Copyright Board Canada

Commission du droit d'auteur Canada

Date	2014-07-18
Citation	File: Public Performance of Musical Works
Regime	Collective Administration of Performing and of Communication Rights *Copyright Act*, subsection 68(3)
Members	The Honourable William J. Vancise Mr. Claude Majeau Mr. J. Nelson Landry
Proposed Tariff(s) Considered	SOCAN Tariffs 22.D.1 – Audiovisual webcasts and 22.D.2 – Audiovisual user-generated content for the years 2007 to 2013

Statement of Royalties to be collected for the performance in public or the communication to the public by telecommunication, in Canada, of musical works

Reasons for decision

I. INTRODUCTION

[1] Pursuant to section 67.1(2) of the *Copyright Act (*the "*Act*"*)*, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed statements of royalties it proposed to collect for audiovisual webcasts (Tariffs 22.4 and 22.D, hereafter Tariff 22.D.1) for the years 2007-2013 in March of 2006 to 2012 and for audiovisual user-generated content (Tariffs 22.7 and 22.G, hereafter Tariff 22.D.2). The statements were published in the *Canada Gazette* on May 20, 2006; June 23, 2007; June 14, 2008; July 4, 2009; July 31, 2010; May 28, 2011; and June 2, 2012.

[2] The following parties objected to one or both Tariffs: Apple Canada and Apple Inc. (Apple); Bell Canada, Yahoo! Canada, Rogers Communications, and Quebecor Media Inc. (collectively "the Services"); the Canadian Association of Broadcasters (CAB); the Canadian Broadcasting Corporation (CBC); YouTube LLC (YouTube); Cineplex Entertainment LP (Cineplex); the

Computer and Communications Industry Association (CCIA);[1] Shaw Communications Inc. (Shaw);[2] and Pandora Media (Pandora). In addition, Pandora filed a request to intervene in respect of SOCAN Tariff 22, specifically for the year 2011.

[3] On April 29, 2011, the Board ruled that these SOCAN two tariffs would be heard jointly for the years 2007-2011. A process was initiated, with a hearing scheduled for June 19, 2012. Prior to the filing of any evidence, CCIA, Shaw and Pandora withdrew their objections from the matter. SOCAN filed its Statement of Case on March 5, 2012.

[4] On May 25, 2012, the date on which the Objectors' cases were to be filed, all the Objectors jointly requested an indefinite postponement of the deadline to file such cases, citing the ongoing settlement negotiations with SOCAN; SOCAN agreed to the postponement. On November 28, 2012, SOCAN wrote to the Board attaching the settlement agreements for Tariff 22.D.1 and for Tariff 22.E,[3] a tariff for similar uses by CBC. Both agreements were for the years 2007 to 2013. At that time, SOCAN indicated that settlement negotiations for Tariff 22.D.2 were ongoing and the agreements would be filed in due course. SOCAN also requested the opportunity to comment on the agreements.

[5] On December 5, 2012, in lieu of asking specific questions to determine whether the tariffs appended to the agreements were fair and equitable, the Board invited parties to make submissions "in respect of the agreements." SOCAN filed a submission on January 11, 2013. The Objectors did not file a submission but reserved the right to respond to SOCAN's submission. SOCAN's submission is discussed in more detail below.

[6] On January 11, 2013, Netflix commented on SOCAN's submission in respect of the tariff 22.D.1 agreement and asked for an intervenor status. On January 25, 2013, Facebook asked the Board for the same status. On February 1, 2013, the Board granted intervenor status to both Netflix and Facebook.

[7] On March 20, 2013, SOCAN filed the agreement for Tariff 22.D.2 for the years 2007 to 2013.

[8] The Board then proceeded as follows. On March 26, 2013, it contacted the following parties who objected at some point to SOCAN Tariff 22 for the years 2007 to 2013 but are not a party to the agreements pertaining to SOCAN Tariffs 22.D.1 and 22.D.2, namely: Shaw, CAB, Pandora, Stingray Digital Group, Entertainment Software Association and Entertainment Software Association of Canada (ESA), Music Canada (previously CRIA) and Pelmorex Media Inc.

