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Regime Fixing of Royalties in Individual Cases
Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21
Copyright Act, ss. 70.2 and 70.15

Members Mr. Justice William J. Vancise
Mr. Claude Majeau
Mr. J. Nelson Landry

**Society for reproduction rights of authors, composers and publishers in Canada v.
Canadian broadcasting corporation, and les chaînes télé astral and teletoon**

**Statement of Royalties to be collected by SODRAC for the reproduction, in Canada, of
musical works embodied into cinematographic works for the purposes of distribution of
copies of the cinematographic works for private use or of theatrical exhibition for the years
2009 to 2012**

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I. INTRODUCTION

[1] These reasons deal with three separate matters. We certify a tariff that will apply to anyone who performs the protected uses the tariff targets. We also issue two licences to single users.

[2] On March 28, 2008, pursuant to subsection 70.13(1) of the *Copyright Act* (the “Act”),¹ SODRAC 2003 Inc. and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (jointly SODRAC) filed proposed Tariff 5 for the reproduction, in Canada, of musical works embedded into cinematographic works for the purposes of distribution of copies of the cinematographic works for private use or of theatrical exhibition for the years 2009 to 2012. The proposal was published in the *Canada Gazette*. The Canadian Association of Film Distributors and Exporters (CAFDE), the Motion Pictures Theatre Associations of Canada (MPTAC) and the Canadian Motion Picture Distributors Association (now Motion Picture Association – Canada) (MPA-C) filed timely objections to the proposal. On June 4, 2009, MPTAC withdrew its objection to the proposed tariff. Six days later, so did MPA-C, who asked to remain as intervenor; that application was denied. MPA-C filed extensive comments, as allowed by the Board’s Directive on Procedure.

[3] On November 14, 2008, pursuant to section 70.2 of the *Act*, SODRAC asked the Board to set the terms and conditions of a licence for the reproduction of musical works in its repertoire by the Canadian Broadcasting Corporation (CBC) from that date until March 31, 2012.

[4] On December 19, 2008, pursuant to the same provision, SODRAC asked the Board to set the terms of a similar licence for the specialty television channels of *Les Chaînes Télé Astral* other than *MusiquePlus* and *MusiMax* and Teletoon Inc. (together, Astral), from that date until August 31, 2012.

[5] On March 31, 2009, the Board issued an interim licence for CBC; the interim licence was extended on April 30, 2012.² On December 14, 2009, the Board issued an interim licence for Astral.³

[6] The Board consolidated the examination of both arbitration matters⁴ and the examination of the proposed tariff 5 proceeded immediately thereafter. The hearings began on June 1, 2010 and

¹ R.S.C. 1985, c. C-42.

² *Application to fix royalties for a licence and its related terms and conditions (SODRAC v. CBC)* (31 March 2009) [Interim Decision](#) of the Copyright Board, as amended on October 13, 2009; *Application to fix royalties for a licence and its related terms and conditions (SODRAC v. CBC)* (30 April 2012) [Interim Decision](#) of the Copyright Board.

³ *Application to fix royalties for a licence and its related terms and conditions (SODRAC v. Les chaînes Télé Astral and Teletoon Inc.)* (14 December 2009) [Interim Decision](#) of the Copyright Board.

⁴ *Application to consolidate two arbitrations: SODRAC v. Canadian Broadcasting Corporation and SODRAC v. Les chaînes Télé Astral and Teletoon* (27 August 2009) Copyright Board [Decision](#).

lasted 13 days. The record was first closed on October 5, 2010, when final responses were filed to the comments of MPA-C. Further inquiries and adjustments were required and the record was finally perfected on July 13, 2011.

II. RIGHTS AND ACTIVITIES CONCERNED; DEFINITIONS

[7] In these proceedings, we set rates solely for the exclusive right of the owner of the copyright in a musical work to reproduce it and to authorize such a reproduction. The right to communicate such works is not at issue, nor is any protected use of a musical sound recording or of a performer's musical performance.

[8] We are not setting royalties for any protected use of a television program, movie or other cinematographic work (hereafter "audiovisual work")⁵ into which the musical work is embedded or synchronized. That being said, audiovisual works are central to these proceedings: every time such a work is copied, so are the musical works embedded into it.

[9] The CBC arbitration concerns all reproductions (hereafter "copies") of musical works made by CBC in its conventional and specialty television and radio⁶ operations, as well as those Internet operations specified below. The Astral arbitration concerns only copies made in the group's specialty television and Internet operations; the radio activities within the Astral group are not at issue. Tariff 5 concerns any copy of a musical work made when the audiovisual work on which it is embedded is copied for retail distribution (e.g., DVD sales and rentals) or exhibition (e.g., copies made onto a movie theatre's server). We decide both arbitration matters first, and Tariff 5 second.

[10] Before so doing, and to avoid confusion, we find it necessary to specify the meaning we ascribe to certain terms and expressions which the parties used inconsistently. These definitions only concern copies of musical works made in the process of producing, creating or using an audiovisual work. The same confusion apparently does not arise with respect to copies of music used in audio only products (radio, Internet podcasts, etc.).

[11] The first set of definitions concerns the **types of copies** made. *Synchronization* refers to the process of incorporating a musical work into an audiovisual work.⁷ Thus, a *synchronization copy* is any copy made in order to include the work into the final (*master*) copy of an audiovisual

⁵ The *Act* would label all these as cinematographic works. However, as the parties, we use the expression "audiovisual work" to clearly indicate that the decision targets works destined to television as well as to cinemas.

⁶ We use the term "radio" only with respect to the delivery of audio content through Hertzian waves, even though the term is now a widely used shorthand for some forms of audio-only offerings on other platforms such as cable and Internet.

⁷ SODRAC uses the expression "first integration".

work. A *post-synchronization copy* of the music is made each time the audiovisual work itself is copied, for example to broadcast, deliver or distribute the audiovisual work.

[12] An *incidental copy* is necessary or helpful to achieve an intended outcome but is not part of the outcome itself. A *production-incidental copy* is made in the process of producing and distributing an audiovisual work, either before or after the master copy is made: it is a form of synchronization copy. A *broadcast-incidental copy* is made to facilitate the broadcast of an audiovisual work or to preserve the work in the broadcaster's archives, while a *distribution-incidental copy* is made for purposes of readying or preserving the motion picture for distribution to the public: both are forms of post-synchronization copies.

[13] The proposed tariff targets primarily two types of copies. A *DVD copy* of music is made each time an audiovisual work incorporating that music is copied onto a DVD for retail sale or rental. This is a post-synchronization, non-incidental copy. A *theatrical copy* of music is made every time a copy of a movie incorporating that music is made in order to distribute the movie to a theatre or other exhibitor or for the purposes of showing it in a theatre. Theatrical copies include those made in a promotional *trailer*, which refers to a short advertisement of an upcoming film, usually consisting of excerpts of the relevant movie. All theatrical copies are distribution-incidental copies.

[14] The second set of definitions concern the **types of licences** offered to facilitate the operations described in paragraph 9. A licence is required for any synchronization or post-synchronization copy of protected musical works, incidental or not. Producers of audiovisual works may or may not clear rights on behalf of downstream users as well as for themselves. They may secure rights for all markets or uses or only for some. All of these permutations exist and must be accounted for.

[15] Producers sometimes secure a *through-to-the-viewer licence*. Such a licence authorizes all copies of a musical work made by the producer or others in the course of delivering the audiovisual work to the ultimate consumer in the intended market, be it television, cinema, DVD, Internet or other. A *buyout licence* is a through-to-the-viewer licence in which royalties are set at a lump sum paid up front.⁸ Other through-to-the-viewer licences give the producer the option to extend the licence beyond a certain time, a certain territory or a certain market at pre-determined prices. When the producer exercises an option pursuant to a through-to-the-viewer licence, the related rights are cleared for downstream users as well as for the producer. According to the

⁸ Mr. Ted East, President of CAFDE, called "buyout" a licence according to which it is "the obligation of the producer to make any further payments down the road for the creative contribution of the individual or individuals in question": Transcripts, volume 2 (SODRAC 5) at 278. While the distinction is of no consequence in these proceedings, it illustrates the confusion we just mentioned.

objectors, through-to-the-viewer licences are the most common licences in the audiovisual market.

[16] By contrast, a bare *synchronization licence* only allows the producer to include the musical work in the master copy of an audiovisual work (as well as, generally, in any production-incident copy): downstream users of the audiovisual work must secure their own licence to copy the musical works embedded in it. If the producer's licence is limited to certain markets, as is often the case, the producer is effectively prevented from offering the audiovisual work in other markets until a further licence is secured for the musical work. Such a licence often includes options that allow the producer to extend the licence beyond a certain time, a certain territory or a certain market at pre-determined prices. This does not transform the licence into a through-to-the-viewer licence. The producer is only allowed to make the copies required to deliver the audiovisual work to downstream users (broadcasters, distributors) in further markets: again, downstream users of the audiovisual work must secure their own licence for the copies of musical works they make when they copy the audiovisual work for their own use. This, according to SODRAC, is the most common type of licence in the audiovisual market.

[17] Audiovisual works that are broadcast on television generally come from one of four **sources**. *In-house productions* and *co-productions* are shows produced by their broadcaster, alone or with other producers. *Commissioned productions* are shows broadcasters order from third-party producers for their own use. Broadcasters also may buy *previously aired productions* that were first produced for another broadcaster or for a non-broadcast platform (e.g., cinema).

THE SODRAC/CBC AND SODRAC/ASTRAL ARBITRATIONS

III. PARTIES, POSITIONS AND PROPOSED RATES

[18] SODRAC is a collective society. It administers the reproduction right in musical works owned by those who have authorized it to act on their behalf. It represents the majority of rights holders in Quebec and most works written in French by Canadians. It also administers in Canada the repertoire of many foreign collectives managing similar rights.

[19] CBC is Canada's public broadcaster. It operates conventional radio (Radio One, Radio 2, *Première Chaîne*, *Espace Musique*), conventional television (CBC Television, *Télévision de Radio-Canada*, Radio-Canada North), specialty television (*RDI*, CBC News Network,⁹ Bold, Documentary Channel) and Internet radio-like (Radio 3, *Bande à part*) services. CBC also offers audio and audiovisual webcasting, streaming, simulcasting and podcasting. It operates the largest digital audio and broadcast system to have been implemented in the world, with over 2,000 workstations spread across 50 sites. Its multiple programming streams span time zones and other

⁹ Previously NewsWorld.

terrestrial limitations. For example, CBC Radio One simulcasts are customized with local content in 31 different city feeds. Some Internet offerings allow users to create individualized playlists. CBC produces or co-produces a significant share of what it broadcasts on television.

[20] Until March 31, 2009, two agreements defined the relationship between SODRAC and CBC. The first, reached on March 19, 1992, licensed the use of the SODRAC repertoire on radio, on television and for certain ancillary purposes (“the 1992 Agreement”). The license fee increased over three years from \$475,000 to \$520,000. The second, reached on October 29, 2002, allowed the use of the SODRAC repertoire in programming merchandise such as DVDs (“the 2002 Agreement”). The per minute, per copy licence fee varied from 0.18¢ to 0.50¢ for background music and from 0.45¢ to 1.25¢ for feature music,¹⁰ with some exceptions. Both agreements were renewed by the parties until the Board’s interim decision.

[21] Astral operates specialty television channels. Unlike CBC, this is the first time that Astral has been approached by SODRAC for a license with regard to its broadcast activities on television and on Internet. Unlike CBC, Astral does not produce or co-produce any programming.

[22] SODRAC starts from the proposition that copyright owners are free to decide how (and to whom) to licence their copyrights in any given market. SODRAC issues bare synchronization licences to producers; these licences do not authorize downstream copies. Consequently, Astral and CBC must licence all broadcast-incidental copies they make. CBC also needs a licence to create, use, distribute and otherwise market its in-house productions and co-productions.

[23] SODRAC proposes deriving royalties for broadcast-incidental and synchronization copies by using ratios. It relies on earlier Board decisions and existing licensing contracts to propose these ratios. Thus, since commercial radio pays for making copies of musical works roughly one-third of what it pays to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for broadcasting the same copies, and since CBC pays royalties to the Canadian Musical Reproduction Rights Agency (CMRRA) according to a formula that uses that same ratio, the rate for all radio and television broadcast-incidental copies targeted in these proceedings (including Astral’s) should be one-third of the corresponding SOCAN tariff. All these rates would be adjusted for repertoire use.

[24] Using the same logic, SODRAC proposes that the rate for synchronizing musical works into CBC productions be 1.9 times the rate for broadcast-incidental copies of these same CBC productions, by reason that online music services pay 1.9 times more for copying musical works

¹⁰ The rate decreased as the amount of music used in a program increased. A 40 per cent discount is applied for CBC commissioned music.

when delivering permanent downloads instead of on-demand streams. Internet uses, third party sales and other uses would be the subject of separate calculations or top ups. In the end,¹¹ SODRAC proposes the following royalties.

