicly perform those sound recordings.

The Board has previously found that for similar uses, the value of rights in sounds recordings should be deemed to be the same as the value of the rights in the musical works embodied in those sound recordings. However, Connect is demanding fees that are more than [●] times the combined amount paid to CMRRA and SOCAN for the right to reproduce musical works. Including payments to SOPROQ, Totem is being asked to pay an amount to reproduce sounds recordings that is approximately [●] times the amount payable for the right to reproduce musical works.



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Furthermore, Totem notes that the rates proposed by Connect are substantially higher than the right to reproduce sound recordings for similar, performance-based uses, such as commercial radio stations.

Finally, Totem is severely constrained in its ability to increase the amounts it charges customers for its background music service. Those hospitality and retail businesses that managed to survive the worst of the COVID-19 pandemic are still trying to recover and are experiencing reduced in-person visits. These commercial establishments have access to lower cost sources of background music including commercial radio or online streaming services so any increase in the price Totem charges for its services would result in the loss of customers who would simply opt to self supply (and may not pay any copyright payments to any of the rights holders).

Conclusion

For all of the above reasons, Totem respectfully requests that the Board issue an Order pursuant to ss. 71(2) fixing the rates payable to Connect for the right to reproduce sounds recordings in connection with the supply of background music at [●] of gross revenues for a period of three years.

Pursuant to ss. 71(1) of the Act, Connect has been given notice of this application.

Please do not hesitate to contact the undersigned if you have any questions.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP



Jay Kerr-Wilson

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