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[1] Yahoo! Canada substituted for the CCIA in these proceedings.
[2] Shaw was also a member of the Services.
[3] This Tariff will be the object of a distinct decision.

Netflix and Facebook were also contacted. It addressed the following two questions to these nine objectors:

> 1. Do you stream audiovisual programs containing one or more musical works for which a licence from SOCAN may be required? If so, what are your views on the request that the Board certify a tariff that reflects the attached agreement between SOCAN on the one hand, and Apple Inc., Apple Canada Inc., Cineplex Entertainment LP, BCE Inc., Rogers Communication Partnership, Videotron G.P. and Yahoo! Canada Co., on the other?
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> 2. Do you stream user-generated content containing one or more musical works for which a licence from SOCAN may be required? If so, what are your views on the request that the Board certify a tariff that reflects the attached agreement between SOCAN on the one hand, and YouTube LLC and Videotron G.P., on the other?

[9] Those who answered yes to one or more of these questions had the right to comment and SOCAN and the signatories to the agreements had a right of response. No further comments were permitted, except by leave of the Board.

[10] ESA and Music Canada withdrew from the proceedings. On April 16, 2013, Facebook, Netflix and CAB sent comments on the agreements in respect of both tariffs 22.D.1 and 22.D 2. SOCAN and YouTube replied on May 21, 2013.

[11] On June 10, 2013, Netflix sought leave to reply to SOCAN and to adduce additional evidence. On July 2, 2013, the Board granted leave to reply, except insofar as it pertains to fair dealing.

II. POSITION OF THE PARTIES

A. SOCAN

[12] SOCAN's initial proposal, as published in the *Canada Gazette*, was for 15 per cent of the greater of gross revenues and gross expenses for Tariff 22.D.1 and 10 per cent of the greater of gross revenues and gross expenses for Tariff 22.D.2, with minimum fees of $200 per month for each tariff.

[13] In its statement of case, without explaining the reasons for doing so, SOCAN changed the rate base from gross revenues to online revenues and proposed 2.1 per cent for permanent downloads, 2.3 per cent for limited downloads, and 3.5 per cent for streams, under Tariff 22.D.1 and a flat rate of 7 per cent for Tariff 22.D.2. For both tariffs, SOCAN's expert derived these rates using Tariff 22.A (Online Music Services) as a proxy.

[14] The decision of the Supreme Court of Canada in *ESA v. SOCAN* [4] meant that SOCAN no longer had the right to collect royalties for permanent downloads and limited downloads. This was reflected in the Board's recent decision on online music services[5] which had been structured the same way. As a result, neither agreement filed by SOCAN makes reference to downloads.[6]

[15] The Tariff 22.D.1 agreement divides streaming revenues into three sources: (1) per-program fees from end-users; (2) subscription fees from end-users; and (3) advertising revenues. The basic form of the settlement tariff[7] is 1.7 per cent of the rate base for 2007-2010 and 1.9 per cent of the rate base for 2011-2013.

[16] For the first revenue source, the rate base is the amount paid by end users, subject to a minimum fee of $0.013 per program. For the second revenue source, the rate base is the amount paid by subscribers, subject to a minimum fee of $0.068 per subscriber in 2007-2010 and $0.075 in 2011-2013. For the third revenue source, the rate base is Internet-related advertising revenues, multiplied by an appropriate adjustment factor.

[17] There are four adjustment factors in the 22.D.1 agreement; each of which has the effect of reducing the royalties otherwise payable. For domestic music video services, the factor is 95 per cent. For domestic services that are not music video services, the factor is 75 per cent. For foreign music video services, the factor is 9.5 per cent. For foreign services other than music video services, the factor is 7.5 per cent. Each of these four factors can be adjusted if a relevant ratio of audiovisual page impressions to all page impressions can be made available by the service to SOCAN; the factors listed above are the default factors used if this ratio is not available.

[18] In addition to these fees for revenue-generating services, the 22.D.1 agreement specified that services that do not generate any revenues shall pay a minimum fee of $15 per year.

[19] The agreement relating to 22.D.2 is very similar to the one relating to 22.D.1. The settlement tariff calls for a rate of 1.7 per cent of relevant revenues for the years 2007 to 2010 and 1.9 per cent of relevant revenues for the years 2011 to 2013, subject to an annual minimum fee of $15.