[25] For CBC:

- a. conventional radio broadcast-incidental copies: \$170,986 per year;
- b. conventional television broadcast-incidental copies: \$1,069,078 per year;
- c. specialty television broadcast-incidental copies: 0.63 per cent of each signal's gross income, adjusted for repertoire use. This yields 0.10 per cent for News Network, 0.23 per cent for *RDI*, 0.27 per cent for Bold and 0.37 per cent for Documentary Channel. SODRAC estimates that this would generate total royalties of \$ 216,814 in 2009;
- d. audio and audiovisual webcasting, streaming and simulcasting: 4 per cent of the royalties payable pursuant to paragraphs a) to c), plus 0.63 per cent of advertising revenues associated to the streaming of previously aired productions on *Tou.tv*, adjusted for repertoire use;¹²
- e. audio-only podcasting: 3 per cent of the royalties payable pursuant to paragraph a);¹³
- f. synchronizing musical works into in-house productions and co-productions: \$1,381,248 for conventional television, 0.393 per cent of gross revenues for *RDI*, and 0.124 per cent of gross revenues for News Network;
- g. sales of programs to consumers for private use: a per-minute, per-copy rate of between 0.28¢ and 0.78¢ for background music and between 0.71¢ to 1.92¢ for foreground music; and
- h. sale or licensing of CBC programs to third party broadcasters and carriers, 3 per cent of revenues adjusted for repertoire use.

[26] For Astral:

- a) broadcast-incidental copies: 0.63 per cent of each signal's gross income adjusted for repertoire use. This is:
 - *VRAK.TV*: 0.32 per cent;
 - *Canal D* and *Séries+*: 0.17 per cent;
 - *Canal Vie*: 0.14 per cent;
 - *Historia, Télétoon* (French) and *Teletoon* (English): 0.13 per cent;
 - *ZTélé*: 0.09 per cent;

¹¹ Though proposed rates varied over time, there is no need to review earlier proposals here.

¹² *Tou.tv* was not part of the original SODRAC application and was added later on. SODRAC considers that the royalties associated to the use of in-house productions and co-productions is included in the 4 per cent “top up” for webcasting, streaming and simulcasting.

¹³ The proposed licence does not target audio-visual podcasts.

– Teletoon Retro (English): 0.0004 per cent;¹⁴

and

– *Télétoon Rétro* (French): 0.0016 per cent.¹⁵

SODRAC estimates that this would generate total royalties of \$380,000 for 2008.

b) all Internet services excluding podcasting: 4 per cent of the royalties payable pursuant to paragraph a).

[27] CBC and Astral argue that a functioning market currently exists, since producers who synchronize music into an audiovisual work secure through-to-the-viewer licences. Until 2005, SODRAC licences reflected this. This arrangement makes sense: the producer, not the broadcaster, controls what is included in a program. What SODRAC proposes would disrupt current licensing patterns. Regulatory efficiency and fairness dictate that we encourage, if not compel, SODRAC to deal with its rights on the same basis as the existing market. The Board should resist any attempt to split licensing deals in order to obtain above-market revenues.

[28] In the alternative, CBC and Astral argue that royalties payable for broadcast-incidental copies should reflect the fact that they have little or no value. In any event, the price of those copies should not be tied to revenues. They are never sold or rented out, generate no revenues and do not help increase audience share.

[29] CBC and Astral also maintain that SODRAC exaggerates the extent to which they use its repertoire, by reason that cue sheets are biased in favour of SODRAC and that the amounts it claims on account of arrangements of public domain works are too high. Broadcasters already are authorized to use some of the works pursuant to through-to-the-viewer licences producers secure from copyright owners, including some foreign collectives. No account is taken of the increase in rebroadcasts and the resulting lowering in copying activity.

[30] Finally, CBC and Astral argue that the adoption of new technologies should not trigger additional reproduction payments. In their submission, technological efficiencies are irrelevant in the context of these proceedings. The mere fact that the use of servers, software and other equipment requires that music be copied does not entitle SODRAC to claim the technological benefits flowing from their use. Valuing musical works on the basis of the features and benefits of broadcast equipment and software will create a disincentive to the adoption of new technology.

¹⁴ Exhibit SODRAC-1, para. 74 uses 0.004 per cent as a result of a calculation error.

¹⁵ Exhibit SODRAC-1, para. 74 uses 0.016 per cent as a result of a calculation error.

[31] CBC acknowledges that it needs a SODRAC licence, but only for its television in-house productions, for its television co-productions and for its radio activities. That synchronization licence should be through to the viewer, to reflect market practices, and the request to segment the licence is a thinly veiled attempt to increase royalties.

[32] Astral makes two additional arguments. First, there is no economic justification to ascribe a separate value to incidental copies made for its Internet services, since these services do not generate profits. Second, the reporting obligations SODRAC proposes are burdensome and disproportionate. It is unreasonable to require Astral to provide documents that it does not receive in the ordinary course of trade (i.e., cue sheets), especially when SODRAC has direct access to the information.

[33] CBC proposes an annual royalty of \$85,000 for CBC radio, an annual through-to-the-viewer royalty of between \$197,000 to \$298,000 for CBC television, and additional royalty of \$2,000 each for the in-house productions and co-productions of Bold and Documentary Channel, as well as a renewal of the rates in the 2002 Agreement for its sales of programs to consumers for private use. Internet uses and licensing to third party broadcasters should not attract any additional royalties.

[34] Astral's position is that it does not need a licence. Alternatively, it asks that the royalties for its licence be either zero or very low, and include all Internet uses.

IV. EVIDENCE

A. SODRAC

[35] Michael Murphy, Full Professor and Head of the Audio and Digital Media Department at Ryerson University's School of Radio and Television Arts, described the digital content management systems used by CBC and Astral. In his opinion, radio and television use similar or identical technologies; their uses of the reproduction rights and the nature of the copying activities are comparable. He also saw no significant difference in the technology or use of reproduction rights between CBC and Astral in their television broadcasting operations.

[36] Professor Marcel Boyer, Emeritus Professor of Economics, *Université de Montréal*, and Research Fellow, Department of Economics, *École Polytechnique de Paris*, commented on the Board's use of ratios. In his opinion, using ratios is appropriate to capture the relative intensity and importance of uses, whether it be the same right in separate markets or separate rights in the same market. He noted that the Board differentiates between primary and secondary rights. The first are essential for the production of a good or service. The second, while possibly important and valuable, are not essential; alternatives exist. Thus, for a radio station, the right to

communicate music is primary (cannot function without it), while the right to copy the same music is secondary (radio can operate without it, at least in theory).¹⁶ The reverse is true for online music services with respect to the permanent downloads they offer.¹⁷ Professor Boyer's review of earlier Board decisions led him to conclude that the Board generally favours a 3 to 1, primary to secondary ratio, adjusted to market circumstances.

[37] A panel consisting of Alain Lauzon, Director General, Martin Lavallée, Director, Licensing and Legal Affairs, and Claudette Fortier, former Director General, testified as to the past and current licensing practices of SODRAC in the relevant markets. The panel also commented on an agreement reached in April, 2009 between CMRRA and CBC radio ("the CMRRA-CBC Radio Agreement") and how it could be used to set royalties in this instance.

[38] Mr. Lavallée, Joël Martin, Chief of Informatics, Clément Baille, Officer, Audiovisual Service and Matthieu Ouellet, formerly with SODRAC and responsible for implementing its most recent IT systems and methods, explained how the SODRAC repertoire is maintained and updated. They also explained how SODRAC used program cue sheets and other information to perform the CBC and Astral repertoire use analyses filed in these proceedings.

[39] Paul Audley of Paul Audley and Associates Ltd commented on the economic evidence filed by CBC and Astral and discussed alternative approaches. His evidence is analysed in more detail below as required.

B. CBC/ASTRAL

[40] Yves Lagacé, Senior Vice-President, Finance, Technology and Operations at Astral, Michel Comtois, First Director Operations and Production, CBC (French) and Chris Bell, V.P. Technology, Astral testified on the past and present broadcasting operations and on the initial and ongoing costs of operating digital broadcasting systems. They stated, among other things, that the implementation of digital systems had not resulted in any cost savings or productivity gains.

[41] Pascal Ouimet, Business Relations, ARTV and Jean Leclerc, Producer, *Planète Bleue Télévision Inc.* testified about the production, licensing and distribution of audiovisual works in Quebec and commented on a variety of licensing and business arrangements, focussing on music rights clearance. Marty Katz, President, Prospero Pictures, Mark Musselman, Vice-President, Serendipity and Jill Meyers, independent music consultant, testified on the same matters for the

¹⁶ *CMRRA/SODRAC Inc. (Commercial Radio Stations) for the Years 2001 to 2004* (28 March 2003) Copyright Board [Decision](#) at 14.

¹⁷ *SOCAN – Tariff 22.A (Internet – Online Music Services) for the Years 1996 to 2006* (18 October 2007) Copyright Board [Decision](#) at paras. 162-3.

rest of North America; they agreed that the established practice for licensing music used in audiovisual works in North America is for the producer to secure a buyout licence.

[42] Marie-Andrée Poliquin, Director of Operations, Financing and Business Affairs, General Television at CBC (French) and Kathy Markou, Manager, Copyright Licensing, Business Affairs at CBC described CBC's licensing practices. Based on her experience within a team that acquires from 700 to 850 music licenses per year, Ms. Markou concluded that SODRAC's licensing practices are inconsistent with those of the rest of the industry.

[43] Dany Meloul, Vice President Legal and Regulatory Affairs and Affiliate Affairs, Astral and Tracey Pearce, Senior Vice-President, Legal and Business Affairs, CTVglobemedia testified about the production and licensing of audiovisual content for broadcast in Canada, reviewed standard agreements and business arrangements and explained how Internet is used to support conventional broadcasting activities. All programming broadcast by Astral is either commissioned or acquired from third party producers. Astral has no control over the music that is incorporated into the programs it broadcasts. Technological investments are necessary to remain relevant so that services continue to be seen by the public. Internet is a (currently unprofitable) complement to the main channels, just another window from which to view content. Making broadcast-incidental copies is part of the business of broadcasting, and broadcasters expect the ability to make such copies is secured by the producer in the synchronization license.

[44] Michael Mooney, Senior Director of Corporate Finance, commented on CBC's past and current financial situation. Francine Touchette, Director, Administration, Internet and Digital Services, provided an overview of CBC's Internet operations and described the operating environment of *Tou.tv* and the *Espace* webcasting services.

[45] Chantal Carbonneau, Director, Legal Affairs and Strategy, Intellectual Property testified on CBC's use of SODRAC's repertoire, the nature of programs licensed to third parties, the circumstances leading to the CMRRA-CBC Radio Agreement, CBC's reporting practices to copyright collectives and the operations of Bold and Documentary Channel. The views she offered can be outlined as follows. First, the starting point in these proceedings should be the 1992 Agreement. It already authorizes all types of copies made by producers and broadcasters. This model would allow CBC to keep a blanket license that would secure the rights required for all of its activities. Second, SOCRAC's claims as to CBC's use of its repertoire are exaggerated. Third, because CBC now purchases less original programming than before and because it operates on multiple television platforms, the number of rebroadcasts had increased significantly. Fourth, the CMRRA-CBC Radio Agreement should not be used as starting point to set the royalties for Internet or podcasting.

[46] Dr. Gerry Wall and Bernie Lefebvre were asked to review SODRAC's proposed methodologies and to suggest appropriate fees. Their conclusions can be summarized as follows: first, what SODRAC proposed is inconsistent with reasonable economic analysis: for example, suggested increases for radio copies are out of line with historical changes in payments to SOCAN; second, those who licence synchronization rights already pay for broadcast-incidental copies, making a Board-imposed, regulated solution neither necessary nor advisable; third, any fee set for broadcast-incidental copies should be nominal to reflect their inherently low value and to avoid discouraging the adoption of new technology. A proper application of the ratio-based valuation methodology proposed by SODRAC, which these experts reject as inappropriate, would only serve to confirm this; fourth, a through-to-the-viewer synchronization license fee can be set based on actual market rates, adjusted for market conditions.

[47] Based on these principles, Messrs. Wall and Lefebvre examined various ways to set the relevant royalties. For example, they envisaged three approaches to setting the price for a CBC through-to-the-viewer television licence. These and other elements of these experts' testimony are reviewed below as required.

C. EVIDENCE PROVIDED BUT NO LONGER NEEDED

[48] Of their own motion or at our request, parties provided us with information, sometimes extensive, on a number of other issues including:

- the relative share of air time of in-house productions and co-productions, commissioned productions and previously aired productions;
- the relative share of air time of re-broadcasts;
- the value of broadcast-incidental copies in a through-to-the-viewer licence or as a share of a bare synchronization licence.

[49] In the end, we do not need this information to set the royalties and as a result, there is no need to review it.

V. TECHNICAL

[50] We agree with Dr. Murphy that television makes and uses copies of music in virtually the same way as radio. The digital content management systems used by radio and television stations (or networks) to store, format, arrange and broadcast content are either the same or similar. So is their reliance of the ability to copy content.

[51] How radio uses digital content management systems was explained in some detail in a recent decision of the Board dealing with commercial radio.¹⁸ There is no need to repeat what

¹⁸ *Commercial Radio Tariff (SOCAN: 2008- 2010; Re:Sound: 2008-2011; CSI: 2008- 2012; AVLA/SOPROQ: 2008-*

was said there. A few words will suffice to understand the importance and extent of music copying in producing and using audiovisual works, and to explain why we disagree with statements to the effect that copying activities have changed very little in decades.

