Copyright Board Canada

Commission du droit d'auteur Canada

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Regime Collective Administration of Performing and of Communication Rights
Collective Administration in Relation to Rights under Sections 3, 15, 18 and 21 *Copyright Act*, subsections 68(3) and 70.15(1)

Members The Honourable William J. Vancise
Mr. Claude Majeau
Mr. J. Nelson Landry

Proposed Tariffs Considered [Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)]

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

Reasons for decision

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I. INTRODUCTION

[1] The Copyright Board's first decisions relating to online music services, rendered in 2007,[1] addressed only three types of activities: the provision of permanent downloads, the provision of limited downloads, and the provision of on-demand streams. To these three are now added several new activities: webcasting (with varying degrees of interactivity), the provision of hybrid services, and the provision of videos of full-length concerts. It is now becoming clear that downloads and streams are not to be considered as a simple dichotomy, but rather as two ends of a spectrum with new activities falling somewhere in between. This characterization of online-music-service offerings informs this decision.

[2] On March 31, 2010, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed, pursuant to subsection 67.1(1) of the *Copyright Act*[2] (the "*Act*"), its proposed statement of royalties to be collected for the communication to the public by telecommunication of musical or dramatico-musical works by online music services (Tariff 22.A) for 2011.

[3] On March 31, 2010, CMRRA-SODRAC Inc. (CSI) filed, pursuant to subsection 70.13(1) of the *Act*, a proposed statement of royalties for the reproduction of musical works by online music services for 2011.

[4] On March 27, 2009 and March 30, 2010, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) filed, pursuant to subsection 70.13(1) of the *Act*, its proposed statement of royalties to be collected for the reproduction of musical works embedded in a music video, by online music services (Tariff 6) for the years 2010 and 2011.

[5] On February 11, 2011, Re:Sound objected to the consolidation of the examination of its proposed Tariffs 8.A (Simulcasting and Webcasting) and 8.B (Semi-Interactive Webcasting) for the years 2009-2012 with the other proposed tariffs for online music services.

[6] In March 2011, SOCAN, CSI and SODRAC each filed their proposed tariffs for online music services for 2012. On April 29, 2011, the Board ruled that the tariffs proposed by SOCAN, CSI and SODRAC would be examined jointly and merged into a single proceeding, but not jointly with Re:Sound Tariff 8, and that the examination would not begin until after the publication of the Board's decision dealing with SOCAN's proposed Tariff 22.A for 2007-2010 and CSI's proposed Online Music Services Tariff for 2008-2010.

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[1] *SOCAN Tariff 22.A – Internet – Online Music Services, 1996-2006* (18 October 2007) Copyright Board Decision. [*SOCAN Online Music Services (2007)*]; *CMRRA/SODRAC Inc. – Online Music Services, 2005-2007* (16 March 2007) Copyright Board Decision. [*CSI Online Music Services (2007)*]

[2] *Copyright Act*, R.S.C. 1985, c. C-42.

[7] In March 2012, SOCAN, CSI and SODRAC each filed their proposed tariffs for online music services for the year 2013. These proposed tariffs were also considered in the present proceedings.

[8] In July 2012, the Supreme Court of Canada issued several decisions affecting online music services: *Bell*,[3] *ESA*,[4] and *Rogers*.[5] Notably, in *ESA*, the Supreme Court concluded that the transmission over the Internet of a musical work that results in a download of that work does not constitute a communication by telecommunication. The effect of this decision on SOCAN was that it could not collect royalties for such downloads.

[9] In October 5, 2012, the Board issued the *Online Music Services (2012)*[6] decision, taking into account the above-mentioned decisions of the Supreme Court of Canada. On December 4, 2012, the Board set a schedule of proceedings for the merged online music services proceedings, with a hearing to begin in November 2013.

[10] Timely objections were filed to the various tariffs. The following parties filed objections: *L'Alliance des radios communautaires* (ARC), *L'Association des radiodiffuseurs communautaires du Québec* (ARCQ) and the National Campus and Community Radio Association (NCRA); Apple Canada and Apple Inc. (Apple); the Canadian Association of Broadcasters (CAB); the Canadian Broadcasting Corporation (CBC); Cineplex Entertainment LLP (Cineplex); Entertainment Software Association (ESA); Music Canada (formerly CRIA); Bell Canada; Rogers Communications; TELUS Communications; Videotron G.P.; Shaw Communications Inc.; Quebecor Media; Computer & Communications Industry Association; Pandora Media (Pandora); Pelmorex Media (Pelmorex); SiriusXM Canada (Sirius); Stingray Digital (Stingray); and YouTube LLC (YouTube). In addition, Google Inc. (Google) had applied to intervene in the proceedings and was granted intervenor status with full participatory rights.

[11] The following parties withdrew from the proceedings prior to the hearings: ARC, ARCQ, NCRA, CBC, Cineplex, ESA, Music Canada, Pelmorex, Sirius, Stingray, YouTube, and Google. All but two Objectors gave no reasons for their withdrawal. NCRA/ARC/ ARCQ withdrew because of a Board ruling that the activities of their members would not be covered by the tariffs under examination. Sirius withdrew because of a similar ruling relating to its activities.

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[3] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326. [*Bell*]

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

[5] *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283. [*Rogers*]

[6] *SOCAN Tariff 22.A – Internet – Online Music Services, 2007-2010* and *CSI Online Music Services Tariff, 2008-2010* (5 October 2012) Copyright Board Decision. [*Online Music Services (2012)*]

[12] At the time of the hearings, the Objectors consisted of Apple, CAB, the Networks (Bell Mobility Inc., Quebecor Media Inc., and Rogers Communications Partnership) and Pandora. Hearings were held from November 19, 2013 to November 28, 2013. Closing arguments of the Parties were presented over a two-day period on May 12 and 13, 2014.

[13] On November 26, 2015, the Supreme Court of Canada rendered its decision in *CBC v. SODRAC*,[7] where it held that the *Act* "should not be interpreted or applied to favour or discriminate against any particular form of technology."[8] The Parties were asked, through a Notice of the Board of December 15, 2015, what the impact of that decision should be in the present proceedings. Specifically, the Board sought the Parties' input on how it should address the issues of 1) technological neutrality, and 2) balance between user and right-holder rights, with relevant factors to include the risks taken by the user, the extent of the investment made by the user in the new technology, and the nature of the copyright protected work's use in the new technology. A joint response on behalf of CSI, SOCAN, Apple, Pandora, CAB and the Networks stated:

> The Parties do not wish to adopt either option as described in the Notice. The Parties do not wish to make further submissions, nor do they wish to add to the evidentiary record. The Parties submit that the Board should issue a decision in the Tariff Proceeding without further evidence or argument to address the impact of *CBC v. SODRAC*.

[14] SODRAC did not provide a response to the Board's Notice.

Amendments to the Copyright Act

[15] Directly affecting these proceedings is the fact that on November 7, 2012, the *Act* was amended by the coming into force of most provisions of the *Copyright Modernization Act*,[9] including the introduction of subsection 2.4(1.1) of the *Act*. It provides that

> [f]or the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

[16] On November 28, 2012, SOCAN submitted that in its opinion the effect of subsection 2.4(1.1) of the *Act* on its proposed tariffs for online music services could, and should, be determined by the Board as a purely legal issue. In particular, SOCAN argued that this provision rendered moot the Supreme Court's decision in *ESA* and requires persons, such as online music

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[7] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 SCR 615. [*CBC v. SODRAC*]
[8] *Ibid* at para 66.
[9] *Copyright Modernization Act*, S.C. 2012, c. 20 (assented to 29 June 2012). [*CMA*]

services, to pay royalties to SOCAN when they post musical works on their Internet servers in a way that allows access to them by their end-user customers, irrespective of whether the musical works are subsequently transmitted to end-users by way of downloads, streams or at all.