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[4] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231. [*ESA*]

[5] Decision of the Board, October 5, 2012. This was the first online music decision post-*ESA*. The decision was ready to be released with certified rates for downloads when ESA was released.

[6] That is, except for clause 9 in the 22.D.1 agreement which indicates that if the decision in *ESA* implied that SOCAN had no right to royalties for downloads, any royalties paid according to the agreement in respect of downloads would have to be returned.

[7] The settlement tariff is the tariff appended to the agreement. In the event that the Board certifies the settlement tariff without amendment, all signatories to the agreement agree to withdraw their objections to the tariff.

[20] SOCAN explained the 22.D.1 agreement as follows. First, the tariff should apply not only to Objectors but to all online providers of audiovisual works containing SOCAN music and all services providing user-generated content, such as Facebook, MySpace and Vimeo, containing SOCAN music. Second, the certification of this tariff need not await the result of the Board's separate process on the making available right. Third, the Board should certify the tariff for the years 2007-2013. Although the hearing was to consider the tariff for the years 2007-2011, the agreement filed by SOCAN covered the years 2007 to 2013.

[21] In addition, SOCAN made arguments with respect to the "Re:Sound 5" criteria for certifying a tariff pursuant to an agreement. These criteria were first set forth in paragraph 10 of the decision relating to Re:Sound Tariff 5 (Use of music to accompany live events):[8]

> Before certifying a tariff based on agreements, it is generally advisable to consider (a) the extent to which the parties to the agreements can represent the interests of all prospective users and (b) whether relevant comments or arguments made by former parties and non-parties have been addressed.

[22] First, the signatory objectors (Apple, Cineplex, and the Services) are some of the largest providers of audiovisual content in Canada other than YouTube; in that sense, the signatories are representative.

[23] Second, other providers of audiovisual content have had ample opportunity to object to or intervene in these tariff proceedings and have chosen not to do so.

[24] Third, the agreement is the result of extensive negotiations between experienced counsel. This implies that the tariff reached in the agreement is that from an open and unrestricted market, between a willing buyer and a willing seller who are both informed and prudent, and who are acting independently from each other.

[25] Fourth, the tariff is not one of first impression; rather it builds on former Tariff 22.D (Commercial Television, Non-Broadcast Television, Pay Audio Services, Satellite Radio) and recently certified Tariff 22.A (Online Music Services). When a tariff of first impression is being considered (such as in Re:Sound Tariff 5), the Board has a greater duty to ensure that the agreement is the proper basis for the tariff. When a tariff is being renewed, this duty is smaller because potential users are more likely to be aware of a certified tariff than a proposed tariff.

B. FACEBOOK

[26] Facebook explained that Audible Magic filtering is used to block videos that contain audio tracks that are copyrighted. This filter works by scanning the videos to see if they contain

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[8] Decision of the Board, May 25, 2012.

copyrighted tracks; if they do, Facebook does not permit the video to be uploaded. To the extent that the filter does not work,[9] the works are exempted pursuant to section 29.21 of the *Act*, the section relating to user-generated content that was inserted in the *Act* pursuant to the *Copyright Modernization Act*[10] and came into force in November 2012. Any videos with music originate on a third-party site that is the one doing the streaming. Facebook only links to those third-party sites. In Facebook's submission, the tariffs do not apply to it.

[27] In addition, Facebook proposed several changes to the tariffs:

- For tariff 22.D.1, the definition of "audiovisual page impressions" should be changed to mean impressions that "*occur* when a user views an audiovisual work" rather than impressions of pages that "allow" the user to hear an audiovisual work.
- In addition, the definition of "page impressions" in 22.D.1 should be clarified to add the following: "To the extent a service displays content and measures user 'impressions' of such content in units other than single internet web pages, it shall be acceptable to treat impressions of such units as 'page impressions' as long as the same unit measure is used in the numerator and denominator of part 'B' of the royalty formula in paragraph 3(c)."
- The default ratios in tariff 22.D.1 should be eliminated.
- For tariff 22.D.2, rather than attempting to isolate and calculate the specific revenue allegedly "generated by" actual visit to pages where videos were offered or viewed, services should have the option, as with tariff 22.D.1, of pro-rating revenue earned from general-use pages (with video as but one component) by the ratio of the total number of videos viewed on the page to the total number of impressions of all kinds served there. (In the case of the Facebook Home page, this would represent video stories viewed from the News Feed versus the total number of News Feed stories served.)
- For both tariffs, services calculating and reporting royalties should be able to use reasonable usage proxies from current periods (consistent with the recommended definitional changes to both tariffs identified above) for calculating royalty liability for past periods.