[52] As was already noted, the process of creating an audiovisual work incorporating a musical work involves making several copies of that work at the production, editing, mixing and other stages before it can even be delivered to the broadcaster. Mr. Leclerc estimated the number of copies at between 12 and 20.¹⁹

[53] Implementation of digital content management systems for television lagged behind that for radio by about a decade because television uses much larger digital files. This required improvements in processing power, memory capacity, prices and compression technology. Today, the implementation of these systems for television is widespread. While it is still technically possible to deliver television broadcasts without the use of servers and digital reproduction technologies, the efficiencies and added functionality associated with these technologies are such that such use has become the norm, not the exception.

[54] Every time a television station copies an audiovisual work, it also makes a copy of the music contained in that work. A broadcaster makes several copies of each program before, during and after the program is broadcast. The program is usually delivered on digital medium. It is then ingested into the station's digital content management system and formatted so as to be compatible with the software used by the broadcaster's server. Often, the program will be edited to meet particular requirements (timing, language, closed captioning). A second copy may be stored on a web server and a proxy file may be created. Further copies will be made when the elements required for delivering programming for the upcoming day or days are copied from the programming archive to the video server hard drives.

[55] Broadcasters also offer content on the Internet, on mobile telephones and on other emerging platforms. These delivery systems can only be deployed using digital servers and reproduction technology. The content offered is varied. Audio content can be simulcast or on demand. Most audiovisual content is offered on an on-demand basis, either as streams or as podcasts that can be downloaded from the station website, by RSS feed to subscribers or through on-line aggregation services like Apple iTunes.

[56] Thanks in part to Internet, the line between traditional and non-traditional audio and audiovisual content is progressively being blurred. The program called "Q" is available terrestrially on CBC Radio One, simultaneously streamed on CBC.ca and broadcast on the CBC

2011; *ArtistI: 2009-2011*) (9 July 2010) Copyright Board [Decision](#). [*Commercial Radio (2010)*]

¹⁹ Transcripts, volume 8 at 1515:1-8.

Radio One channel on Sirius satellite radio. It can be downloaded as an audio or video podcast. An edited video version is available as an on-demand stream on CBC.ca and broadcast on the CBC Bold specialty channel.

VI. LEGAL ANALYSIS

[57] Before we proceed to determine the terms and conditions of a licence, it is necessary to address two sets of legal issues. The first are general principles that inform this decision as they did many others. The second concern the true nature of the licensing arrangements that have existed and continue to exist in the relevant and other related markets.

A. GENERAL LEGAL PRINCIPLES

[58] A few principles that generally form the basis for the Board's decisions are worth repeating here.

[59] First, copyright owners generally are free to structure their dealings with users as they wish. SODRAC members are free to decide how (and to whom) to licence their copyrights in any given market. This general principle is subject to exceptions, some of which we will address later. Users who do not wish to deal with owners must avoid making protected uses of the owners' copyrights.

[60] Second, owners who ask a collective to administer their rights are no longer free to structure their copyright dealings as they wish. When the Board is asked to decide how a collective will deal with users, the collective no longer can refuse to licence uses in that market. Owners can regain full control over their dealings only if the relevant rights cease being administered collectively.

[61] Third, once the Board sets the terms and conditions of a licence, concerned users can insist that the collective deal with them accordingly. Users remain free to clear rights through other channels, to the extent this is possible. As a result, the prices the Board sets will tend to act as a cap on royalties.

[62] Fourth, the Board cannot impose liability where the *Act* does not or remove liability where it exists.²⁰ Consequently, the Board cannot decide who should pay, only what should be paid for which uses, and only to the extent that the envisaged use requires a licence.

[63] Fifth, an important distinction exists between a tariff proceeding and an arbitration conducted pursuant to section 70.2 of the *Act*. In the first, the Board imposes obligations on

²⁰ *CMRRA/SODRAC Inc. (Online Music Services) for the Years 2005 to 2007* (16 March 2007) Copyright Board [Decision](#) at para. 119. [*CSI – Online Music Services (2007)*]

absent users as a matter of course: a tariff is a prospective norm of general application. By contrast, an arbitration concerns only the parties involved. The licences we issue here bind only CBC and Astral, not any other broadcaster. *A fortiori* it is not possible for us to impose through arbitration obligations on copyright users who operate upstream or downstream from the transactions for which we set a price: we cannot force producers to sign through-to-the-viewer licences. Neither can we, through these proceedings, force SODRAC to deal with them.

B. CONTEXTUAL LEGAL PRINCIPLES

[64] These proceedings require understanding how synchronization licences are designed and issued by copyright owners generally, and by SODRAC in particular. Importantly, the focus must be to a large extent on SODRAC's practices. The fact that other rights holders may issue through-to-the-viewer licences, or that some users may view the collective's licensing practices as inconsistent with those of the rest of the industry, while relevant, is not decisive. We are asked to design a licence for the use of SODRAC's repertoire, not other rights holders. To the extent that its licensing practices are both consistent and significant in the relevant market, they cannot simply be set aside as deviant.

[65] The parties' views on prevailing licensing terms and market practices are diametrically opposed. CBC and Astral claim that producers secure through-to-the-viewer licences for the musical works they synchronize into their audiovisual works. If they are correct, then broadcasters do not need a licence for their broadcast-incidental copies. By contrast, SODRAC argues that through-to-the-viewer licensing is not universal in Canada. It also states that it has never issued such a licence and that, even if it wanted to, it could not do so for some foreign repertoires. In fact, the record of these proceedings confirms that licensing practices for the use of music in audiovisual works are far more complex and varied than either side suggests.

[66] Producers generally negotiate synchronization licences one at a time. Practices vary from market to market. Whether and to what extent producers clear downstream music rights depends largely on the amounts available to purchase the required licences: a Hollywood producer may spend a much larger share of a (much larger) production budget to secure music rights than a Quebec documentary producer will.

[67] Hollywood studios favour through-to-the-viewer buyouts: they pay up front for all the music rights they and downstream users may need.²¹ Others prefer paying less at the start; they will secure a through-to-the-viewer licence only for their intended market and secure options allowing them to clear the rights for further markets or for longer periods of time.

²¹ Apparently, producers sometimes succeed in buying out rights directly from the composer or publisher even where such rights are administered by a collective on an exclusive basis.

[68] The importance of buyouts to CBC and Astral is difficult to assess. It will increase to the extent music is licensed on that basis in the American audiovisual productions they use. It will decrease to the extent American producers probably use the SODRAC repertoire far less than Canadian or Quebec producers.

[69] We disagree that through-to-the-viewer licensing in general, and buyouts in particular, is the dominant model in the rest of Canada, despite assurances to the contrary from many witnesses. In this respect, we rely largely on the testimony of Ms. Markou, which we found to be both balanced and instructive. When licensing music, CBC seeks to licence as wide a basket of rights as possible, but only for the uses contemplated at the time of production. For example, a licence may not include a DVD option if the program is not expected to end up on DVD.²² In some licences, only certain rights will be paid for up front; when that occurs, the licence sets out the price for every option.²³ CBC will negotiate territory, market, term and number of uses,²⁴ something that need not be done if the licence is an outright buyout. Licensing a later use is unnecessary if the licence is a buyout. Shortening the term, dropping a market, building in options to lower the up-front licence fee²⁵ are not compatible with buyouts. A complete buyout would not need to be renewed.²⁶

[70] We reviewed the large number of licences signed by SODRAC and other copyright owners filed in these proceedings. To the extent a synchronization licence appeared ambiguous, we interpreted it as granting the producer not only the right to make copies, but also the right to authorize others to make copies necessary to allow fulfilling the primary purpose of the production. Put another way, a third-party producer's synchronization licence for a program intended for broadcast by CBC will license the CBC uses mentioned in the licence unless the licence clearly states that it does not.

[71] Two things are clear. First, outright buyouts are not the dominant model in Canada. Through-to-the-viewer licensing does exist, but is generally circumscribed to specific markets, probably with a view to reducing licensing costs. Second, SODRAC licences are not ambiguous. The collective has issued few, if any, through-to-the-viewer licenses.

[72] The history of SODRAC's dealings with broadcasters and producers leaves no doubt in this respect. In 1990, the Supreme Court of Canada ruled that there was no ephemeral copy exemption in Canada.²⁷ Starting in 1992, SODRAC licensed the main Quebec broadcasters to

²² Transcripts, volume 9 at 1863:2-10.

²³ *Ibid.* at 1786:19-1787:11.

²⁴ *Ibid.* at 1783:17-20.

²⁵ *Ibid.* at 1786:14-18.

²⁶ *Ibid.* at 1788:11-25.

²⁷ *Bishop v. Stevens*, [1990] 2 S.C.R. 46. [*Bishop*]

make broadcast-incidental copies of music, to synchronize music in their own productions and to authorize “upstream” the synchronization of music in the programs they commission. Since 1993, SODRAC has advised producers that they cannot authorize downstream copies. Until 1998, SODRAC did not ask a producer to secure a licence for a program if the broadcaster commissioning the program already held a SODRAC licence, based on the assumption that the broadcaster paid for the licence the producer needed. Then SODRAC started requiring producers to apply for a licence for such commissioned programs, apparently to secure cue sheets more easily. Still, the producer’s licence was issued for free. Around 2006, SODRAC started asking that producers pay synchronization royalties even for commissioned programs. Ms. Fortier’s testimony to the effect that SODRAC has never issued buyout licences to producers only serves to confirm what the licences show: when a SODRAC licence authorizes the user to authorize copies made by a third party, that user is, virtually always, the broadcaster, not the producer.

[73] Virtually all SODRAC licences issued to producers that were filed in these proceedings clearly specify, in one form or another, that the producer cannot authorize copies made by broadcasters, distributors and other exhibitors. These include such statements as the following:

- the producer cannot authorize copies made by third parties. Sometimes, the word “*tiers*” is used. Sometimes, it is “*tiers exploitant*”, an obvious reference to the downstream user who intends to make use of the work;²⁸
- the licence allows a first integration “*en vue de l’exploitation par un tiers*”²⁹. When the only “*exploitation*” mentioned in the licence is by a single broadcaster, then that broadcaster is that “*tiers*”;³⁰
- the licence authorizes only those copies that are made by the producer;³¹
- the licence does not authorize downstream copies made in the markets for which the licence is being issued;³²
- the licence is limited to the first fixation;³³
- the licence is non-transferable.³⁴

[74] Such wording is consistent with the way SODRAC dealt with the main Quebec broadcasters. Since SODRAC licensed these broadcasters to make broadcast-incidental copies, licensing the producer to authorize such copies would have been redundant.

²⁸ Exhibit DEF-58 generally; respecting “*tiers exploitant*” see licence 144450, January 19, 2006, s. 12.

²⁹ Exhibit SODRAC-99A (2006) (licence 151363, July 13, 2006); Exhibit SODRAC-99C (2006) (licence 151339, July 13, 2006); Exhibit DEF-4 (licence C.18-184680, March 20, 2008).

³⁰ Contrary to what Astral and CBC argued, anyone who is not party to a contract is a “*tiers*”, even the broadcaster named in a producer’s synchronization licence.

³¹ Exhibit SODRAC-99A (2005) (August 9, 2005 licence, s. 13).

³² Exhibit SODRAC-99C (2006) (licence 155795, October 20, 2006, s. 13); Exhibit DEF-4 (licence 161773, February 8, 2007, s. 12).

³³ Exhibit SODRAC-99A (2005) (licence 131492, August 20, 2005, s. 10).

³⁴ Exhibit SODRAC-99C (2007) (licence CAT18#171183, July 11, 2007, “*autorisation*” clause).

[75] A few synchronization licences issued by SODRAC to producers expressly authorized downstream copies. These licences are different from others in two important respects.³⁵ First, royalties are not for a set amount, but are income based. Second, the clause providing that SODRAC reserves all other rights is either removed or modified.

[76] Most SODRAC licences specify a term, a territory and a market. Astral and CBC argued that this is an indication that all downstream uses in that territory, in that market and during that term are authorized by the licence. Such inference would be helpful only if SODRAC licences were ambiguous, which is not the case. Furthermore, term, territory and market can just as well be explained as limitations to what the producer can do with the master. The producer must secure a further licence before attempting to exploit the program or movie outside of these parameters: a program licensed to be broadcast on CTV cannot be offered to CBC until the producer has secured a further licence.

[77] Furthermore, some provisions of the collective agreements signed between producers' and composers' associations pursuant to the federal *Status of the Artist Act*³⁶ are incompatible with through-to-the-viewer producer licences.³⁷ The same is true of the standard composition contract of the *Société professionnelle des auteurs et des compositeurs du Québec* (SPACQ).³⁸

[78] The record is clear. In the most relevant market, the province of Quebec, through-to-the-viewer licensing exists but is not the norm.

[79] Some witnesses stated that broadcasters expect producers to clear the right to make broadcast-incidental copies. Indeed, the standard Astral contract requires the producer to provide assurances to this effect. Broadcasters' expectations and producers' assurances do not bind SODRAC.

VII. SETTING THE ROYALTIES

[80] We start by deciding on some general propositions which will inform the rest of these reasons. We then decide the way we intend to approach the issue of repertoire adjustments. Finally, we set out how we arrive at the royalties for each and every use targeted in these arbitrations.

³⁵ Exhibit SODRAC-99A (2007) (licence 164501, May 9, 2007; Licence 16452, June 19, 2008; Licence 166553, May 9, 2007).

³⁶ S.C. 1992, c. 33.

³⁷ See for example Exhibit SODRAC-36A, p. 23, art. 6; Exhibit SODRAC-37A, ss. 4.04, 9.13; Exhibit SODRAC-38A, ss. 4.03 to 4.05, and Appendix C, s. 4.