[17] On December 7, 2012, the Board issued a Notice stating that the effect of subsection 2.4(1.1) of the *Act* was properly before it as a necessary incident to the exercise of its core competence and that it was not possible to certify SOCAN's proposed tariffs without deciding what effect the introduction of subsection 2.4(1.1) has on SOCAN's ability to receive royalties for such activities. Some of the persons and groups which made submissions pursuant to that notice are parties to these proceedings.

[18] The Board's decision relating to the effect of subsection 2.4(1.1) of the *Act* is issued concurrently with this decision and is discussed more fully below in the section dealing with legal issues.

[19] The time it has taken for the issuance of this decision is due to various factors. Of note is the fact that the proceedings involved the Board issuing seven orders, ten rulings, and thirty-eight notices. Ensuring coherence in the context of a complex legal and factual matrix was one of the most challenging undertakings members of this panel have faced. The novel issues raised by the wide array of services— and combinations thereof—targeted by the various proposed tariffs in this matter required thorough consideration. The different activities targeted and the differing terminology used by the various collective societies added layers of difficulties in arriving at a useful and coherent result.

[20] Consultations on the wording of the tariff started in June 2016 and extended over several months. Given the complexity of the exercice, many requests were made for extension of time to respond to the Board's orders. Lastly, the related process and decision dealing with the very important decision on the scope of "making available" was a significant undertaking in its own right. We wish to thank Parties that put forward submissions and arguments in this novel area of law for their useful contributions.

II. THE PARTIES

[21] SOCAN is a collective society that administers performing rights in musical works on behalf of Canadian composers, authors and publishers as well as affiliated societies representing foreign composers, authors and publishers.

[22] CSI is a collective society created by two other collectives, the Canadian Mechanical Reproduction Rights Agency (CMRRA) and SODRAC. These collectives have granted CSI an exclusive mandate to license the reproduction of musical works in their repertoires for certain uses.

[23] CMRRA is a licensing and collecting agency for the reproduction rights of musical works in Canada. It represents over 6,000 Canadian and American publishers who own and administer the majority of the music recorded and performed in Canada.

[24] SODRAC administers royalties stemming from the reproduction of musical works. It represents some 6,000 Canadian songwriters and music publishers as well as the musical repertoire from over 89 countries.

[25] Apple designs, manufactures, and markets mobile communication and media devices, personal computers, and portable digital music players, and sells a variety of related software, services, peripherals, networking solutions, and third-party digital content and applications. In particular, Apple sells and delivers digital content such as permanent downloads and applications through the iTunes Store.

[26] CAB's members affected by the proposed tariffs are radio broadcasters that operate Internet websites. These websites communicate music via simulcast of the over-the-air signal of the radio station, and in limited cases, via non-interactive webcasts or free on-demand streams.

[27] The Networks are some of Canada's largest media and telecommunications companies. Bell offered its mobile customers the ability to subscribe to a limited download service and to purchase full-track downloads. These services were later discontinued. Rogers's "urMusic" service offered subscribers the ability to purchase full-track downloads, subscribe to a limited download service and purchase downloads of music videos. This service was offered until November 2012, at which time it was discontinued. Quebecor Media offered music services through two subsidiaries, Archambault and Videotron. Archambault operated an on-demand streaming service known as Zik.ca that allowed customers to make local copies for offline listening. Archambault offered permanent downloads at Archambault.ca. The Zik.ca service was discontinued in August 2015[10] while the Archambault subsidiary was sold in September 2015.

[28] Pandora operates the largest and most successful streaming service in the United States. It does not offer downloads. As of the time of the writing of this decision, Pandora does not offer its webcasting services in Canada.

III. POSITION OF THE PARTIES

[29] Before describing the position of each party, we note that the royalty rates proposed by SOCAN and CSI in their proposed tariffs, as published in the *Gazette*, are difficult to describe without resorting to simplification, or without reproducing the entire proposed royalty structure.

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[10] http://ici.radio-canada.ca/nouvelle/735092/zik-fermeture-musique-continu-quebecor.

This is mostly due to the fact that these proposed tariffs were primarily based on the combination of services that a particular entity provided.

[30] For example, under SOCAN's proposed tariffs, an entity that provided on-demand streams only, would pay 15.2 per cent of revenues, while an entity that provided on-demand streams along with limited downloads would pay 12.6 per cent of its revenues. Thus the effective rate applicable to revenues attributable to the provision of on-demand streams would be 15.2 per cent in one case, but 12.6 per cent in another.

[31] This is further complicated by the fact that SOCAN proposed an "add-on" per-play rate for free streams, to be paid by an entity that already provides another service covered by the proposed tariff. For example, according to SOCAN's 2012 proposed tariff, an entity providing limited downloads along with free streams would pay 12.6 per cent of gross revenues, plus 4.6¢ per stream.

[32] Despite these complications, this is not a novel structure; a similar structure was also present in the following certified tariffs: *SOCAN Online Music Services (2007)*; *CSI Online Music Services (2007)*; and *CSI Online Music Services (2012)*.

[33] To simplify this situation, in these reasons, when we refer to proposed rates for a particular service, we typically refer only to the rate that would apply in the case where an entity provides only that service. Moreover, all collectives revised their proposed rates at various points in these proceedings. Unless specified otherwise, these reasons refer to the last proposed set of rates for each collective.

[34] The simplification that we use has the benefit that it dovetails closely with the type of evidence presented by the expert witnesses. The economic experts presented proxy analyses based on separate offerings, not joint offerings. This is not surprising: the complexity of the economic models with joint pricing is well-known. To model joint pricing, one needs to model two separate marginal revenue functions and the joint marginal cost function, where the inputs to production may be partially or wholly common. Issues with identifying three functions are considerably more pernicious than those with identifying two functions.

[35] However, the simplification has one significant drawback. It is difficult, if not impossible, to compare tariffs using joint pricing and the tariff we certify today. To disentangle joint pricing, we would need the revenue weights associated with each activity and some measure of the intensity of each activity as well. This drawback is not problematic *per se*, but we mention it given the focus that the Board, collectives, and users of tariffs frequently put on comparing current and previous tariffs.

A. SOCAN

[36] SOCAN takes the position that a making available right (MAR), now forming part of the communication right by virtue of new subsection 2.4(1.1) of the *Act*, is engaged in downloads, streams and combinations thereof. SOCAN also states that the *ESA* Supreme Court decision did not invalidate its right to a tariff for limited downloads or hybrid webcasts (which permit the making of cache copies of songs for later listening). The *ESA* decision referenced permanent copies; SOCAN submits that limited downloads and cache copies are not permanent copies.

[37] SOCAN takes the position that a service offering hybrid webcasts should pay half of the royalties payable under the tariff to SOCAN, and half to CSI. Finally, SOCAN argues that the rate base should be gross revenues, not amounts paid by consumers. This change would take into account business models where consumers pay nothing.

[38] In its statement of case,[11] SOCAN proposed a rate of 3.4 per cent of revenues for permanent downloads. The minimum fees would be 1.7¢ per song in a bundle of 13 or more songs, and 2.3¢ for all other songs. SOCAN also proposed a rate of 3.4 per cent of revenues for limited downloads. The minimum fees would be 60.9¢ per subscriber per month, for portable limited downloads, and 39.9¢ per subscriber per month, for non-portable limited downloads.

[39] SOCAN proposed a rate of 8.6 per cent for on-demand streams and recommended streams. The minimum fee would be 50.67¢ per subscriber per month, except in the case of free on-demand streams, where the minimum fee would be the lesser of 50.67¢ per unique visitor per month and 0.13¢ per song streamed. For hybrid on-demand streams, SOCAN proposed a rate of 8.6 per cent on the basic streaming tier and 50 per cent of the combined rate to be certified by the Board for the hybrid tier. For music videos, SOCAN proposed a rate of 2.24 per cent for permanent and limited downloads and 5.67 per cent for on-demand and recommended streams.