C. NETFLIX

[28] As Netflix noted, the following provision of the settlement 22.D.1 tariff applies to Netflix:

> "For a service that offers subscriptions to end-users: 1.7 per cent for the years 2007 -2010 and 1.9 per cent for the years 2011-2013 of the amounts paid by subscribers. In the case of free trials, a minimum monthly fee of 6.8¢ for the years 2007- 2010 and 7.5¢ for the years 2011-2013 per free trial subscriber shall apply;"

[29] Netflix argues that free trials are fair dealing for the purposes of research, in a manner analogous to Apple's free previews.

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[9] That is, if a video containing a copyrighted track is permitted to be posted to Facebook.
[10] S.C. 2012, c. 20. (Previously Bill C-11).

[30] Netflix's fair dealing analysis proceeded as follows. Netflix trials are research in the sense that they

> "enable consumers to determine if the Netflix offering 'suits the user's tastes' and helps the consumer 'ensure its... quality before obtaining it.' Trials are to the subscription model what previews are to the individual transaction model − a chance for the consumer to sample the offering to determine whether they wish to enter into a commercial arrangement to obtain it."[11]

[31] The purposes of the dealing are

> "to (i) facilitate consumer investigation of the Netflix service and content catalogue, (ii) permit consumers the opportunity to sample Netflix's offering and recommendation mechanism in order to determine if it suits their tastes and needs, and (iii) satisfy consumers that the content and delivery of the repertoire and Netflix's analysis of their preferences is sufficiently attractive to warrant purchasing a subscription."[12]

[32] The character of the dealing is fair since only one copy is streamed; files are not downloaded or kept on user devices. The amount of the dealing in a subscription context is the unit of time. In this case, a one-month subscription is fair compared to a subscription designed to run for months or years. As with previews, there are no genuine alternatives to the dealing. The nature of movies and television shows is such that they are designed for widespread dissemination. The free trial does not have a negative effect on the streaming of works to paying subscribers.

[33] Netflix further argued that royalties on free trials are a violation of the Supreme Court's principle of technological neutrality as established in *ESA*. Tariffs should not permit double dipping or impose gratuitous costs.

[34] Finally, Netflix stated that almost all subscribers join Netflix following a one-month free trial.

D. CAB

[35] CAB advised that it is negotiating with SOCAN for Tariff 22.D.3,[13] which will be a carve-out for CAB members from Tariff 22.D.1. It wishes to maintain its objection in the meantime.

E. YOUTUBE

[36] YouTube's position is that

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[11] Submission of Netflix, April 16, 2013, at 5-6.
[12] Ibid., at 6.
[13] This tariff has not yet been named.

> "it is important that any amendments be in the form of additional or alternative provisions to those already included in the proposed Tariff. In other words, the current provisions should not be deleted or changed in order to accommodate any revisions. The current provisions were the subject of detailed and protracted negotiations between YouTube and SOCAN and reflect these parties' best efforts to craft a Tariff satisfactory to both."[14]

F. SOCAN'S REPLY

[37] While Facebook had argued that the tariff does not apply to it, and Netflix had argued that its trial subscriptions are not subject to the tariff, SOCAN replied that the Board does not need to define who is liable to pay the tariffs; they are tariffs of general applicability. Anyone who makes the specific use of music is liable to pay the tariffs.

[38] The definition of audiovisual page impression in the agreement tariff follows. "Audiovisual page impression" means a page impression that allows a person to hear an audiovisual work. This is precisely analogous to the definition of audio page impression in certified SOCAN Tariffs 22.B-G: "audio page impression" means a page impression that allows a person to hear a sound.

[39] SOCAN listed several evidentiary questions, which it says would be necessary to evaluate Netflix's fair dealing claim. SOCAN claims it is unfair to answer an important question such as fair dealing with such a thin record as the Board currently has.