³⁸ Exhibit SODRAC-101C, ss. 16 to 18.

A. SOME GENERAL PROPOSITIONS

[81] The first question concerns the extent to which the adoption of new technology should trigger royalties. According to CBC and Astral, this does not warrant additional royalty payments even where it results in more copies being made. We disagree. The adoption of copy-dependent technologies allows broadcasters to remain competitive and to protect their core business even when it does not generate direct profits. These technologies are necessary for Astral and CBC to remain relevant so that services continue to be seen by the public.³⁹ These are clear benefits arising from the copy-dependant technologies. Since these technologies involve the use of additional copies, some of the benefits associated with the technologies must be reflected in the remuneration that flows from these incidental, additional copies.

[82] The second question concerns the relationship that should exist between the licence we approve and the existing market. We can only rule on the licensing relationship that will exist between SODRAC on the one hand, and Astral and CBC on the other. We cannot dictate to SODRAC or the producers how they will deal with one another, let alone influence the conduct of producers who deal with copyright owners other than SODRAC.

[83] The third question concerns the advisability of encouraging through-to-the-viewer producer licensing. From a policy perspective, there may be sound reasons why we should not design the licence we issue so as to encourage or force producers to secure through-to-the-viewer licences. Quebec producers operate on small budgets. Forcing them to secure through-to-the-viewer licences, especially buyouts, would require them to allocate a larger share of an already too small production budget to music licensing. They should remain free to decide whether they wish to offer a turnkey service for the audiovisual works they licence, or whether they wish to pay only for the rights they use. The most we can do is to design the broadcaster's licence in such a way that it need not pay royalties when the producer is able to provide the broadcaster with the needed authorization. This we address below.

B. REPERTOIRE ADJUSTMENTS

[84] SODRAC does not represent all copyrighted music. As a result, some valuation approaches require performing a repertoire adjustment before arriving at a royalty rate.

[85] Repertoire use adjustments are made on the basis of a percentage of music played. This makes sense under most circumstances. Such is the case if the starting point for a valuation is what SOCAN collects in the relevant market. The SOCAN rates are already adjusted for the proportion of music to total air time.⁴⁰ This is why, when a SOCAN tariff is used to derive a rate

³⁹ Testimony of Ms. Meloul, Transcripts volume 10 at 1990:20-1991:4.

⁴⁰ See for example *SOCAN-Re:Sound CBC Radio Tariff, 2006-2011* (July 8, 2011) Copyright Board [Decision](#) at

for SODRAC (or Re:Sound), the denominator for any repertoire use adjustment should be music played, not air time.

[86] A repertoire adjustment must be applied to the rate for radio broadcast-incidental copies. SODRAC performed an analysis that led it to conclude that its repertoire represents 34.5 per cent of music played on radio. CBC suggested using 33 per cent instead, reflecting the fact that the CMRRA-CBC Radio Agreement postulates that the CMRRA repertoire represents 67 per cent of music played. The CMRRA figure is a rough estimate. The analysis performed by SODRAC is more transparent, and to our mind, more accurate. Consequently, the final royalties are based on the assumption that 34.5 per cent of music played on CBC radio is part of the repertoire of SODRAC.

[87] A repertoire adjustment must also be applied to television broadcast-incidental copies. SODRAC performed repertoire use analyses for CBC and Astral, generally based on an examination of program cue sheets. As some information was missing for specialty television, SODRAC asked Benoît Gauthier of Réseau Circum Inc. to develop an alternative sampling method. This led SODRAC to conclude that the use of its repertoire, as a percentage of music played, was as follows:

CBC:

- CBC television: 46.33 per cent;⁴¹
- *RDI*: 86.66 per cent;
- News Network: 37.06 per cent;
- Bold: 42.64 per cent; and
- Documentary Channel: 58.36 per cent.

Astral:

- *VRAK.TV*: 51.22 per cent;
- *Canal D*: 27.77 per cent;
- *Canal Vie*: 21.85 per cent;
- *ZTélé*: 13.86 per cent;

para. 98. [*CBC Radio (2011)*]

⁴¹ This is an average of 59.55 per cent for French television and 38.47 per cent for English television, weighted according to programming expenses.

- *Historia*: 20.29 per cent;
- *Séries+*: 27.81 per cent;
- Teletoon (English): 19.19 per cent;
- *Télétoon* (French): 21.06 per cent;
- Teletoon Retro (English): 0.06 per cent; and
- *Télétoon Rétro* (French): 0.26 per cent.

[88] Having performed her own analysis, Ms. Carbonneau concluded that these claims were exaggerated. She put the use of the SODRAC repertoire by CBC Conventional (English) television at 23.23 per cent. She also stated that SODRAC's analysis with regard to CBC Conventional (French) television was incomplete and unreliable.

[89] The Objectors were quite critical of the results of SODRAC's repertoire use analyses. They argued that SODRAC claims an excessive amount for arrangements of public domain works, but did not provide evidence of the extent to which this exaggeration, if it exists, may influence the overall calculation of repertoire use. We have no reason to believe that CBC or Astral use recent arrangements of public domain works often enough to influence the calculations we are required to perform in order to set the relevant royalties.

[90] The Objectors also claimed that SODRAC may be seeking royalties in respect of works that are not in its repertoire. These claims remained at the level of generalities. Actual results lead us to the opposite conclusion. The analysis Astral performed for one of the three periods SODRAC examined to derive its repertoire adjustments bore strikingly similar results.⁴² So was the analysis Ms. Carbonneau performed in response to a question of the Board.⁴³ SODRAC calculated a repertoire use of 59.55 per cent for French television; Ms. Carbonneau's calculations yielded 59.25 per cent. For English television, the results were more significantly different: 38.47 and 21.67 per cent, which was then adjusted to 23.23 per cent.

[91] SODRAC proposed taking into account the analysis Astral performed by including it in the calculations of the repertoire use for the period in which the analysis was performed. We prefer using only the average of the SODRAC analyses, for the following reasons, noting though that paradoxically, the Astral data tend to increase the rate. First, using only the SODRAC data better reflects the various trends in repertoire use on certain channels which the data illustrate. Second, the data are consistent. Third, using or not using the Astral data apparently varies the overall

⁴² Compare the second and third columns of the table found at Exhibit SODRAC-1 at para. 63.

⁴³ Letter dated December 28, 2010, answer to Question 1.

amount of royalties by no more than one per cent. The only exceptions are Teletoon Retro (English and French) for which fewer data were available: for these services, we use SODRAC's approach, which is a blend of its own and Astral's data.

[92] With respect to CBC, we prefer SODRAC's analysis to CBC's. SODRAC's analysis is based on the cue sheets for all programs shown on television for a period of three years. This is an analysis of the universe, not of a sample. By contrast, CBC's analysis is based on a summary file presented by SODRAC for one week of programming. In more than half of the titles analysed by CBC, the notation "no cue sheets" was written in the comments field of CBC's analysis. This can only diminish the reliability of the analysis. Finally, the figures CBC proposes are methodologically suspect, for the reasons outlined by SODRAC.⁴⁴

[93] We therefore conclude that the use of the SODRAC repertoire, as a percentage of music played, is as follows:

CBC:

- CBC television: 46.33 per cent;
- *RDI*: 86.66 per cent;
- News Network: 37.06 per cent;
- Bold: 42.64 per cent; and
- Documentary Channel: 58.36 per cent.

Astral:

- *VRAK.TV*: 49.85 per cent;
- *Canal D*: 28.23 per cent;
- *Canal Vie*: 21.83 per cent;
- *ZTélé*: 14.30 per cent;
- *Historia*: 18.96 per cent;
- *Séries+*: 27.50 per cent;

⁴⁴ Letter dated January 21, 2011. SODRAC argues that CBC's analysis is based on a single week that nothing indicates being representative of everything broadcast and that the treatment of CBC's French and English segments is inconsistent by not referring to the same databases.

- Teletoon (English): 19.18 per cent;
- *Télétoon* (French): 21.03 per cent;
- Teletoon Retro (English): 0.06 per cent; and
- *Télétoon Rétro* (French): 0.26 per cent.

[94] No repertoire adjustment is required for the royalties payable for sale or licensing of CBC programs to consumers or to third party broadcasters and carriers, since both proposed formulas automatically adjust royalties according to the amount of repertoire music used in each program.

C. SETTING THE APPLICABLE RATES

i. Broadcast-incidental Copies – Radio

[95] CBC and SODRAC agree that CBC Radio must pay for its broadcast-incidental copies.

[96] Relying on the testimony of Messrs. Wall and Lefebvre, CBC proposes using the 1992 Agreement as starting point. Mr. Audley disagrees, if only because at the time, neither party had any information with respect to the use being made of SODRAC’s repertoire. We agree with Mr. Audley. Furthermore, the agreement was reached at a time, and in a context, that has largely changed (see: *CBC Radio (2011)*).⁴⁵

[97] The CMRRA-CBC Radio Agreement expressly sets the royalties for the reproduction right at one third of those for the communication right, adjusted for repertoire. SODRAC proposes using the same approach here. Relying on the testimony of Messrs. Wall and Lefebvre, CBC argues that this would result in increases that are out of line with historical changes in copyright payments to SOCAN. CBC’s witnesses also argued that the agreement is not a reliable basis from which to set royalties, given the circumstances under which it was negotiated.

[98] To conclude that the royalty increase would be out of line with increases in payments to SOCAN, one must use, for the comparison, the same 1992 Agreement which we just rejected as starting point. We see no reason to do this. We also see no reason to simply set aside the CMMRA-CBC Radio Agreement. It is the best benchmark available to us in these proceedings. It reflects a meeting of the minds between the same user and a sister collective, precisely for the same uses. At a minimum, it serves to confirm some market acceptance of a ratio that is very close to what the Board has used in other instances to perform similar comparisons.

⁴⁵ *CBC Radio (2011)*, *supra* note 40 at paras. 66-74.

[99] That being said, we prefer to use the CMRRA-CBC Radio Agreement as validation of the 3.2-to-1 ratio we used in *Commercial Radio (2010)*.⁴⁶ Using that ratio ensures that CBC and commercial radio are treated equally. We apply that ratio to the royalty amounts we recently set in *CBC Radio (2011)*.⁴⁷ For the reasons outlined in paragraph 86, the final royalties reflect a radio repertoire use of 34.5 per cent. Therefore, the rates we certify are \$174,476 for 2008, \$177,251 for 2009, \$180,955 for 2010 and \$184,574 for 2011.

[100] The rates the Board certified in *CBC Radio (2011)* include an amount of 1.22 per cent for CBC radio's simulcasting activities. This amount has been removed from the previous calculation. The royalties for these and other Internet copies are set below.

[101] The Board has not certified the royalties CBC radio will pay to SOCAN for 2012. To maintain the link between the SOCAN and SODRAC royalties, the licence provides that the SODRAC royalties will be calculated in accordance with the formula we used for the years 2008 to 2011:

$$0.1065 \times \text{SOCAN royalties for 2012}$$

where $0.1065 = (1 \times 0.345) \div (1.0122 \times 3.2)$.

[102] CBC will pay the same amount as in 2011 as interim royalties. Any adjustment required in the amount of SODRAC royalties will be payable on the date the Board will set for the similar adjustment to the 2012 SOCAN royalties when it certifies the 2012 SOCAN tariff for CBC.

ii. Broadcast-incidental Copies – TV

[103] Each side essentially proposed a single approach for setting royalties for the broadcast-incidental copies made by all television services under examination.

[104] Astral and CBC sought royalties that were either nil or very low, based on the assumption that they do not need a licence for such copies: thus, Messrs. Wall and Lefebvre proposed valuing any licence for Astral's broadcast-incidental copies at no more than 5 per cent of the total value of the licences secured by the producers whose programs are aired on Astral stations. We disagree. As we explain in paragraphs 69 to 79, through-to-the-viewer licensing is not as prevalent in the relevant market as the objectors maintain. CBC and Astral make broadcast-incidental copies for which they require a licence from SODRAC, including those that CBC makes of its own productions, for which the synchronization fees are calculated separately below.

⁴⁶ *Commercial Radio (2010)*, *supra* note 18 at paras. 217-223.

⁴⁷ *CBC Radio (2011)*, *supra* note 40 at paras. 114 (without simulcasting) and 122 (including simulcasting).

[105] Relying on Dr. Murphy's conclusion that the use of copies on radio and television is virtually the same, SODRAC argued that a ratio analysis that is valid for CBC radio is equally valid for CBC television and that any ratio analysis valid for CBC television is equally valid for Astral. SODRAC also relied on an agreement it reached with ARTV as supporting its proposed approach.

[106] Messrs. Wall and Lefebvre argued that the ARTV Agreement is not an appropriate benchmark since the agreement licenses not only broadcast-incidental copies but also in-house productions. We agree.

[107] These experts also challenged the use of the radio ratio for the purposes of television, quoting differences between the two media they consider significant. First, producers already clear television broadcast-incidental copies. We have already found that this is not so: see paragraphs 69 to 79. Second, music plays a far more prominent role on radio. In our opinion, the difference in the rates for the SOCAN radio (4.4 per cent) and television (1.9 per cent) tariffs already accounts for any relevant difference between the media. Third, television broadcasters have little control over the nature and amount of music included in most programming. We fail to see how this is relevant. We have already found that broadcasters derive value from the copies they make of synchronized music. We see no reason to conclude that the relative value of the copy and the communication is different for radio than for television.