B. CSI

[40] CSI proposed a rate of 9.9 per cent of revenues for permanent downloads. The minimum fees would be 4.1¢ per song for 2011 and 4¢ per song for 2012-13 for songs in a bundle of 13 or more songs, and 7.6¢ for 2011 and 7.8¢ for 2012-13 for songs not in a bundle. For the go-forward period (2014 and beyond, until a new tariff is certified), CSI asked that a bundle be defined as 15 songs or more, rather than 13 songs or more.

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[11] In their statements of case, each of the Collectives proposed rates that are different from the rates published in the *Canada Gazette*. For the sake of brevity, unless *ultra petita* issues are engaged, the gazetted rates are omitted from the description of the position of the Parties. See *Annex A* for a table of the various rates as they appeared in the *Canada Gazette* and the statements of case of the respective collectives.

[41] CSI proposed a rate of 9.9 per cent of revenues for limited downloads. The minimum fees would be the greater of 99¢ per subscriber per month and 0.17¢ per play for portable limited downloads, and the greater of 66¢ per subscriber per month and 0.17¢ per play for non-portable limited downloads.

[42] CSI proposed a rate of 5.39 per cent of revenues for on-demand streams. The minimum fees would be the greater of 35.93¢ per subscriber per month and 0.094¢ per play, except in the case of free on-demand streams, in which case the fees would be the lesser of 35.93¢ per unique visitor per month and 0.094¢ per song streamed.

[43] CSI proposed two possible rates for hybrid on-demand streams, both based on half the streaming rate and half the limited-download rate. The first was based on SOCAN receiving 3.4 per cent of revenues for limited downloads, and the second based on SOCAN not receiving royalties for limited downloads. If SOCAN receives royalties for limited downloads, CSI proposed royalties of 7.65 per cent of revenues, with minimum fees of the greater of 50.96¢ per subscriber per month and 0.13¢ per play. If SOCAN does not receive royalties for limited downloads, CSI proposed royalties of 9.35 per cent of revenues, with minimum fees of the greater of 62.31¢ per subscriber per month and 0.16¢ per play.

[44] CSI proposed royalties of the greater of 3.24 per cent of revenues and 0.022¢ per play for non-interactive webcasting. For interactive webcasting, CSI proposed royalties of the greater of 6.22 per cent of revenues and 0.042¢ per play. For hybrid, non-interactive webcasting, CSI proposed royalties of the greater of 6.68 per cent of revenues and 0.045¢ per play, if SOCAN is entitled to royalties for limited downloads. If SOCAN is not entitled to royalties for limited downloads, CSI proposed royalties of the greater of 8.42 per cent of revenues and 0.057¢ per play. For hybrid, interactive webcasting, CSI proposed royalties of the greater of 12.83 per cent of revenues and 0.088¢ per play, if SOCAN is entitled to royalties for limited downloads. If SOCAN is not entitled to royalties for limited downloads, CSI proposed royalties of the greater of 16.17 per cent of revenues and 0.110¢ per play.

[45] CSI proposes that the International Standard Recording Code (ISRC), the Universal Product Code (UPC), and author fields be made mandatory for all online music services. In CSI's opinion, the Board laid the groundwork for this possibility in its 2012 decision.

[46] CSI proposes that invoices following a late report be issued on its next invoicing cycle, rather than 20 days after receiving the late report by reason that it uses a standardized invoicing cycle and finds it difficult to send invoices outside of that cycle. CSI requests that a penalty of $50 be imposed to discourage late reports or late payments.

[47] CSI also proposed a change in the rate base. At present, the rate base is the amounts paid by subscribers or end users. This does not include any advertising revenues earned in the course of

online music transactions. CSI's proposal to change the rate base to gross revenues would encompass all of these "indirect revenues."

C. SODRAC

[48] SODRAC is the only collective society that proposed a tariff for the reproduction of music videos. In its proposed tariffs, SODRAC proposed a rate of 9.9 per cent of revenues for the reproduction of music videos in the form of permanent downloads. For bundles of 15 or more files, SODRAC proposed a minimum of the greater of 4.4¢ per work and twice the minimum payable pursuant to the SOCAN Tariff 22 for such a download; in other cases, a minimum of the greater of 6.6¢ per work and twice the minimum payable pursuant to the SOCAN Tariff 22. In its statement of case, it proposed a rate of 6.5 per cent of revenues for the reproduction of such videos in the form of permanent downloads. For bundles of 20 videos or more, SODRAC proposed a minimum of 2.7¢ per video, and 9.9¢ per video in other cases.

D. APPLE

[49] Apple submits that the Board's findings with respect to the SOCAN and CSI tariffs in its *Online Music Services (2012)* decision should remain in place. These findings are three-fold. First, the Board found CSI's rate for permanent downloads and limited downloads to be 9.9 per cent. Second, the Board found that SOCAN had no right to collect in respect of downloads. Third, the Board found that, even if SOCAN had the right to collect in respect of downloads, it would have rejected SOCAN's proposed basis for calculating those royalties.

[50] In Apple's opinion, the rate base for downloads for CSI should remain the same: revenues from sales. Apple explained that it does not have other revenues.[12]

[51] In the *Canada Gazette*, CSI proposed monthly minimum fees for all services except for permanent downloads. In its statement of case, CSI proposed a minimum fee of the greater of a monthly fee and a per-play fee. (See Annex A) Apple argues that the minimum fee structure that CSI is applying for is *ultra petita*, since it was not in the *Canada Gazette*.

[52] CSI requests that Apple supply songwriter information when it sells permanent downloads. However, Apple notes that songwriter information is in the control of the publishers, not of the services. It should not be asked to provide information that it does not control.

[53] Finally, Apple stated that it offers free previews of musical works of up to 90 seconds in length. As such, the tariff language should be adjusted to reflect the fact that previews may be longer than 30 seconds.

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[12] Exhibit Apple-1 at para 4.

[54] With respect to SOCAN, Apple argues that the right to collect for downloads, if revived by subsection 2.4(1.1) of the *Act*, only began on November 7, 2012, the date of coming into force of most provisions of the *CMA*, including subsection 2.4(1.1). SOCAN would thus have no right to collect for any downloads prior to that date during the tariff period, pursuant to *ESA*. Furthermore, Apple argues that SOCAN did not properly file a tariff proposal for the making available of musical works. Finally, SOCAN builds its valuation of the act of making available on the now-rejected valuation for the download rate.

[55] It is Apple's submission that the act of making available merges with the act of transmission for songs that are actually downloaded. Thus, under *ESA*, no royalties are owed for these acts. For songs that are not downloaded, the value of making available is *de minimis*. Apple notes that making available cannot apply to webcasting, as the language of the statute, in its opinion, expressly prohibits it.

[56] Apple contends that it carries very few music videos containing musical works in SODRAC's repertoire.[13]

[57] Apple proposed the following rates for SOCAN: for permanent and limited downloads, rates of between 0.31 and 0.85 per cent of revenues; for recommended streams, a rate of 5.25 per cent of revenues.

[58] Apple proposed the following rates for CSI: for permanent and limited downloads, a rate of 9.9 per cent of revenues; for webcasting, whether interactive or non-interactive, a rate of 1.719 per cent of revenues.

[59] Finally, Apple proposed a rate of 5.6 per cent of revenues for SODRAC's music videos tariff.

E. CAB AND PANDORA

[60] CAB and Pandora filed some exhibits in common and were represented by common counsel.