[40] SOCAN disputed Netflix's contention that levying royalties on free subscriptions is double dipping. Not everyone who gets a free trial chooses to continue his or her subscription after the month has expired. If there were no royalties payable on free trials, these customers would be listening to SOCAN's repertoire for free.

[41] SOCAN noted that the analogy to previews is inappropriate. In the case of a free trial, the viewer can listen to SOCAN's works in their entirety, in the same quality as they would be if the viewer purchased the movie or television show in question.

G. NETFLIX'S REPLY

[42] Netflix made three points in reply. First, SOCAN did not defend its proposal to have minimum fees for free trials. Second, while the signatories to the agreement may have agreed, they don't offer free trials. Third, the minimum fees for free trials are distortive, since they encourage cheap subscriptions over expensive subscriptions with a free trial.

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[14] Submission of YouTube, May 21, 2013, at 1.

III. ANALYSIS

A. THE "RE:SOUND 5" ANALYSIS

[43] In its decision in Re:Sound 5, the Board set out a framework for determining whether it should certify a tariff based on agreements. The Board has not received any comments on Tariff 22.D.1 or 22.D.2 from non-parties; although there were many comments on Tariff 22 generally, all of them related to the internet broadcast of audio works, not audiovisual works.

[44] Three parties objected to the tariffs and withdrew their objections prior to the signing of the settlement agreements: CCIA, Pandora, and Shaw.

[45] The CCIA withdrew because its member Yahoo! Canada preferred to remain in the proceedings on its own behalf. Since the CCIA claimed that its interests and those of Yahoo! Canada were the same, we accept this and do not need to address the objections of the CCIA separately.

[46] Pandora's request to intervene and its withdrawal do not make it clear on what grounds it is objecting to Tariffs 22.D.1 and 22.D.2. Indeed, the request to intervene focuses on audio content, not audiovisual content. This is not surprising given that Pandora has appeared before the Board in other proceedings and has never mentioned that it delivers audiovisual content. Thus, there are no outstanding arguments made by Pandora that require the Board's consideration.

[47] Shaw's only objection not otherwise addressed was to the reporting requirements of the tariff. The withdrawals by Music Canada and ESA do not raise fairness issues, since neither of these parties are targeted by the tariffs.

[48] In summary, there are no "Re:Sound 5" reasons not to certify the tariffs pursuant to the agreements.

B. ANALYSIS OF THE SUBMISSIONS BY FACEBOOK

[49] We reject most of Facebook's arguments for the following reasons. The Board has long held that when it certifies SOCAN tariffs, these are tariffs of general application.[15] If Facebook does not engage in the protected acts whose price the tariff sets, it does not have to pay the tariff. Facebook would have the Board determine that it does not engage in these protected acts as a finding of fact; the Board declines to do so as this is an issue for another forum.

[50] Similarly, Facebook's contention that default ratios should be eliminated is rejected. The purpose of default ratios is convenience for those licensees that do not want to or cannot

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[15] See, for example, Arbitration between SODRAC and CBC/Astral, November 2, 2012, at para. 63.

calculate their page impression ratios. Any licensee that does not want to use the default ratios has only to calculate their own page impression ratios.

[51] We agree with SOCAN that an audiovisual page impression is triggered when there is a possibility of viewing an audiovisual work, not when an audiovisual work is actually viewed. As noted by SOCAN, this is consistent with the definition of audio page impression elsewhere in Tariff 22.

[52] The issue of how to count a page, however, is a different matter. Facebook submitted that if there is a consistent way to count pages for both the numerator and the denominator of the page impression ratio that is different from what is currently being used (counting full pages), it could be used.

[53] Facebook's position is consistent with the evidence the Board has heard in the Re:Sound 8 (Non-interactive and semi-interactive Webcasts) matter. In that file, Re:Sound filed a report by Dr. Michael Murphy, professor of Engineering at Ryerson University's School of Radio and Television Arts, which stated that:

> "The report also examines the concept of 'Page Impressions' and explains by way of example how it is no longer a reliable or meaningful surrogate to reflect the degree of usage or interaction of music listeners when dealing with dynamic Web content using today's available technologies."[16]

[54] As Dr. Murphy went on to explain, a dynamic web page changes content many times without refreshing the whole page; thus a single page impression could encompass many "pages" worth of content. In our understanding, Facebook counts pages in a manner consistent with its dynamic web pages.