[108] Linking SODRAC royalties for broadcast-incidental copies to what a television service pays to SOCAN offers a further advantage. Broadcast-incidental copies probably are not all worth the same. Arguably, a second or later broadcast should attract lower royalties than a first one. A rebroadcast generally attracts a lower audience. The producer of the program generally gets a lower licensing fee. The ratio between the licensing fees for first and subsequent broadcasts is anyone's guess: the assumptions on which the parties' experts had to rely to come to such a ratio show this. Because of the way in which they are calculated, SOCAN's overall royalties implicitly account for these varying values.

[109] Therefore, we will apply the same ratio for television as for radio. The royalties for CBC conventional television will be 31.25 per cent of SOCAN royalties, before repertoire adjustment. The other television services targeted in this application pay at rates of either 0.8 per cent or 1.9 per cent. Applying the ratio, we obtain rates, before repertoire adjustment, of 0.59375 per cent for each Astral Specialty Channel, 0.59375 per cent for Bold and Documentary Channel and 0.25 per cent for *RDI* and News Network.

[110] For the reasons outlined in paragraphs 87 to 92, we prefer the repertoire adjustments proposed by SODRAC to those proposed by the objectors. With respect to CBC, this yields rates of:

- Conventional television: 14.478 per cent ($31.25\% \times 0.4633$) of what CBC television pays to SOCAN;
- *RDI*: 0.217 per cent ($0.25\% \times 0.8666$) of gross income;
- News Network: 0.093 per cent ($0.25\% \times 0.3706$);
- Bold: 0.253 per cent ($0.59375\% \times 0.4264$); and
- Documentary Channel: 0.347 per cent ($0.59375\% \times 0.5836$).

[111] For the Astral television services, the rates are:

- *VRAK.TV*: 0.296 per cent ($0.59375\% \times 0.4985$) of gross income;
- *Canal D*: 0.168 per cent ($0.59375\% \times 0.2823$);
- *Canal Vie*: 0.130 per cent ($0.59375\% \times 0.2183$);
- *Ztélé*: 0.085 per cent ($0.59375\% \times 0.1430$);
- *Historia*: 0.113 per cent ($0.59375\% \times 0.1896$);
- *Séries+*: 0.163 per cent ($0.59375\% \times 0.2750$);
- Teletoon (English): 0.114 per cent ($0.59375\% \times 0.1918$);
- *Télétoon* (French): 0.125 per cent ($0.59375\% \times 0.2103$);
- Teletoon Retro (English): 0.0004 per cent ($0.59375\% \times 0.0006$); and
- *Télétoon Rétro* (French): 0.002 per cent ($0.59375\% \times 0.0026$).

[112] CBC and Astral broadcast some television programs for which the right to make broadcast-incidental copies was cleared by the producer. The licence formula should recognize this. We will allow the broadcasters to discount the royalties otherwise payable to SODRAC if the broadcaster can establish that the producer cleared music through to the viewer. The discount will be calculated using the acquisition cost for the program as numerator and the broadcaster's total acquisition costs as denominator for all programs except CBC's own production; for those, the calculation will be made using the program's production costs.

[113] For the time being, we will not allow the broadcasters to discount their royalties for programs using no SODRAC music; the use of non-SODRAC music is already accounted for in our repertoire use adjustments.

[114] SODRAC secures some rights on a non-exclusive basis. This allows copyright owner members to licence copies directly to users. SODRAC maintains that source licensing of its repertoire is not possible where SODRAC offers a blanket licence. The manner in which CBC and Astral will be allowed to discount royalties where a producer secures a through-to-the-viewer licence makes it unnecessary to address the issue.

iii. Synchronization – CBC

[115] CBC requires a licence to synchronize works from SODRAC's repertoire in its in-house and co-productions for conventional television, *RDI* and News Network. SODRAC starts with the proposition that the same relationship exists between a synchronization copy and a broadcast-

incidental copy as between copies made to deliver permanent downloads and on-demand streams. The first involve a primary right, the second, a secondary right.

[116] The ratio of reproduction royalties for permanent downloads and on-demand streams is 1.9 to 1. SODRAC proposed using that ratio to set CBC's synchronization royalties. Royalties would then be adjusted downwards to reflect the fact that CBC should pay synchronization royalties only for its in-house and co-productions, whereas it pays royalties for broadcast-incidental copies of all programs.

[117] Messrs. Wall and Lefebvre challenged this approach on two grounds. First, it is awkward to set the value of a primary right as a function of a secondary right. Second, the similarities between the online music services and television markets are far from obvious, if only because no synchronization copies are made in delivering downloads or streams over the Internet. We agree.

[118] Relying on the testimony of these experts, CBC proposed using the 1992 Agreement as starting point. Royalties are allocated between television and radio, using the ratio of CBC payments to SOCAN and then adjusted for any change in repertoire use and for inflation. The amounts producers now pay to SODRAC are then backed out to reflect the fact that at the time of the 1992 Agreement, SODRAC did not collect any royalties from producers. For the reasons outlined in paragraph 96, we find that this approach is not appropriate.

[119] Alternatively, CBC proposed using blanket synchronization licenses between SODRAC and certain broadcasters to derive comparable, blanket through-to-the-viewer royalties for CBC. Messrs. Wall and Lefebvre derived implicit, per-minute rates that were then multiplied to reflect repertoire use and adjusted to account only for in-house productions and co-productions (since these experts argued that producers clear all required rights for other programs). Mr. Audley argued that this approach fails to consider differences in revenues and scale of operations and assumes similar use patterns of the relevant repertoires. It wrongly assumes that each broadcaster produces programs in-house to one degree or another. We agree with Mr. Audley.

[120] CBC finally proposed a bottom-up approach, involving the following steps. The first is to determine the amount, in seconds, of pre-existing and commissioned musical works in the repertoire of SODRAC used by CBC in its in-house productions and co-productions during the course of a year; this is necessary because the manner in which synchronization royalties are set for both types of music is different.⁴⁸ The second is to set a price for two time units (here, 30 seconds and full song) of music used in each category. The third is to multiply the first number

⁴⁸ All commissioned music for a program or series attracts a single, pre-determined synchronization royalty payment. Royalties for pre-existing music vary as a function of the amount used: Exhibit SODRAC-1 at para. 201.

by the second for each category. This is the approach Messrs. Wall and Lefebvre prefer. They consider it offers the greatest affinity to what a market price would be. It also resembles the calculations SODRAC performed to validate its proposed royalty.

[121] In our opinion, this approach provides the best estimate of what CBC should pay for its synchronization copies, for the following reasons. First, this approach is transaction-based. Since it relies on CBC's actual use of the repertoire, it can be adjusted to CBC's music consumption patterns. Second, it applies different prices to pre-existing and commissioned work, as seems to be the case in the existing market. Third, despite the weaknesses outlined below, it yields results we believe to be sufficiently reliable and fair under the circumstances. This is the approach that we will use, subject to a few adjustments and to disposing of some disputes between the parties.

[122] One must first determine the amount, in minutes, of pre-existing and commissioned musical works in the repertoire of SODRAC used by CBC in its own productions during a year. In this respect, SODRAC filed exhaustive data for the years 2006 to 2008. Using these data yielded two average, yearly figures, which both sides used. The number of 30-second units of pre-existing music, adjusted for repertoire, is 2,195.28. The number of minutes of commissioned music is 40,744.

[123] Next, one must determine separate rates for the right to synchronize pre-existing and commissioned music.

[124] With respect to pre-existing musical works, Messrs. Wall and Lefebvre relied on licences issued by right holders other than SODRAC to arrive at rates of \$198 per 30-second excerpt and \$338 per full song. Mr. Audley challenged their approach; why only use non-SODRAC licences to set a price in a market where SODRAC's presence is strong? He preferred applying the SODRAC card rates of \$300 per 30-second excerpt and \$1,200 per full song. For the first amount, Mr. Audley relied on Mr. Lavallée's testimony that the card rates represent market averages. For the second, Mr. Audley relied on the market practice of capping the royalties for a full song at four times the rate for a 30-second excerpt.

[125] Messrs. Wall and Lefebvre repeated their analysis, relying this time on some SODRAC licenses filed as part of the record of these proceedings. They arrived at a 30-second rate of \$265. We use this rate for two reasons. First, it accounts for SODRAC's market presence. Second, it reflects actual bargains that were made part of the record: a rate card often acts as a cap on royalties.⁴⁹ For the reasons outlined by Mr. Audley, we cap the number of units per song at four.

⁴⁹ The use of a set price per unit, irrespective of the size of the broadcaster or the audience of the program may need further explanation. So may the fact that only SODRAC licences are used. Given the agreement of the parties to proceed as they did, we opted not to raise these issues.

Applying these rates to the figures referred to in paragraph 122, we obtain an average annual synchronization license fee of \$581,749.

[126] With respect to commissioned musical works, Messrs. Wall and Lefebvre used as starting point the agreement between SPACQ (the composer's union), the *Association des producteurs de films et de télévision du Québec* (APFTQ: the audiovisual producers' union) and SODRAC ("SAS Agreement"). This agreement came as a result of the collective agreement reached between SPACQ and APFTQ pursuant to federal status of the artist legislation. It provides that when music is commissioned for a program or series that is not produced for a broadcaster holding a SODRAC blanket licence authorizing the broadcaster to authorize producers to synchronize SODRAC music into the commissioned program, SODRAC is to be paid a synchronization royalty of \$100 per program or \$200 per series.

[127] The experts chose to use the series rate because series account for a substantial majority of the production carried out under the agreement. They also assumed that a typical series has 13 episodes. This translates into a rate of \$15.38 per episode. A review of minutes of use in an episode of a typical series suggests that less than five minutes of commissioned music is used. Using that number, the experts determined that the synchronization fee for a minute of commissioned music is approximately \$3. The average implied synchronization fee for commissioned musical works in CBC productions is therefore approximately \$122,000 per year.⁵⁰

[128] Mr. Audley proposed some adjustments to this approach. First, he noted that the \$200 is paid only on account of the author. The normal practice in Quebec is that royalties are divided equally between the author and the publisher. For this reason, he argued that an appropriate starting point would be twice the amount paid to the composer, or \$400. Second, he noted that the SAS Agreement, relying on the collective agreement, defines a series as any production of two or more episodes. With this in mind, he proposed to estimate the number of episodes per series at the average of 2 and 13, or 7.5. Leaving the number of minutes of commissioned music per episode at five, Mr. Audley arrived at a synchronization fee for a minute of commissioned music of approximately \$10.67. This yields an average annual synchronization fee of \$434,738.

[129] We agree with the parties to use the SAS Agreement as starting point. For the reasons provided by Mr. Audley, we conclude that the rate should be doubled to \$400. We disagree with Mr. Audley's assumptions concerning the number of episodes per series. His approach caps the number of episodes to 13; yet the agreement allows for much longer series, if only by providing that subsequent seasons of the same series do not trigger additional royalties unless new

⁵⁰ According to our understanding of the record, this includes live to tape synchronization, which SODRAC (rightly) claims is compensable: see *Bishop*, *supra* note 27.

commissioned music is added. On this issue, we prefer the approach of Messrs. Wall and Lefebvre. Since the number of five minutes of commissioned music per episode is undisputed, this is the number we use. This yields a rate of \$6.1538 per minute and an average annual synchronization royalty of \$250,730 for CBC's use of commissioned musical works in the SODRAC repertoire.

[130] The total annual synchronization license fee for CBC is therefore \$832,479 (\$581,749 + \$250,730) for the period 2006 to 2008. We decided to use the average for 2006 to 2008 because the result we obtained for each year was essentially constant: \$833,324 in 2006, \$841,207 in 2007 and \$823,091 in 2008. This was true even though there was a shift between pre-existing and commissioned musical works during the period. Nothing would indicate that the result would be significantly different for the years 2008 to 2012.

[131] Messrs. Wall and Lefebvre proceeded on the assumption that the CBC synchronization licence would be through to the viewer. Even though this is not the case in the end, this should not result in any discount: through-to-the-viewer licences clearly are the exception, not the norm, for CBC's own production.

[132] Messrs. Wall and Lefebvre suggested that a discount of 40 per cent should be applied to reflect the nature of a blanket license and its associated cost savings. We disagree. A blanket license benefits both parties. There is no precedent for the Board applying a discount on the basis of a blanket license. In fact, its only decision on the issue *added* to the rate in order to account for the benefits derived by low-use commercial radio stations from the blanket licence.⁵¹ Neither CBC nor its experts offered any cogent reason to renege past practice.

[133] Synchronization fees for webisodes produced for delivery on the Internet are addressed below, with other television Internet royalties.

[134] We have chosen to set a single, yearly royalty for all the music CBC synchronizes. We did so in part because both parties' analyses and arguments and the information they supplied to us invited this approach. We did so despite certain misgivings.

[135] The market for the use of music in television programs is highly amenable to transactional licensing. Synchronization licensing already is largely transactional. The nature and extent of the rights granted in each licence vary considerably. Practices vary from market to market and from country to country; they will continue to be so.

⁵¹ *SOCAN – Various Tariffs for the Year 1991* (31 July 1991) Copyright Board [Decision](#), (1990-1994) Copyright Board Reports 284 at 303.