[61] CAB notes that any changes to music use information reporting requirements should include a transition period to allow for an updating of systems and data, clear notice requirements when deficiencies occur, and special recognition for stations that are incapable of reporting according to the new requirements. CAB argued that late fees are an enforcement issue and that it is thus outside the jurisdiction of the Board to set such penalties.

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[13] Exhibit Apple-2 (confidential), Appendix A at para 29.

[62] Pandora submits that there can be no making-available adjustment for streams other than interactive streams. Subsection 2.4(1.1) of the *Act* provides that "communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it *from a place and at a time individually chosen by that member of the public*." [emphasis added] Pandora explained that recommended streams do not allow users to choose when a particular song is played and so cannot be subject to royalties when they are made available.

[63] For SOCAN's recommended stream tariff, CAB and Pandora proposed a rate of 5.3 per cent of revenues, with a minimum fee of $100 per year. For CSI's recommended stream tariff, they proposed a rate of 1.7 per cent of revenues, which would also be tiered according to the level of revenues and adjusted for repertoire.

F. THE NETWORKS

[64] The Networks submit that the decisions of the Supreme Court in *ESA* and *Rogers* prevent SOCAN from collecting royalties for permanent or limited downloads, or music video downloads. In their opinion, "making available" applies to communications, but not to downloads, which are not communications according to *ESA* and *Rogers*.[14] According to them, this implies that subsection 2.4(1.1) of the *Act* does not overrule the Supreme Court's decisions that SOCAN is not entitled to collect royalties for downloads.

[65] The Networks proposed the following rates for SOCAN. For permanent and limited downloads, because SOCAN is not entitled to collect royalties on these, no rate should be certified. For on-demand streams and recommended streams, they proposed royalties of 5.3 per cent of revenues. Finally, for on-demand streams of music videos, they proposed royalties of 3.02 per cent of revenues.

[66] The Networks proposed the following rates for CSI. For permanent and limited downloads, they proposed royalties of 9.9 per cent of revenues. For webcasting, both interactive and non-interactive, as well as on-demand streams, they proposed royalties of 1.238 per cent of revenues.

[67] Finally, for SODRAC's music video tariff, the Networks proposed royalties of 5.6 per cent of revenues.

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[14] Submissions of the Networks on the Making Available Amendment, June 14, 2013, at paras 16*ff*.

IV. EVIDENCE

A. SOCAN

[68] Marc Paquette, Assistant Manager, Media Licensing, SOCAN, testified about three changes in the online music landscape since the last hearing in 2010. First, he mentioned the *ESA* decision, which resulted in refunds to services exceeding $20 million. Second, he mentioned that SOCAN no longer collects royalties for downloads. Finally, Mr. Paquette noted the increase in the number of streaming services available in Canada.[15]

[69] At the time of his testimony, there were only four streaming services licensed by SOCAN. Mr. Paquette discussed each of the licences related to those services in some detail.

[70] Mr. Paquette discussed the difficulty with the "hybrid tier" of online music services. Hybrid services are a combination of on-demand streaming services and limited download services. Since they offer on-demand streams, they are subject to SOCAN's tariff of 7.6 per cent of revenues. Because they also offer limited downloads, they are also subject to CSI's tariff of 9.9 per cent.[16] The total tariff of 17.5 per cent was excessive, according to SOCAN's licensees.[17] Based on an agreement between SOCAN and CSI, the total amount payable for hybrid services was reduced. Furthermore, the reduced amount was payable half to SOCAN and half to CSI. This 50-50 split aligns with the way some collective societies deal with the hybrid tier elsewhere in the world.

[71] Finally, Mr. Paquette clarified that a *mixed service* has multiple music uses and one revenue source.[18] This is different from a *hybrid service* that has a single music use with multiple features such as online and offline listening.[19]

[72] Dr. Stan Liebowitz, Ashbel Smith Chair of Economics, University of Texas at Dallas, testified as SOCAN's economic expert. Dr. Liebowitz divided the value of the MAR into two parts: the part associated with songs that are downloaded and the option value associated with songs that are not downloaded.[20] The value of the first part is at least as high as the value of the right of communication to the public by telecommunication, as understood prior to the Supreme Court of Canada's decision in *ESA* (the "pre-*ESA* communication right"), since "making [a] song available is at least as important as 'communicating' a download."[21] The option value for songs

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[15] Transcripts, Vol. 7 at 1859.
[16] The CSI tariff provides for a rate of 9.9 per cent of revenues for limited download services, whether or not they offer streams.
[17] *Supra* note 15 at 1876.
[18] Transcripts, Vol. 8 at 1892.
[19] Transcripts, Vol. 7 at 1872; Vol. 8 at 1892.
[20] Transcripts, Vol. 4 at 864.
[21] Exhibit SOCAN-10 at slide 8.

not downloaded is difficult to quantify, but is definitely greater than zero. The total value of the MAR, therefore, is somewhat greater than 3.4 per cent of revenues. Since permanent downloads have no other communication-related value than the MAR, such value for permanent downloads is greater than 3.4 per cent. SOCAN's proposal for the permanent download rate is 3.4 per cent, however, not an amount greater than 3.4 per cent of revenues.

[73] According to Dr. Liebowitz, the value of limited downloads is also greater than 3.4 per cent, for three reasons. First, limited downloads attract the MAR on songs that are downloaded. Second, limited downloads have the option value on songs that are not downloaded. Third, the Supreme Court's decision in *ESA* did not invalidate the communication right in limited downloads. Each of these three amounts is additive and the first of these is 3.4 per cent; thus, the value of limited downloads is greater than 3.4 per cent.[22]

[74] Dr. Liebowitz explained that recommended streams and on-demand streams are somewhat different from one another,[23] but are sufficiently similar to use the same pricing approach.

[75] Dr. Liebowitz arrived at his rate for streams using two alternative methodologies. First, he began with the existing rate for on-demand streams, 7.6 per cent of revenues. He argued that the addition of the MAR should take the rate to somewhere between 8 and 10 per cent of revenues. He did not explain how he arrived at these two bounds, which imply a rate of 0.4 per cent to 2.4 per cent for the MAR.

[76] Second, he began with the commercial radio blended rate of 4.2 per cent of revenues and made three adjustments. First, he adjusted for the fact that streams use more music than commercial radio. This is because on-demand streams play only music, whereas commercial radio also includes talk, weather, commercials, etc. This adjustment took Dr. Liebowitz to a rate of 5.3 per cent. Second he adjusted for the fact that talk is more valuable than music. As Dr. Liebowitz mentioned, the Board has already noted the exclusive nature of on-air talent that raises the value of talk relative to music on radio. The second adjustment took the rate to 7.4 per cent, assuming that the value of talk is three times that of music. Dr. Liebowitz considered alternative assumptions that would raise or lower this rate, but he found that his assumption was most reasonable.[24] Finally, he added a value for the MAR, which, once again, took the overall value for streams to between 8 and 10 per cent of revenues. Once again, he did not explain precisely how he arrived at these two bounds.

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[22] Exhibit SOCAN-7 at paras 11-12.
[23] Transcripts, Vol. 4 at 892.
[24] Exhibit SOCAN-10 at slides 18-A*ff*.

B. CSI

[77] Caroline Rioux, President, CMRRA, testified that CSI was dealing with 23 online music services.[25] She explained that these services required information from CSI to calculate the amounts that they owed as a result of the decision for the years 2008-2010. It is not a straightforward calculation. Among other things, CSI had to go back through its financial records and recalculate the amounts owing. The same calculation problem existed for CSI licensees that offered limited downloads or on-demand streams.

[78] Ms. Rioux gave details about the information CSI requires to identify a track sold. Overall, about 97 per cent of tracks sold have an ISRC attached to them, but 41 per cent have a UPC and 12 per cent have songwriter information.[26] Making these three fields mandatory would improve CSI's ability to identify tracks sold. The ISRC alone is not sufficient to identify a track, because of re-releases and compilation albums.