[55] We accept YouTube's submission respecting the text of the agreements while adding in Facebook's option for counting page impressions. In so doing, we are essentially offering users a choice. They may count static webpages as per the agreements or they may count pages in a dynamic-consistent way. So long as they count both the numerator and the denominator in the same way, they are complying with the tariff.

[56] The consequences of this decision will likely resonate in any number of Internet tariffs in the next few years. If dynamic webpages are becoming or have become the norm in the delivery of online content, a method appropriate for counting them may well become part of other tariffs as well.

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[16] Exhibit Re:Sound-2, at para. 14, "Report on Contemporary Music Webcasting Technology" (Re:Sound Tariff 8 Evidence).

C. Analysis of the Submissions by Netflix

[57] Netflix argued that royalties on free trials are a violation of the Supreme Court principle of technological neutrality established in *ESA*. We do not agree.

[58] The principle of technological neutrality is that, since only the reproduction right is triggered when a CD is sold in a store, only the reproduction right should be triggered when a digital album is sold online. The CD is an alternative technology to the digital download. There is no alternative-technology equivalent to a Netflix free trial. Video stores never offered a free month's membership with the right to rent as many videos as the customer wanted for no additional charge. Thus, there is no issue with technological neutrality.

[59] Netflix also wanted the Board to find that the free trials are fair dealing in the same way that the Board found that free previews are fair dealing. We decline to do so, for several reasons.

[60] First, the analogy between free previews and free trials is weak. In a free preview, the customer can hear a portion of a musical work in a degraded format. In a free trial, the customer can hear complete musical works, to the extent that such works are fixed in the audiovisual work being watched.

[61] Second, it is not altogether clear that Netflix is the only provider that offers free trials. When the Board was examining the free previews offered by iTunes, it was possible to argue that iTunes was the dominant provider of permanent downloads. Thus, in examining the practices of iTunes, the Board was essentially examining the practices of the permanent-download industry. However, in the case of Netflix, it is not clear that they dominate the market for videos. Without the argument of market dominance, an analysis of Netflix's policy of free trials would necessarily be incomplete with respect to the overall video industry.

[62] Third, and equally importantly, we do not have the evidentiary base with which to make that decision. While we could delay this decision for several more months during which time we would be collecting evidence from the parties on this issue, the fact that Netflix declined to participate in the process for many months is sufficient reason for us to decline to do so. If Netflix now wants to argue that it does not owe anything for its free trials, the appropriate forum in which to do so is not the Board.

[63] We also reject Netflix's three arguments made in its reply, which are set out in paragraph 42 above.

[64] First, SOCAN is not required to provide a justification for the existence of a minimum fee. The justification is obvious – if there were no minimum fee, there would be no compensation to rights holders for free trials, regardless of duration.

[65] Second, while Netflix may be correct that none of the signatory objectors offer free trials, this fact is not determinative. Neither SOCAN nor Netflix filed evidence about the fairness of the minimum fee. In the absence of such evidence, the Board can only presume that the minimum fee emerging from negotiations among experienced parties is the object of an agreement as much as any other element of this agreement. Furthermore, while we do not have evidence relating to the cost of a one-month Netflix subscription on the record, minimum fees in the agreement seem consistent with the Board's usual practice on minimum fees.

[66] Third, it is always true that a regular tariff with a minimum fee is somewhat distorted and favours business models for which each transaction (whether measured by a monthly subscription, or a download) is priced rather than some of them are offered for free. But the minimum fees here are not overly distorted. In fact, when Netflix mentions its monthly price of $8, it neglects to mention that using the Board's usual formula of two-thirds the royalties at the average price, the minimum fees would be higher than they are in the agreement. So, while there is undeniably some distortion, the distortion is relatively minimal and not likely to induce changes in business models.

IV. THE TARIFFS

[67] We certify the tariffs as in the agreements, with the exception of the Facebook clause for measuring pages.

Gilles McDougall
Secretary General