[136] Broadcasters use a variety of audiovisual works from a variety of sources in a variety of countries. CBC rarely needs a SODRAC licence when it broadcasts a Disney movie. In the case of a co-production with foreign broadcasters, the need for a SODRAC licence is impossible to determine without reading the contract and sometimes, without knowing whether the contract was complied with.

[137] A blanket licence with set royalties, whether a set rate or a fixed amount, necessarily relies on an incomplete analysis of assumptions and generalities (number of episodes in a series, average cost of individual synchronization licences, amount of pre-existing and commissioned music used) derived from past events and transactions. It removes some of the freedom enjoyed by others in the market.

[138] A licence that accounts for transactional dealings leaves choices. It respects the principle according to which the Board cannot impose liability where none exists or dispense from liability where it exists.⁵²

[139] We are also uncertain about the long term usefulness of the SAS Agreement as a starting point to calculate the synchronization royalties for commissioned music. We would have preferred to know more about the agreement's background. We do not fully understand why it was necessary to transform a simple rate per program or series into a rate per minute. Neither do we fully understand why, if most programs use less than five minutes of commissioned music, the per-episode royalty should be divided by five; using a number that is higher than the average will tend to artificially decrease the total amount of royalties.

[140] The parties may wish to revisit these issues at some appropriate time.

iv. Internet Audio – CBC

[141] CBC offers a variety of Internet audio and audiovisual services, including conventional radio simulcasting, standalone services (*Bande à part*, CBC Radio 3) and podcasting.

[142] The CMRRA-CBC Radio Agreement sets royalties of 4 per cent of conventional radio royalties for simulcasting and streams, and 3 per cent for podcasting, resulting in a total Internet royalty “top up” of 7 per cent. SODRAC proposed using these rates. CBC did not propose a royalty amount, arguing instead that Internet-related copies have little or no value, that *Bande à part* and CBC Radio 3 only use music owned by persons who warrant that they are not members of any copyright collective and that most CBC podcasts contain no music. CBC also argued that the CMRRA-CBC Radio Agreement should not be used as benchmark since it was entered into

⁵² *CSI – Online Music Services (2007)*, *supra* note 20 at para. 119.

on a without prejudice basis in order to avoid protracted negotiations or an expensive proceeding.

[143] We have already found that copies required to facilitate the use of new modes of delivery deserve remuneration. The fact that these modes are not currently profitable may influence the amount of royalties, not their existence. Assurances from third parties that they are not members of SODRAC are insufficient to conclude that no licence is required, though we are inclined to agree that this may generally be the case for *Bande à part* and Radio 3. We cannot conclude with CBC that its podcasts contain no SODRAC music absent concrete evidence in support of the proposition, if only because the statement is counter-intuitive. Why would one remove theme music from a podcast?⁵³

[144] Only two potentially reliable benchmarks were made available. The first are the SOCAN Internet tariffs. Pursuant to SOCAN tariffs 1.C (CBC Radio) and 22.E (Internet – CBC), CBC pays a total top up of 2.72 per cent for its Internet uses of SOCAN music. The second is the CMRRA-CBC Radio Agreement which SODRAC propose we use. The SOCAN rates were set based on very little evidence. The Agreement's price is as reliable a benchmark for Internet as it is for conventional radio. This is the approach we use. CBC will pay a top up of 7 per cent of conventional radio royalties for its Internet uses.

[145] CBC continues to add to its Internet music offerings. Whether these merit either separate royalties or an increase in the top up can be left to another day. During the period under examination in these proceedings, they were not significant enough to warrant a re-examination of the issue.

v. Internet TV

[146] For reasons already stated, we find that Internet copies have value and should be remunerated.

[147] The CMRRA-CBC Radio Agreement sets royalties of 4 per cent of conventional radio royalties for simulcasting and streams. SODRAC proposes using this approach for similar audiovisual Internet offerings. SODRAC did not ask royalties for audiovisual podcasts.

[148] The CMRRA-CBC Radio Agreement is all the evidence available to us to set a rate. The reasons that led us to apply the same approach to radio and television broadcast-incidental copies are just as valid here. If anything the rate may be too low because it does not account for the added value of exclusive access to commissioned music.

⁵³ It may be that those programs that CBC offers at podcasts tend to contain less music on average. If so, it is up to CBC to offer the demonstration.

[149] Some webisodes are exclusively produced for delivery on the Internet. We were not provided with evidence that would allow us to estimate the synchronization fees for such productions. Given the absence of evidence, the simplest way to address the issue is to provide that the 4 per cent top up licences synchronization copies as well.

[150] As a result, CBC will pay a top up of 4 per cent of all television royalties to account for all audiovisual Internet copies of music.

vi. Sales of programs to consumers for private use (DVD and downloads)

[151] CBC and SODRAC agree that CBC should continue to pay royalties for its sales of programs to consumers for private use. We agree.

[152] With respect to DVD copies, CBC seeks the *status quo*. SODRAC proposes a 57 per cent increase, without providing any supporting evidence. Given the lack of evidence, we prefer using the existing rates, adjusted for inflation. Since the licence will apply from November 2008 to March 2012, we will adjust the rates for the whole period based on the increase up to the mid-point of the licence, July 2010. Based on inflation data taken from the Statistics Canada website, the consumer price index increased from 101.2 since the 2002 agreement was reached, in October 2002 to 116.8 in July 2010. This calls for an adjustment of 15.4 per cent. For feature music, the per-minute rates are therefore 1.44¢ for the first fifteen minutes, 0.87¢ for the next fifteen and 0.52¢ thereafter. The rates for background music are 0.58¢, 0.35¢ and 0.21¢. The licence also reflects the provisions of the 2002 Agreement dealing with music programs, commissioned music, and sets.

[153] SODRAC proposes to set the same royalty rate for online sales as for DVD sales. CBC states that based on its understanding of the market, the fees for online sales should be lower than for DVD copies. CBC did not provide actual evidence to support its statement. Absent evidence to the contrary, we see no reason to treat these types of sales differently.

vii. Sale or licensing of CBC programs to third-party broadcasters and carriers – CBC

[154] SODRAC proposes that the royalties for copies CBC makes in connection with the sale or licensing of programs to third party broadcasters be the same as those the Board set in 2000 for MusiquePlus,⁵⁴ or 3 per cent of revenues, adjusted for actual repertoire use in the licensed program. CBC asks instead that we rely on a recent licence between SODRAC and a Quebec broadcaster, who does not pay additional royalties for such copies. No further evidence was provided.

⁵⁴ Application to fix royalties for a licence and its related terms and conditions (*SODRAC v. MusiquePlus Inc.*) (16 November 2000) Copyright Board [Decision](#). [*MusiquePlus (2000)*]

[155] The agreement CBC refers to is not a reliable benchmark, for two reasons. First, royalties for the blanket licence are a percentage of revenues, including production revenues. To date, we have taken no account of CBC's production revenues in the rates we have set: CBC would get the copies it makes to deliver programs to third party licensees for free. Second, the licence appears to be atypical: generally, SODRAC does not licence broadcasters at the same time for their broadcast incidental copies and for the copies they make to deliver programs to third party licensees.

[156] By contrast, the rate set in *MusiquePlus (2000)* is *prima facie* reasonable. Absent evidence to the contrary, there is no reason to differentiate between broadcasters when they carry the same activity. Therefore, the royalties for copies CBC makes in connection with the sale or licensing of programs to third party broadcasters are set at 3 per cent of revenues, adjusted for repertoire.

D. SUMMARY OF RATES TO BE CERTIFIED, ESTIMATED ROYALTIES AND ABILITY TO PAY

[157] Tables 1 and 2 in the Appendix provides a summary of the rates that we certify for CBC and Astral's copying activities.

[158] Based on the evidence provided, we estimate at \$2.3 million the amount payable by CBC in 2008 for all its uses of the SODRAC repertoire, excluding the sale of programs to consumer and the licensing of CBC programs to third-party broadcasters. For Astral, we estimate the royalties payable in that same year for all the services targeted in the licence at \$370,000.

SODRAC TARIFF 5

[159] This part of our reasons deals with proposed SODRAC Tariff 5, for the reproduction in Canada of musical works embedded into cinematographic works for the purposes of distribution of copies of the cinematographic works for private use or of theatrical exhibition for the years 2009 to 2012. As stated in paragraph 13, the tariff concerns two types of copies of music: DVD copies for retail sale or rental, and theatrical copies made to enable showing a movie in a theatre, including promotional trailers.

VIII. PARTIES, POSITIONS AND PROPOSED RATES

[160] SODRAC is described in paragraph 18. CAFDE is a trade organization representing Canadian distributors and exporters of motion pictures and television programs. MPA-C serves as the voice of international producers and distributors of movies, home entertainment and television programming in Canada.

[161] SODRAC Tariff 5 was first certified on June 24, 2005. It targeted only DVD copies of cinematographic works initially intended for theatre distribution or for television. Royalties were set at 1.2 per cent of distribution revenues. The tariff reflected an agreement reached earlier between SODRAC and CAFDE.⁵⁵

[162] The position of SODRAC in this matter is essentially the same as in the arbitrations. Each reproduction should attract a royalty payment. SODRAC does not issue buyout or through-to-the-viewer licenses. Buyouts are rare or non-existent in the relevant market. SODRAC has been receiving DVD royalty payments for years and the market has fully integrated this practice.

[163] Initially, SODRAC proposed a DVD rate of 1.2 per cent of distribution revenues subject to minimum fees of 8¢ per DVD destined to be sold to consumer and 32¢⁵⁶ per DVD destined to be rented to consumers. Having reviewed CAFDE's statement of case, and noting the association's preference in this respect, SODRAC then proposed using instead the same per-minute, per copy structure and rates as SODRAC proposed for CBC sales of programs to consumers. For feature music, the rate would be 1.92¢ for the first fifteen minutes, 1.18¢ cents for the next fifteen and 0.71¢ thereafter. The rates for background music would be 0.78¢, 0.47¢ and 0.28¢, respectively.

[164] SODRAC also asked that the tariff be extended in two respects. First, it asked that the tariff be extended to direct-to-video releases. Second it asked that movie distributors pay 1.2 per cent of their distribution revenues for theatrical copies. Other changes to the tariff are proposed, with a view to clarifying its ambit.

[165] The position of CAFDE is closely aligned to that of CBC and Astral. Producers already clear the required rights through to the viewer. The proposed approach is inconsistent with standard licensing practices of the North American motion picture industry and would disrupt an already functioning market.

[166] Alternatively, CAFDE proposed that the tariff be structured as in the CBC 2002 Agreement, with two important differences. The tariff would not differentiate foreground and background music and the rates would increase, not decrease, with the amount of music used: 0.65¢ per minute for the first 15 minutes, 1.25¢ for the next fifteen minutes and 2.0¢ for the rest. Royalties would be capped at 1.2 per cent of distribution revenues. Finally, the tariff should make the distinction between copies made in Canada and elsewhere; only the former can be subject to the tariff.

⁵⁵ *SODRAC Tariff 5 (Video-copies) for the Years 2004 to 2008* (24 June 2005) Copyright Board [Decision](#) at 1. [SODRAC 5 (2005)]

⁵⁶ The initial rate of 36 cents lowered to 32 cents in an email dated May 31, 2010.

[167] CAFDE argued that the Board should not impose a separate tariff on theatrical copies. Producers already clear the necessary rights. A trailer has no commercial value and generates no revenues since the movie-going public will not pay to see it. It is neither sensible nor efficient to impose a separate license for reproductions that have little or no independent value. Alternatively, CAFDE proposed that any tariff for theatrical copies be a nominal, per picture amount, discounted to reflect only the amount of SODRAC music used. In the end, however, CAFDE argued for a flat price of \$100 per distributor, per year, irrespective of the number of theatrical copies made.

[168] CAFDE opposed the extension of the tariff to direct-to-video releases, on the grounds that SODRAC offered no rationale for such an extension. Finally, CAFDE claimed that the reporting obligations sought by SODRAC are burdensome and disproportionate.

[169] As mentioned in paragraph 2, MPA-C filed extensive comments. These are generally in line with the arguments of CAFDE. MPA-C added that the proposed rate structure should be connected to the act of reproducing, not distribution revenue and that non-SODRAC and pre-cleared music should not attract royalties. Alternatively, if the Board chooses to set the tariff based on an average use of music in a DVD, the rate for non-Canadian audiovisual works should be 10 per cent of that for Canadian works, to recognize the relative importance of the SODRAC repertoire in both types of works.

IX. EVIDENCE

[170] Ms. Fortier and Mr. Lavallée testified for SODRAC. Their evidence consisted of a review of a variety of licences, some historical background to the negotiations leading to proposed SODRAC Tariff 5 and other background information. With respect to DVDs, for example, SODRAC largely relied on its evidence and arguments relating to CBC sales of programs to consumers for private use. It relied on an approach used in another decision of the Board⁵⁷ to derive proposed minimum royalties for DVD copies; neither these calculations, nor the CAFDE witnesses' contradictory evidence, need be reviewed here, for reasons that will become clear. With respect to theatrical copies, the only support SODRAC offered for the proposed rate of 1.2 per cent is that it was the same as the one it had initially proposed for DVD copies.

[171] Patrick Roy, President and Chief Executive Officer of Alliance Atlantis Vivafilm and Ted East, President of CAFDE, testified for CAFDE. They discussed the film distribution business in Canada and commented on the negotiations leading up to the agreement on SODRAC Tariff 5. They also alluded to situations where SODRAC asked royalties for music which had been source

⁵⁷ *CSI – Online Music Services (2007)*, *supra* note 20.

cleared. They argued that through-to-the-viewer licensing is standard practice in the market and that no additional payments are warranted.