[79] Ms. Rioux then explained the difficulties that CSI has in issuing an invoice mid-cycle.[27] The cycle of payments and invoices used by CSI has little flexibility in its dates; if a report is late, CSI cannot issue an invoice until the next quarter.

[80] For example, in 2010, second-quarter sales reports were due to CSI on July 20. CSI delivered its invoices to its licensees on July 23. Payments were due on August 22. CSI delivered payment data to CMRRA and SODRAC on August 27. Finally, CMRRA and SODRAC distributed royalties to rights holders on September 15.[28] If a licensee was late with a sales report, it could not receive its invoice on time, which means it would pay its invoice late and the royalties from that licensee would not be distributed in the period for quarterly distribution.

[81] Finally, Ms. Rioux clarified CSI's position on hybrid services. As with SOCAN, CSI maintains that the Board never intended hybrid services to pay 17.5 per cent of revenues combined to both collectives.

[82] Dr. Marcel Boyer, Professor Emeritus of Economics, University of Montreal, and Dr. Joël Blit, Assistant Professor of Economics, University of Waterloo, testified as a panel of economic experts for CSI.[29] They suggested CSI tariff rates for the various uses by online music services, as summarized in the table at Annex B.

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[25] Transcripts, Vol. 2 at 405.
[26] Transcripts, Vol. 2 at 415.
[27] Transcripts, Vol. 2 at 458-459.
[28] Exhibit CSI-12 at slide 16.
[29] The report (Exhibit CSI-03) by Drs. Boyer and Blit was also coauthored by Mr. Paul Audley.

i. Permanent Downloads

[83] Drs. Boyer and Blit used the existing CSI model to determine the rates for permanent downloads. The model consists of several steps. First, the average mechanical royalty is computed.[30] Second, the average price of a downloaded track is also computed. Third, the ratio between these two is calculated as a percentage. Finally, this percentage is used as a proxy for the CSI permanent download rate, without further adjustment.

[84] The average mechanical royalty, weighted by the share of mechanical licensing activity of three groups of mechanical rights holders (Music Canada, *Association québécoise de l'industrie du disque, du spectacle et de la vidéo* (ADISQ), and those that are not affiliated with either of these organizations) is 8.43¢ for 2011 and 8.36¢ for 2012. The weighted average price of a downloaded track, taking into account tracks downloaded as singles and those downloaded as part of bundles, was 82.1¢ in 2011 and 82.3¢ in 2012. The ratio of the average mechanical royalty to these two prices, expressed as a percentage, is 10.3 per cent for 2011 and 10.2 per cent for 2012; in the existing model, the ratio is used as a proxy for the CSI rate, without further adjustment.

[85] The existing model also sets the minimum fees at two thirds the average royalty. For single tracks, the average prices are $1.11 in 2011 and $1.15 in 2012. Using the rates of 10.3 per cent and 10.2 per cent, the experts obtain minimum fees of 7.6¢ in 2011 and 7.8¢ in 2012. The average price of a bundled track is 60.3¢ in 2011 and 59.8¢ in 2012. The minimum fees obtained are thus 4.1¢ for 2011 and 4.0¢ for 2012.

ii. Limited Downloads

[86] Drs. Boyer and Blit then turned to the limited download rate. They argue that this rate should be the same as the permanent download rate, according to the three following principles, as enunciated in *Online Music Services (2012)*.[31] First, there is no difference in the relative importance of the reproduction and the communication rights between permanent and limited downloads. Second, if a lower rate were set for limited downloads, given that limited downloads generate less revenue per track, this would entail double discounting. Third, the elimination of SOCAN's entitlement to collect royalties for permanent downloads left additional money on the table that the Board felt properly should be allocated to CSI. As a result, Drs. Boyer and Blit argue that the appropriate rate for limited downloads should be the same as for permanent downloads, i.e. 10.3 per cent in 2011 and 10.2 in 2012-2013.

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[30] "Mechanical royalty" as used herein, refers to the penny rate record labels pay to reproduce musical works onto pre-recorded CDs, converted to a percentage of the retail price of a download.
[31] *Supra* note 6 at paras 90-96.

[87] The minimum fee they proposed is in two parts: a subscription rate and a per-play rate. The subscription part is based on monthly subscription rates. The Board customarily sets a minimum fee at two-thirds of the average royalty. In its 2012 decision, the Board found that the average subscription prices for limited download services were $15 per month for portable subscriptions, and $10 per month for non-portable subscriptions. According to Drs. Boyer and Blit, this finding was not contradicted by new evidence. Consequently, they saw no reason to change the per-subscriber minimum rates of 99¢ per month for portable limited downloads and 66¢ per month for non-portable limited downloads.

[88] The per-play part is in respect of the free, on-demand streaming rate. Drs. Boyer and Blit argue that this part should be the appropriate CSI share of the total free, on-demand streaming minimum fee for both SOCAN and CSI. However, in order to determine the appropriate share, they make several assumptions. First, they assume that, had the Board certified a SOCAN rate for downloads in its 2012 decision, that rate would have been 3.4 per cent of revenues. Second, they assume that the Board will certify a rate of 3.4 per cent of revenues for SOCAN in the present proceedings. Third, they assume that the Board will return to its principle of certifying the same combined CSI and SOCAN rate for the three "core activities" of permanent downloads, limited downloads, and on-demand streaming.

[89] The specific, numerical consequences of these assumptions according to Drs. Boyer and Blit follow their arguments. The 2012 free, on-demand streaming rates for CSI and SOCAN were 0.09¢ and 0.13¢, respectively, for a total combined on-demand streaming minimum fee of 0.22¢. The on-demand streaming rate for CSI was 5.18 per cent; the on-demand streaming rate for SOCAN was 7.6 per cent. Therefore, the combined CSI and SOCAN on-demand streaming rate was 12.78 per cent. However, had the Board set a SOCAN rate of 3.4 per cent for downloads, the combined CSI and SOCAN download rate would be 3.4 + 9.9 = 13.3 per cent.

[90] Since Drs. Boyer and Blit assert that the combined value of on-demand streaming should be the same as for downloads, the free, on-demand streaming rate has to be grossed up to take into account this higher combined value for download. The proposed new minimum fee for free, on-demand streaming, is 0.23¢ (0.22 × (13.3/12.78)). A share of this grossed-up rate then has to be allocated to CSI. The CSI share of this is 0.17¢ (0.23 × (9.9/13.3)). The minimum fee they propose is thus the greater of 0.17¢ per file downloaded as a limited download and 66¢ (for non-portable) or 99¢ (for portable) per subscriber per month.

iii. On-demand Streams

[91] For on-demand streams, Drs. Boyer and Blit proposed that the existing rate of 5.18 per cent be grossed-up to account for the highest combined value of CSI and SOCAN download rates. As such, they proposed a rate of 5.39 (5.18 × (13.3/12.78)) per cent of revenues.

[92] The proposed minimum fee is again the greater of two parts—a subscription rate and a per-play rate. The subscription rate is the grossed-up version of the subscription rate last certified. Namely, the fee is 35.93¢ (34.53 × (13.3/12.78)) per subscriber per month.

[93] Similarly, the proposed per-play rate is the grossed-up version of the last per-play rate certified. It corresponds to 0.094¢ (0.09 × (13.3/12.78)).

iv. Webcasting

[94] For non-interactive webcasting, Drs. Boyer and Blit start outside the online music tariff, namely with the commercial radio tariff. They justify their approach on the basis that the ratio of copyright payments to music programming expenses should be the same in commercial radio and webcasting.

[95] The value of the previous commercial radio tariff (without repertoire adjustments) is the value of activities protected under four rights: the communication of musical works, 4.2 per cent; the communication of sound recordings, 4.2 per cent; the reproduction of musical works, 1.375 per cent; and the reproduction of sound recordings, 1.375 per cent. The total is 11.15 per cent of revenues.

[96] In commercial radio, copyright represents 41.03 per cent of music programming expenses. Drs. Boyer and Blit assume that in webcasting, copyright represents 100 per cent of music programming expenses. This means that the rate of 11.15 per cent gets grossed up to 27.18 per cent. Of this, half goes to sound recordings, leaving 13.59 per cent. This is because the Board has consistently ruled that the value of musical works and sound recordings should be equal, before repertoire adjustment. Of this amount, one (1) part goes to the reproduction right for every 3.2 parts that go to the communications right. This is because the Board has consistently adopted a ratio of 1:3.2 between the reproduction right and the communication right for commercial radio broadcasting, and Drs. Boyer and Blit transpose that ratio into webcasting. This calculation leads to a CSI rate of 3.24 per cent (and a corresponding SOCAN rate of 10.35 per cent).

[97] Drs. Boyer and Blit also use commercial radio to compute a per-play rate for webcasting, to be used as a minimum fee. Based on the number of minutes per track (3.92), the fraction of radio time devoted to music (65.6 per cent) and listenership data, Drs. Boyer and Blit compute the per-play rate associated with total royalties paid by commercial radio at 0.077¢. Based on the 1:1 ratio of value of musical works to value of sound recordings and the 1:3.2 ratio of value of reproduction to communication rights, this implies a CSI commercial radio per-play rate of 0.009¢. Finally, in calculating the per-play rate for non-interactive webcasting, the number of plays must be adjusted to reflect the fact that in addition to music accounting for 100 per cent of program expenditures, music also accounts for 100 per cent of program time. The result of these adjustments is a rate of 0.018¢ per play.

[98] Drs. Boyer and Blit compute an interactivity premium[32] as the net ratio of the price of a single track to the price of a bundled track. A single track sells for $1.15 as a digital download and a bundled track sells for $0.60. The ratio of these two prices is 192 per cent. Thus, they argue that the interactivity premium should be 92 per cent, and the interactive webcasting rate 6.22 (3.24 × 1.92) per cent of revenues. The per-play minimum should be 0.035¢ (0.018 × 1.92).

v. Hybrid On-demand Streams

[99] For hybrid on-demand services, consisting of on-demand streams and limited downloads, Drs. Boyer and Blit made several assumptions. First, they assumed that hybrid services are 50 per cent on-demand streams and 50 per cent limited downloads. Second, they assumed that the amount that is paid for the half that is limited downloads should be split between SOCAN and CSI in the same way as the total for limited downloads is split; they made the same assumption for on-demand streams. Finally, they assumed that SOCAN would receive either 3.4 per cent for limited downloads or zero, and considered the two cases separately.

[100] If SOCAN receives 3.4 per cent for limited downloads, Drs. Boyer and Blit suggest CSI should receive half of the limited download rate of 9.9 per cent and half of the on-demand stream rate of 5.39 per cent. This is equal to 7.65 per cent. If SOCAN receives nothing for limited downloads, the authors argue that CSI should receive half the total combined rate of 13.3 per cent for limited downloads and half the on-demand stream rate of 5.39 per cent. This leads to a rate of 9.35 per cent of revenues.

[101] The per-play rate is computed by Drs. Boyer and Blit again starting from the free, on-demand combined stream rate of 0.23¢, but using CSI's share for hybrid services. If SOCAN is entitled to 3.4 per cent of revenues for limited downloads, CSI's per-play rate is 0.13¢ (0.23 × (7.65/13.3)). If not, CSI's per-play rate is 0.16¢ (0.23 × (9.35/13.3)).

[102] The per-subscriber rate is calculated by Drs. Boyer and Blit as follows. For the on-demand streaming portion, they propose that CSI should receive 17.96¢, or half of the 35.93¢ that is being proposed for on-demand streams. For the limited download portion, they suggest the corresponding half of the combined CSI and SOCAN per-subscriber rate, or 44.35¢, be allocated in the following way. If SOCAN is entitled to 3.4 per cent for limited downloads, CSI should receive 33¢ (44.35¢ × 9.9/13.3). If not, CSI should receive the full 44.35¢. Summing the two portions leads to CSI rates of 50.96¢ (17.96¢ + 33¢) or 62.31¢ (17.96¢ + 44.35¢).

[32] See discussion at paras 233*ff* on the issue of "interactivity premium."

vi. Hybrid Webcasting

[103] Finally, Drs. Boyer and Blit proposed rates for hybrid webcasting. Hybrid webcasting is part webcasting and part limited downloads; the webcasting can be either non-interactive or interactive. As such, Drs. Boyer and Blit proposed rates for hybrid non-interactive webcasting and hybrid interactive webcasting.

[104] The proposed value of hybrid webcasting is based on several assumptions. First, hybrid webcasting is 50 per cent limited downloads and 50 per cent webcasting. Second, the amount that is paid for the half that is limited downloads should be split between SOCAN and CSI in the same way as the total for limited downloads is split; the same assumption holds for on-demand streams. Finally, SOCAN receives either 3.4 per cent for limited downloads or zero; the two possibilities are considered independently by Drs. Boyer and Blit.

[105] For the webcasting portion, Drs. Boyer and Blit propose to take 50 per cent of the rates they proposed for webcasting. This amounts to 1.62 per cent for non-interactive webcasting and 3.11 per cent for interactive webcasting.

[106] For the limited download portion, they start from the premise that the combined value of the reproduction and communication rights in musical works is 13.59 per cent. Assuming first that SOCAN receives 3.4 per cent for limited downloads, they then take the proportion of 9.9/13.3 to calculate the CSI rate. This comes to 10.2 (13.59 × (9.9/13.3) per cent. Half of this rate, or 5.06 per cent, is attributed to hybrid non-interactive webcasting. Adding 92 per cent for interactivity leads to a rate of 9.72 (5.06 × 1.92) per cent. The corresponding total CSI rates, if SOCAN receives 3.4 per cent for limited downloads, are thus 6.68 (1.62 + 5.06) per cent for hybrid non-interactive webcasting, and 12.83 (3.11 + 9.72) per cent for hybrid interactive webcasting.

[107] If SOCAN is not entitled to receive royalties for limited downloads, the corresponding CSI rates are 6.80 per cent for the download portion for non-interactive webcasts and 13.06 per cent for interactive webcasts. The total CSI rates are thus 8.42 (1.62 + 6.80) per cent for non-interactive webcasts and 16.17 (3.11 + 13.06) per cent for interactive webcasts.

[108] The per-play fees for hybrid webcasting are calculated in a similar way.

C. SODRAC

[109] Martin Lavallée, Director of Licensing and Legal Affairs, SODRAC, testified about SODRAC Tariff 6. He explained the membership contracts currently used by SODRAC, which were referred to in its statement of case. In these contracts, authors and composers assign exclusive rights to authorize and prohibit all reproductions of a musical work, in any medium known and yet to be discovered, except for paper, for their entire catalogue, past, present and

future. Publishers also assign exclusive rights, although their contracts differ from those of authors and composers, because of the chain of title.

[110] Mr. Lavallée described the derivation of the main rate for music videos of 5.64 per cent as coming from the 9.9 per cent CSI rate for musical works.[33] In SODRAC's statement of case, two minimum fees for music videos were proposed—one for music videos in bundles of 20 or more videos, and one for unbundled videos. The statement of case did not explain the origin of this definition of bundle. Mr. Lavallée explained that the minimum fee would be treated as a bundle beginning from the 20th musical work, because of an agreement between SODRAC and ADISQ.