[172] The CAFDE panel also commented on the copies made in the DVD and movie theatre markets. DVDs are made under the control of the distributor. Mr. Roy stated that very few Canadian films go straight to DVD. Trailers received particular attention because they use music either in or out of context. An in-context use occurs when the music played is that which is already synchronized with the scene used in the trailer. An out-of-context use involves any other use of music in a trailer, whether already used in the movie or used only in the trailer. According to the CAFDE panel, in-context uses are generally authorized in the producers' synchronization licence, while out-of-context uses are not: indeed, for the latter, the distributor, not the producer, will secure the necessary rights from the music publisher.

X. ANALYSIS

[173] For the reasons stated in paragraphs 69 to 79, Canadian distributors do require SODRAC licences, although not as often as SODRAC may think. That being said, we must account for the much greater presence of major Hollywood studios in this market as compared to the broadcast television market. Because of the way they clear music rights for their productions, the royalties payable for any given movie must vary with the amount of music used that requires a SODRAC licence.

A. TARIFF FOR DVD COPIES

[174] In 2005 the Board noted that there was no indication as to whether the rate it certified represented the true value of the relevant right.⁵⁸ The record of these proceedings adds nothing in this regard. We abandon the percentage rate of 1.2 per cent in favour of the rate structure used for CBC sales of programs to consumers, for three reasons. First, that structure appears to have served CBC and SODRAC well. Second, the parties agree to use this structure. Third, this approach allows royalties to vary with the extent to which distributors need access to the SODRAC repertoire.

[175] SODRAC asks that we simply import the CBC rate structure into the tariff. CAFDE proposes two important differences. The tariff would not differentiate foreground and background music and the rates would increase, not decrease, with the amount of music used.

[176] Little was said on either side in support of one approach over the other. In the end, we accept the distributors' proposition for two reasons. First, we are willing to accept for the time being that asking distributors to distinguish between background and foreground music would

⁵⁸ *SODRAC 5 (2005)*, *supra* note 55 at 5.

create enforcement issues. We need to learn more about the apparently satisfactory *modus operandi* CBC and SODRAC have reached in this respect before we can impose such distinctions. Second, we have no way to appreciate the impact on the overall royalties of an increasing rate scale as opposed to a decreasing one. Again, data collected from CBC and distributors will no doubt help us determine this in subsequent proceedings. The tariff is set at 0.65¢ per minute, per copy for the first 15 minutes, 1.25¢ for the next fifteen minutes and 2.0¢ for the rest.

[177] We will not cap royalties at 1.2 per cent of distribution revenues. We have no evidence that would lead us to believe either that cap is appropriate or that the cap should be 1.2 per cent.

[178] We agree with SODRAC that the tariff should extend to direct-to-video releases. The fact that few Canadian audiovisual works are released in this manner is not sufficient to justify leaving this segment of the market in the uncertain status it now experiences.

B. TARIFF FOR THEATRICAL COPIES

[179] We certify a nominal tariff for theatrical copies, trailers (except out-of-context uses) and other distribution incidental copies of \$100 per year for each distributor who distributes any film containing any SODRAC music. Our reasons for doing so are as follows.

[180] First, we must set a price for these copies. Licences issued to producers by SODRAC and other copyright owners may not clear the right to make distribution incidental copies. It is almost certain that some distributors will require a SODRAC licence for such copies.

[181] Second, SODRAC offered no evidence whatsoever in support of its proposed rate of 1.2 per cent of distribution revenues. The rate comes from the DVD market, in which said rate has been abandoned. The DVD and theatrical markets are structured very differently.

[182] Third, SODRAC failed to demonstrate that distribution incidental copies have any standalone significant value. To the contrary, the record tends to show that the standalone value of these copies is low. For example, we fail to see why showing movie trailers should attract music royalties when listening to music previews does not.⁵⁹

[183] Fourth, the vast majority of movies shown in Canadian cinemas are American. American movie producers tend to clear the rights required to make distribution incidental copies of music except for out-of-context use in trailers.

⁵⁹ *CSI – Online Music Services (2007)*, *supra* note 20 at para. 140.

[184] A tariff is needed for distribution incidental copies. However, everything within the record indicates that most of these copies are already licensed and that the market assigns little or no value to such copies. This is why we set a nominal tariff. SODRAC should expect that future panels would require evidence to the effect that unauthorized broadcast incidental copies are significant in both number and value before anything but a nominal tariff is set.

[185] Section 7 of the proposed tariff would authorize the out-of-context use of musical works already embedded in the movie a trailer is intended to promote. We see no reason to authorize any out-of-context uses in the tariff. The evidence is to the effect that these are already negotiated separately.

[186] Table 3 in the Appendix summarizes the rates we certify for SODRAC Tariff 5.

THE WORDING OF THE TARIFF AND OF THE LICENCES

[187] This time again, the Board asked its general counsel to lead discussions with the parties on the wording of the licences and of the tariff. The discussions proved to be lengthy and difficult, in part by reason that some issues that should have been addressed during the hearings were only raised in the context of these discussions. In the future, these issues should be addressed during hearings, not after.

XI. TARIFF 5

[188] Reporting requirements were a major focus of the discussions on tariff wording, in large part because of the change in tariff formula.

[189] The tariff the Board certified for 2004 to 2008 was a percentage of a distributor's revenues, irrespective of repertoire use. At the request of CAFDE, we abandon the revenue-based formula in favour of a tariff of so many cents per minute of music requiring a SODRAC licence, per DVD sold. As a result, the distributor now needs to know the amount of music requiring a SODRAC licence each movie contains. In itself, the change in formula justifies expanding reporting requirements.

[190] CAFDE offered a number of (sometimes contradictory) suggestions about how to allocate the reporting burden between distributors and SODRAC. Thus, CAFDE asked that distributors report to SODRAC only if a movie requires a SODRAC licence but at the same time proposed shifting to SODRAC the burden of identifying which music requires a licence. In the end, CAFDE proposed that distributors report in at least two stages. Minimal information would be supplied at first, to allow SODRAC to determine if a licence is required and the amount of royalties payable per DVD sold. If that information proved insufficient, SODRAC would be allowed to request further information. CAFDE also argued that distributors should not be required to supply information used only for distribution purposes.

[191] CAFDE's arguments in support of its position were as follows. All music copyrights are licensed at source except for SODRAC. SODRAC is most able to determine whether a distributor needs a SODRAC licence for a given movie. As a result, the onus should be on SODRAC to identify movies that contain music requiring a SODRAC licence. Furthermore, if most music copyright is licensed at source, the SODRAC licence is of marginal utility and reporting obligations should be staged. Finally, distributors should not be required to supply information used only for distribution purposes, since users should not be required to do a collective's work.

[192] Some of the arguments offered by CAFDE make sense. That being said, SODRAC rightly points that it cannot determine whether a movie requires a SODRAC licence unless it receives information on every movie. This, in addition to our earlier finding that the SODRAC licence is not as marginally useful in the relevant market as the distributors argue, leads us to set the reporting requirements according to the following principles.

[193] First, as a rule, it should be up to the user to determine, in advance, which uses require a licence. In this instance, however, this principle must be adapted to market realities. Thus, we agree with CAFDE that SODRAC is most able to determine whether a distributor needs a SODRAC licence for a given movie.

[194] Second, if SODRAC is to be asked to determine the need for a licence for each movie, it should receive some information on every movie.

[195] Third, the burden of providing information should lie with the person most likely to have that information. Thus, SODRAC should be asked to determine whether a work is in its repertoire, but the distributor who claims that a work was licensed through other channels should be asked to supply that licence.

[196] Fourth, users will be required to supply a reasonable amount of information for distribution purposes.

[197] Based on these principles, we set the tariff reporting requirements as follows.

[198] Distributors shall report to SODRAC every movie they distribute, whether or not the movie contains music requiring a SODRAC licence. Any other approach would require that the distributor determine which movies require a SODRAC licence, a task CAFDE and SODRAC agree the distributor is ill-equipped to perform. Strictly speaking, however, if a distributor does not deal in any movie requiring a SODRAC licence during the life of the tariff, it is not subject to the tariff and as such, under no obligation to report to SODRAC.

[199] In most cases, SODRAC apparently can determine a movie's musical content using the DVD's end credits, its jacket and a cue sheet. Additional information is required only in certain

cases. Therefore, distributors should not be required to supply all the information all of the time. Instead, SODRAC should be entitled to ask for additional information only if required. Consequently, reporting will occur in several stages.

[200] First, the distributor shall supply what is at hand: the identification number distributors always assign to a movie, the cover, the DVD itself and if available, the cue sheet. For the time being, the cue sheet will be supplied only if available; apparently, that sheet is rarely supplied to distributors, even though they are entitled by contract to receive it.

[201] Second, SODRAC shall attempt, based on the information received and anything else already otherwise available to it, to determine how much it is owed and how to fairly distribute the royalties once collected.

[202] Third, if the cue sheet was not supplied, the distributor will be required to collaborate with SODRAC in securing a copy. Only then will SODRAC be entitled to further information.

[203] Finally, in those rare instances where all this information remains insufficient for SODRAC to determine the amount of royalties and their fair distribution, SODRAC will be allowed to ask for even more information, that the distributor is better equipped than SODRAC to obtain.

[204] The tariff will not make compulsory the provision of information that is not available to distributors, at least not for the time being. SODRAC agrees that the reporting requirements should account for the reality faced by individual distributors.

[205] The meaning of “available” raised some issues, especially with respect to transactions that will have occurred before the tariff is in place. Thus, though the information contained in a contract signed by a distributor is available to that distributor, retrieving a contract signed in 2008 or 2009 may prove time consuming. There is no merit in forcing distributors to do so, at least not during the application period of a tariff of first impression that is set to expire at the end of this year. In the longer term, however, distributors should be required to set up systems that ensure they retrieve available, useful information from contracts at the time the contract is signed. The tariff will achieve this by specifying, in the transitional provisions, that with respect to transactions occurring by December 31, 2012, “available” means “readily available”. This will allow distributors until the end of the year to adjust their reporting systems.

[206] Given the nominal amount of royalties payable in this respect, SODRAC will receive no information on music use in theatrical releases and trailers.

[207] SODRAC asked to receive information with respect to any menu, bonus feature, trailer or other element supplied with the DVD. The standard terms of distribution contracts apparently provide for such information should be supplied to the distributor. In practice, this does not

appear to be the case. The information is at best of marginal use, since the feature movie, not its add-ons, provides real value to the viewer. Distributors will not be required to supply the information, at least for the time being.

[208] Distributors will be required to report the number of promotional copies and not, as CAFDE proposed, simply to certify they have not exceeded the maximum number of such copies the tariff allows (300). SODRAC should be able to keep track of compliance based on the distributor's reports, without the need to resort to an audit.

[209] The tariff does not include a mechanism allowing distributors to retain royalty reserves for unsold copies. Since royalties are payable only on copies sold, the issue should be moot.

[210] Distributors will not be entitled to audit SODRAC; other means are available to confirm whether a work requires a SODRAC licence. Neither will audits be limited to one a year.

[211] The tariff contains transitional provisions made necessary because the tariff takes effect on January 1, 2009, while it is being certified much later. At the request of CAFDE, errors in royalty payments committed before the end of 2012 will not attract the usual penalties: the change in tariff formula and the need to set up new reporting systems justify this exception. Neither will any interest be payable on royalty adjustments required for the period from 2009 to 2012, as SODRAC consented to this.

[212] The answers we received from CAFDE concerning the information distributors report to producers left us somewhat in the dark. Apparently, distributors do not keep precise inventory records. Yet at least some distribution deals are based on a percentage of revenues, and we fail to see how a distributor could keep track of revenues without keeping track of sales. Each movie is the subject of a separate contract, with separate advances, etc., with each separate producer. Even if the payment of royalties to the producer is on total revenues, that total can only be arrived at by adding individual sales for each individual movie.

[213] Yet if these statements are true, the new tariff formula may cause even more problems than the previous one. For example, if distributors only account for sales in dollar amounts instead of units, it may not make sense to use a tariff formula that relies on the number of units. This will no doubt be addressed in the next proceedings.

[214] During the discussions on tariff wording, consideration was given to the possibility that the tariff licence copies made outside Canada that would violate the parallel importation rules. CAFDE objected, arguing that the proposed tariff targeted only copies that a distributor authorized the making of. SODRAC did not respond. Under the circumstances, we did not include this provision.

XII. THE SODRAC/ASTRAL AND SODRAC/CBC LICENCES

[215] The discussions on the wording of the licences were as difficult, if not more so, than for SODRAC Tariff 5. As we shall see later, the parties raised issues that would have been better presented at the hearing. That being said, the wording of the licenses is largely based on the principles set out in paragraphs 193 to 205.

A. WHAT THE LICENCES DO NOT PROVIDE FOR

[216] The licences target only the services mentioned therein and do not provide a formula that would make it possible to extend their applications to any services that might be added. This is unnecessary: unlike a tariff, a licence does not apply on an interim basis once it has expired. CBC's licence does not target the Explora service, which was launched a few days before the licence expired. The Board decided on April 30 to deal with all of the operations of the service at the same time as with CBC's blanket licence for 2012-2016.