D. THE COLLECTIVES

[111] Dr. Michael Murphy, Professor at the School of Radio and Television Arts, Ryerson University testified about the increased relevance of streaming to mobile devices. In 2006, when the Board first considered online music tariffs, streaming to mobile devices was basically impossible, because of high data costs and slow data speeds.[34] Today, mobile devices dominate some of the webcasting statistics.

[112] There are almost 24,000 music apps available in Canada at the time of the hearings,[35] according to Dr. Murphy. Some of these apps allow offline access, which is equivalent to a limited download.

[113] Echoing his testimony in the *Re:Sound Tariff 8 (2014)*[36] proceedings pertaining to non-interactive and semi-interactive webcasts, Dr. Murphy stated that page views are not a good metric by which to measure music use. By contrast, most American services have installed technology that allows them to count plays, because this is mandated by the U.S. Copyright Royalty Board.[37]

[114] Dr. Murphy described the technology known as a progressive download. Similar to a stream, in that it plays as it is being transmitted from the server, it also stores a copy on the user's local device to facilitate rewinding and replaying.[38] During the course of his testimony, Dr. Murphy also demonstrated the functionality of several services, including non-interactive services and interactive services. Finally, Dr. Murphy described cloud-based services as being

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[33] Transcripts, Vol. 2 at 353.
[34] Transcripts, Vol. 1 at 73.
[35] Transcripts, Vol. 1 at 83.
[36] *Re:Sound Tariff 8 – Non-interactive and semi-interactive webcasts for the years 2009-2012* (14 May 2014) Copyright Board Decision. [*Re:Sound Tariff 8 (2014)*]
[37] Transcripts, Vol. 1 at 87.
[38] Transcripts, Vol. 1 at 101.

either digital lockers or digital warehouses.[39] Digital lockers are simply offline storage, whereas digital warehouses perform some form of matching function between the user's library and the service's library.

E. APPLE

[115] Jennifer Walsh, Country Manager for iTunes in Canada, testified on behalf of Apple. Ms. Walsh explained that iTunes offers only permanent downloads, with the exception of pre-release streams and previews of up to 90 seconds.[40] Music videos are permanent downloads, but concert films are available for rental, that is, as limited downloads.

[116] iTunes in the Cloud has several features. Users are able to store the music they have purchased from the iTunes Store using cloud storage, and access it from a variety of devices. Users can push download from the iTunes Store to more than one device. Users can also re-download the purchased song to that device or another one later. The feature avoids the need to synch devices; furthermore, there is no fee for re-accessing a paid download of a permanent copy.[41]

[117] iTunes Match costs users $27.99 per year. In exchange for this payment, songs are matched from the user's library to the Match library. Unmatched songs are uploaded to Match. Users can access their Match library from any device anywhere.[42]

[118] Ms. Walsh also explained the free, pre-release streams. These are only available in the week prior to the release of the album and they consist of streams of the entire album. These streams drive sales, rather than substitute for sales.[43]

[119] Ms. Walsh then described the iTunes Radio service, a service available in the U.S. but not in Canada. There are genre and subgenre stations that are programmed by the iTunes music team.[44]

[120] Finally, Ms. Walsh addressed the SODRAC video tariff. Since very few of iTunes's videos contain SODRAC music, Ms. Walsh expressed the concern that the reporting requirements were onerous.[45]

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[39] Transcripts, Vol. 1 at 196-197.
[40] Transcripts, Vol. 5 at 1094.
[41] Exhibit Apple-4 at slide 6.
[42] Transcripts, Vol. 5 at 1104.
[43] Exhibit Apple-4 at slides 16-17.
[44] Transcripts, Vol. 5 at 1128-1129.
[45] Transcripts, Vol. 5 at 1137.

[121] Dr. Hal Singer, Managing Director, Navigant Economics, testified as the economic expert on behalf of Apple. He criticized Dr. Liebowitz's analysis of the value of the MAR. First, Dr. Singer said, the Board did not use a bargaining approach to arrive at the value of 3.4 per cent for the pre-*ESA* communication right. Second, even if a bargaining approach were appropriate to determine the value of the MAR, Dr. Liebowitz fails to understand how SOCAN's bargaining power has changed.[46]

[122] Dr. Singer proposed a value for the MAR for songs downloaded of between 0.31 and 0.85 per cent of the price of a download. Dr. Singer argued that the value of the MAR for songs not downloaded is *de minimis* and should not be compensated, leading to a total value of the MAR for all songs of between 0.31 and 0.85 per cent. Asked during his testimony whether 0.31 per cent was *de minimis*, Dr. Singer explained that it was not.[47]

[123] Dr. Singer agreed with Drs. Liebowitz, Boyer, and Blit that the appropriate starting point for webcasting was commercial radio. Dr. Liebowitz made three adjustments—for music usage, music productivity, and the MAR—and Drs. Boyer and Blit made two adjustments—for music programming expenses and interactivity. Dr. Singer agreed with the adjustment for music usage and criticized the others as having no merit.[48]

[124] First, Dr. Singer explained that if music generates lower revenues per hour than talk, this means that it has lower marginal productivity. He then noted that Dr. Liebowitz has embedded an assumption in his analysis— constant marginal productivity of music and talk. But there can't be constant marginal productivity of music and talk, because if there were, the marginal productivity of music would be below that of talk regardless of how much talk and music were used. As such, the way to maximize productivity would be never to use music and have all commercial radio be 100 per cent talk radio.[49] Since this is not what one observes in reality, the assumption of constant marginal productivity must be false.

[125] Second, Dr. Singer argued that the MAR should not apply to webcasting. The value of the MAR is essentially an option value; users have the option to listen to a song at some point because it has been made available. But commercial radio already embeds a considerable amount of option value because of the diversity of options available. Some stations play rock, some play jazz, some play country music. If the MAR applies to commercial radio, that option value is already embedded in its rates. As such, a webcasting rate that is based on the commercial radio

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[46] Exhibit Apple-7 at slide 8.
[47] Transcripts, Vol. 5 at 1307-1308.
[48] Transcripts, Vol. 5 at 1320.
[49] Transcripts, Vol. 5 at 1323.

rate does not require an adjustment for the MAR. Furthermore, the value of the MAR is imprecise and unknown.[50]

[126] Third, Dr. Singer criticized Drs. Boyer and Blit's adjustment of the commercial radio proxy to account for music expenses as destroying the proxy, since it exceeds the Board's prior adjustment by a factor of five. It can be argued that, the greater the adjustments necessary to use a proxy, the more the proxy is destroyed and the less the proxy is usable. In Dr. Singer's opinion, the magnitude of the adjustment put forward by Drs. Boyer and Blit is very large.

[127] Furthermore, Drs. Boyer and Blit's adjustment requires the assumption that music copyright is 100 per cent of the webcaster's programming expenses.[51] This assumption is untested and, according to Dr. Singer, likely untrue.

[128] Fourth, Dr. Singer criticized Drs. Boyer and Blit's adjustment for interactivity. Either the adjustment is unnecessary, because additional revenues will flow to the webcaster because of interactivity, or it is inappropriate, because it is a penalty for something that webcasters cannot monetize.[52]

[129] Finally, Dr. Singer criticized CSI's proposed per-play rate for webcasters. It is one-sided, in that it protects CSI from risk but allows it to share in profits. Furthermore, it is excessive, in that it would result in Apple paying 20 per cent of its revenues under the per-play fee.[53]

F. CAB AND PANDORA

[130] Mr. Joseph Kennedy, CEO and Chairman Emeritus of Pandora Media, began his testimony with a description of the Music Genome Project. Every song selected for inclusion in the Pandora catalog is analyzed by a member of Pandora's music analysis team, who scores it with regard to between 100 and 500 (depending on genre) musical characteristics. The analyzed tracks are placed in Pandora's database and each song is converted into an n-dimensional database vector, where "n" represents the number of identified characteristics for that particular song. The patented Music Genome Project and other sophisticated algorithms associate songs with common traits.[54]

[131] Mr. Kennedy then gave some success metrics for Pandora over the past two years. The number of registered users has more than doubled and the number of active users has almost

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[50] Exhibit Apple-7 at slides 9, 14.
[51] Exhibit Apple-7 at slide 15.
[52] Exhibit Apple-7 at slide 16.
[53] Exhibit Apple-7 at slide 17.
[54] Exhibit Pandora-3 at slide 8.

doubled. The number of thumbs (both up and down) has more than tripled and Pandora's share of total radio listening has increased from 3.4 to 8.1 per cent.[55]

[132] Mr. Kennedy testified about the royalty rates paid by Pandora in the U.S. For musical works, Pandora pays 4.3 per cent of revenues. For sound recordings, Pandora pays 55.9 per cent of revenues.[56] Mr. Kennedy also testified about the royalty rates Pandora pays in Australia and New Zealand; these figures are highly confidential.