[217] The objectors requested a provision that the licence be automatically reopened if there was an amendment to the *Act* affecting the rights under it. Such a provision would be superfluous given that the licences expire before the coming into force of the recent amendments to the *Act*.

[218] We will not include a provision, as requested by SODRAC, providing that the licence is non-transferable. Entry into the market is sufficiently regulated by the CRTC to allay the concerns that have led SODRAC to seek such a provision.

B. DEFINITIONS

[219] The licences contain a number of definitions, the defined terms of which start with an upper case letter.

[220] The *definition of "Broadcasting"* was the subject of considerable discussion. Ultimately, we used the definition from the *Broadcasting Act*⁶⁰ and adapted it to the present purposes. The last paragraph of the definition provides access to free video on demand available to the subscribers to a service (VRAK) at no extra charge upon purchase of that service.

[221] The *definition of "CBC Program"* distinguishes between what is subject to CBC's television synchronization licence and programs for which the right to synchronize must be cleared in another manner. This provision was the subject of a lengthy and difficult debate.

[222] Initially, SODRAC proposed the following:

⁶⁰ S.C. 1991, c. 11.

[TRANSLATION]

Audiovisual work produced by the CBC/SRC Network or coproduced with an independent producer not affiliated with the CBC/SRC Network, as long as the CBC/SRC Network holds more than 50 per cent of the property rights and copyright in the audiovisual work and, in all cases, where the CBC/SRC Network controls the production of the audiovisual work in question and where the audiovisual work is not eligible for a tax credit or private, public or para-public funding (excluding the amounts allocated to the CBC/SRC Network by the Treasury Board).

[223] During the discussions on the wording of its licence, CBC submitted that this definition did not reflect its business model. The licence should authorize the synchronization into programs funded by CBC, whether or not it holds the rights in these programs. The definition should cover any CBC co-productions regardless of the percentage of the rights held by each party or the source of funding. The 50 per cent cut-off point was artificial. The concepts of production, co-production and production control would be difficult to apply.

[224] The General Counsel to the Board then proposed the following preliminary definition:

[TRANSLATION]

Radio or television program of which CBC has paid for over half of the production costs, regardless of whether or not the program was produced by CBC and whether or not CBC holds the copyright in that program.

[225] SODRAC objected to this change for the following reasons. First, the Board has to determine who is responsible for clearing the rights, which the amended definition does not allow. Second, the practice of allowing CBC to authorize upstream copies of independent producers whose production they are funding must be stopped. This is the old, now abandoned model. Third, the 50 per cent cut-off point, however artificial it might be, is the very basis of the calculations SODRAC and CBC apparently performed to establish the share of broadcast time of CBC's in-house productions, even though they each arrive at different results (68 per cent in the case of SODRAC, and 43 per cent in the case of CBC).

[226] Finally, and most importantly, SODRAC submitted that it was too late to discuss such a radical amendment of the definition establishing what is and what is not subject to the television synchronization licence. First, the new definition would change the legal framework for the debate. The objectors had always agreed that producers must obtain a synchronization licence. The debate had concerned the relative share of in-house productions and what such a production is. It had not concerned substituting another concept for this one. Second, there is no evidence on record to establish the share of programs corresponding to the proposed definition. If the royalties varied according to actual consumption, the problem would not be as great: one would have to classify each program and calculate the royalties. But the licence the Board intends to

adopt is for a lump sum and therefore based on hypotheses on what qualifies or not: by changing the definition, one changes the data that served to calculate the lump sum. Third, the link between the producer and the synchronization licence seems natural at first sight. However, the nature of the CBC/producer relationship when CBC is not the producer but pays for most of the production costs has not been sufficiently explored.

[227] We agree with SODRAC. Above all, this is a substantive issue that should have been addressed at the hearings and that requires evidence on the record that is not there. The definition may create some uncertainty: the manner in which CBC and SODRAC both attempted to distinguish between what is and what is not an in-house production did not dispel all of our doubts in that regard, far from it. That being said, the prevalence of the concept of producer in CRTC regulations and elsewhere leads us to conclude that the parties will, for the time being, be able to resolve any minor disagreements that might remain with respect to the past.

[228] Finally, SODRAC suggested defining what is subject to the synchronization licence according to the CRTC's rules governing Canadian Program Certification. CBC objected to this. We share CBC's point of view. Following SODRAC's suggestion would require relying on a concept that was not discussed at the hearings.

C. USES AUTHORIZED BY THE LICENCE

[229] This provision has evolved considerably from what SODRAC proposed. The final wording, albeit not without its critics, is a much better reflection of users' practices.

[230] We removed the reference to an author's moral right since it seems unnecessary in licences involving such experienced users.

[231] We broadened as much as possible the user's right to use music when self-promoting the relevant program or series. It will now be possible to use the music used in a program of a series with footage from another program of the same series to announce the series. Also, in spite of SODRAC's objection, it will be possible to use the work in a montage for the purpose of promoting the service on which a program is broadcast, if the work remains associated with footage from the series from which it is taken. This is certainly a question of moral rights. That being said, we assume that an author who agrees to his or her music being incorporated in a program expects it to be promoted.

[232] Section 2.03 of the CBC licence authorizes CBC to authorize a third party to reproduce a work from the repertoire only if it has already been synchronized with a program. This should prevent relying on the provision to re-authorize downstream synchronization by the independent producer of a program to be broadcast on CBC but in which CBC does not hold the rights.

D. RESTRICTIONS

[233] This provision clearly sets out certain limitations to what the licence authorizes. The provision is much shorter than what SODRAC was seeking. Strictly speaking, such restrictions are unnecessary. Indeed, it is preferable that a licence be sufficiently clear without such restrictions. That being said, the complexity of the issues raised by the parties as to the true scope of the previous licences and of the licences we adopt demonstrates the usefulness of such provisions, which are common both in contractual licences and in the Board's tariffs. What we have provided is mainly guided by the scenarios SODRAC seems to be concerned about.

E. ROYALTIES

[234] As we explained in paragraphs 112 to 114, the licences allow CBC and Astral not to pay royalties for incidental reproductions of programming containing works that are part of the SODRAC repertoire and which are source-licensed.

[235] The conditions we have attached to this discount are fairly strict. First, the program must contain at least one work from the repertoire; for the reasons sets out in paragraph 113, income from programs containing no work from the repertoire remains in the rate base. Second, CBC must provide SODRAC with documentation establishing that the incidental reproduction rights have been cleared with respect to *all* the works from the repertoire embedded in the program. This documentation must, at least, include the licence agreements and the cue sheet. A producer's or distributor's guarantees in that respect in the broadcast licence are not sufficient.

[236] The discount is based on the production costs for a CBC Program and the acquisition costs for any other program broadcast by CBC or Astral.

[237] SODRAC did not object to the discount. It did, however, raise several seemingly legitimate questions regarding oversight over production costs and the reporting requirements that should frame the discount. Others could undoubtedly be mentioned, including the possibility of applying a premium to election, as is the case for the royalties television pays SOCAN under the modified blanket licence. That being said, the conditions we are imposing are sufficiently strict, especially as the licences in question essentially govern past activities. To quote the objectors, we prefer to let the licence be for a while before determining whether it needs to be adjusted.⁶¹

⁶¹ SODRAC argues that the licence could not apply to a CBC Program. We disagree. CBC could clear synchronization rights based on its SODRAC licence, but licence at source with the rights holders the incidental reproduction rights.

[238] SODRAC asked to receive in advance all financial and other information used to calculate the discount. Access to this documentation is a matter for audits. Requiring users to provide the licences establishing that the rights have been cleared is sufficient.

[239] The objectors requested that the discount apply to services that do not use the repertoire for a month. The way in which the discount applies renders this debate moot: the discount applies solely to programs that contain works from the repertoire, for the reasons set out in paragraph 113. As pointed out by SODRAC, the rates established by the licence are averages that already take into account that the repertoire may not be used during certain periods.

F. REPORTING AND PAYMENT REQUIREMENTS

[240] SODRAC wanted to receive everything that Astral and CBC send to SOCAN. That would be excessive. Users report to SOCAN with respect to many works that are not in the repertoire of SODRAC. That being said, users must provide SODRAC with any relevant information that they have provided to SOCAN.

[241] SODRAC requested that the licence authorize SOCAN to send what it receives to SODRAC. We would rather deal with this matter when reviewing the next SOCAN tariff.

G. ACCESS TO SODRAC'S REPERTOIRE

[242] SODRAC agrees to public access to the repertoire and to the list of foreign copyright collectives it represents. It requests, however, that this access be controlled with respect to the share of rights it administers. We do not agree. The share of rights held by SODRAC is information that SODRAC would have to provide in response to a request made pursuant to section 70.11 of the *Act*.

H. ACCOUNTS AND AUDITS

[243] The relevant provisions include some unusual elements, added at the users' request: use of an external auditor on 10 days' notice. We agree to exceptionally including these elements since this is a licence and not a tariff and since SODRAC does not seem to object to it. However, it would have been unreasonable to require that the independent, external auditor commit in writing to comply with the confidentiality provision. We have also not extended the right to an audit to the objectors nor limited the number of audits.

I. GUARANTEE

[244] SODRAC agrees to guarantee the user against certain actions. Like the objectors, we prefer the term claims since it better reflects how these provisions operate in practice: it is in SODRAC's interest to take up the cause of a licence holder as soon as a third party comes

forward (claim), without waiting for a judicial proceeding to be instituted (action), thus minimizing its costs.

[245] The licences do not specify what should happen when an objector has paid royalties to a representative or sub-publisher of a SODRAC right holder. Such situations should be governed by the relevant agreements. Should there be a problem, the objectors will be able to raise the issue when the next licenses are reviewed.

J. CONFIDENTIALITY

[246] At the request of the objectors, this provision specifies that the disclosure of confidential information “to SODRAC” concerns only the members of the board and employees. We agree to include this clarification since this is a licence and not a tariff and since SODRAC does not seem to object to it. However, it would be unreasonable to require that information be disclosed to the person claiming royalties only when that person agrees in writing to respect the confidentiality of certain information: in that regard, we would rather rely on the common sense of the management society.

K. NOTICE

[247] SODRAC would prefer that it be mandatory that all information be sent to it electronically in a single format (Excel). We are not imposing this requirement, except with regard to CBC radio stations, which information CBC agrees to transmit in this format. Anything else should be sent electronically only where possible given that the licence is retroactive. Users should, however, expect to adjust their systems in the future, for standardization purposes.

L. TRANSITIONAL PROVISIONS

[248] The provisions in the licences are different from those in the tariffs, because, among other things, the licences will not continue applying on an interim basis after they have expired.



Gilles McDougall
Secretary General

APPENDIX

TABLE 1 – Summary of the rates certified for CBC

TARIFF ITEMS	RATES
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BROADCAST-INCIDENTAL COPIES – RADIO	
2008	\$174,476
2009	\$177,251
2010	\$180,955
2011	\$184,574
2012	0.1065 × 2012 SOCAN royalties
BROADCAST-INCIDENTAL COPIES – TELEVISION	
Conventional television	14.478 per cent of what CBC television pays to SOCAN
<i>RDI</i>	0.217 per cent of gross income
News Network	0.093 per cent of gross income
Bold	0.253 per cent of gross income
Documentary Channel	0.347 per cent of gross income
	Royalties can be deducted if the right to make broadcast-incidentals was already cleared by the producer
SYNCHRONIZATION	
Pre-existing musical works, per year	\$581,749
Commissioned musical works, per year	\$250,730
TOTAL	\$832,479
INTERNET	
Audio (Internet services + podcasting)	4 per cent + 3 per cent of conventional radio royalties
TV	4 per cent of all TV royalties
SALE OF PROGRAMS TO CONSUMERS FOR PRIVATE USE – DVD SALES, PER MINUTE	
Feature music	
For the first 15 minutes	1.44¢
For the next 15 minutes	0.87¢
Thereafter	0.52¢
Background music	
For the first 15 minutes	0.58¢
For the next 15 minutes	0.35¢
Thereafter	0.21¢
	A 40 per cent discount applies for CBC commissioned music
SALE OR LICENSING OF CBC PROGRAMS TO THIRD-PARTY BROADCASTERS AND CARRIERS	3 per cent of revenues, adjusted for repertoire

TABLE 2 – Summary of the rates certified for Astral

TARIFF ITEMS	RATES
BROADCAST-INCIDENTAL COPIES – TELEVISION	
<i>VRAK.TV</i>	0.296 per cent of gross income
<i>Canal D</i>	0.168 per cent of gross income
<i>Canal Vie</i>	0.130 per cent of gross income
<i>Ztélé</i>	0.085 per cent of gross income
<i>Historia</i>	0.113 per cent of gross income
<i>Séries+</i>	0.163 per cent of gross income
Teletoon (English)	0.114 per cent of gross income

<i>Télétoon</i> (French)	0.125 per cent of gross income
Teletoon Retro (English)	0.0004 per cent of gross income
<i>Télétoon Rétro</i> (French)	0.002 per cent of gross income
	Royalties can be deducted if the right to make broadcast- incidental copies was already cleared by the producer
INTERNET TV	4 per cent of all TV royalties

TABLE 3 – Summary of the Rates for Tariff 5

TARIFF ITEMS	RATES
DVD COPIES, PER COPY PER MINUTE	
For the first 15 minutes	\$0.0065
For the next 15 minutes	\$0.0125
Thereafter	\$0.0200
THEATRICAL COPIES, PER DISTRIBUTOR PER YEAR	\$100