[133] Finally, Mr. Kennedy noted that there is some music use information that Pandora cannot supply, notably the ISRC, the International Standard Musical Work Code (ISWC), the Global Release Identifier Standard (GRid) and the author, the composer and the publisher of the musical work.[57]

[134] Dr. David Reitman, Vice-President, Charles River Associates testified as the economic expert on behalf of CAB and Pandora. He agreed with Drs. Liebowitz, Boyer, Blit and Singer that the appropriate starting point for the webcasting tariffs is commercial radio, and with Drs. Liebowitz and Singer that the commercial radio tariff should be adjusted for the use of music. But Dr. Reitman disagreed with the other adjustments.

[135] Dr. Reitman clarified that value should be associated with profit, not with revenues. At the margin, the value of a minute of music and a minute of talk must be equal. Of course, the revenues from a minute of talk need not equal the revenues from a minute of music.[58] In Dr. Reitman's opinion, Dr. Liebowitz confuses value with revenue and Drs. Boyer and Blit confuse value with cost.

[136] Dr. Reitman agreed with Dr. Singer that there does not need to be an interactivity premium, since there will be additional revenue associated with interactivity, and some of that will flow to creators as royalties.[59]

[137] Dr. Reitman described Drs. Boyer and Blit's per-play rate as excessive; in his opinion, it would preclude a webcaster like Pandora from establishing in Canada.

[138] Finally, Dr. Reitman proposed that the CSI webcasting tariff be tiered for the same reason that the commercial radio tariff is tiered: smaller-revenue stations tend to be less profitable.[60]

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[55] *Ibid* at slide 12.
[56] *Ibid* at slide 25.
[57] *Ibid* at 28.
[58] Exhibit CAB-3 at slide 8.
[59] Transcripts, Vol. 7 at 1667.
[60] Exhibit CAB-3 at slide 20.

G. THE NETWORKS

[139] Mr. Christian Breton, Vice-President of the Music Sector, *Groupe Archambault*, testified on behalf of the Networks.

[140] Mr. Breton described the Zik service offering: $9.99 per month for web-only and $14.99 per month for web and mobile, with a 14-day free trial for all subscribers. It is a streaming web service. The rest of Mr. Breton's testimony was confidential or highly confidential, covering the financial aspects of the service, as well as technological details of the manner in which the service is implemented.

V. LEGAL ISSUES

A. THE ROYALTY RATE FOR MAKING AVAILABLE AND THE SUBSEQUENT TRANSMISSION

[141] In the companion decision, *Online Music Services (CSI: 2011-2013; SOCAN (2011-2013); SODRAC (2010-2013) – Making Available Right*,[61] released concurrently with this decision, the Board established that:

- the act of placing a work or other subject-matter on a server on a telecommunication network in a way that a request from a member of the public triggers the transmission of that work or subject-matter, whether in the form of a stream or download, and whether or not such a request ever takes place, is deemed to be a communication to the public by telecommunication;
- subsection 2.4(1.1) of the *Act* applies to an act of making available which may result in streams, downloads, or both;
- the introduction of subsection 2.4(1.1) of the *Act* did not have the effect of overturning the Supreme Court of Canada's decision in *ESA*; and
- the act of making a work or other subject-matter available to the public remains a communication to the public by telecommunication regardless of whether a resulting transmission is a download or a stream; it remains distinct from such a transmission. The two acts of making available and transmission do not merge to become a single, larger act.

[142] Pursuant to the Order Fixing Various Dates as the Dates on which Certain Provisions of the Act Come into Force[62] (CIF Order), subsection 2.4(1.1) of the *Act* came into force on November 7, 2012.[63]

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[61] *Online Music Services (CSI: 2011-2013; SOCAN (2011-2013); SODRAC (2010-2013) – Scope of section 2.4(1.1) of the Copyright Act – Making Available* (25 August 2017) Copyright Board Decision.
[62] Order Fixing Various Dates as the Dates on which Certain Provisions of the Act Come into Force (P.C. 2012-1392 October 25, 2012; SI/2012-85 November 7, 2012).
[63] Qualifying sound recordings and performer's performances benefit from a stand-alone "making available" right,

[143] SOCAN is not entitled to collect royalties for the making available of musical works for the period prior to November 7, 2012.

[144] Moreover, for the period from November 7, 2012 through to December 31, 2013, we are unable to establish and certify a distinct royalty rate for the making available portion of the communication to the public by telecommunication of musical works, for the reasons that follow.

[145] In *SOCAN 22.B-G (2008)*,[64] the Board refused to set a tariff for the "other sites" considered in that matter. In that decision, it gave several reasons relevant to the present matter. First, to set a tariff blindly would have been *ipso facto* unfair. Second, there was no reliable benchmark that could be used to set the tariff. Third, the Board could not have, in the absence of evidence, discharged its obligation, as mandated by the Federal Court of Appeal in *CAB v. SOCAN and NRCC*,[65] to provide adequate reasons explaining how it arrived at the rate of the tariff.

[146] On judicial review, the Federal Court of Appeal agreed with the Board, stating that

> it would have been unreasonable for the Board to certify this impugned Item of the proposed Tariff 22 in the absence of the necessary probative evidence, on mere guesses, speculations and approximations, especially in view of the long retroactive period covered […]
>
> [T]o proceed to a determination of the kind sought by SOCAN, in the absence of that evidence, would be acting arbitrarily and unreasonably […][66]

[147] Similarly, in the present matter, the evidence on the value of making available filed by SOCAN and the Objectors is significantly deficient. We begin with the evidence adduced by SOCAN.

[148] SOCAN describes a hypothetical bargaining situation between the owners of the making available component of the communication to the public and the owners of the pre-*ESA* communication right. Writing for SOCAN, Dr. Liebowitz notes that

> [f]rom an economic point of view, therefore, it is difficult to imagine that a negotiator for MAR rights holders (even excluding the option component of the value), sitting in a room with the other rights holders and the users of these rights, would be in a weaker bargaining

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pursuant to paragraphs 15(1.1)(*d*) and 18(1.1)(*a*).

[64] *SOCAN Tariffs 22.B to 22.G (Internet – Other Uses of Music) 1996-2006* (24 October 2008) Copyright Board Decision at paras 113-116. [*SOCAN 22.B-G (2008)*]

[65] *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada and Neighbouring Rights Collective of Canada*, 2006 FCA 337.

[66] *SOCAN v. Bell*, 2010 FCA 139 at paras 26-27.

> position than would a similar negotiator, in the pre-ESA timeframe, representing the holders of the Communication Right. This would imply a market value for the non-option component of the MAR that was as high as or higher than was the pre-ESA Communication Right (i.e., 3.4%).[67]

[149] SOCAN's argument, basically a thought experiment, fails on two grounds.

[150] First, the protection for the act of making a work available in the manner contemplated in subsection 2.4(1.1) of the *Act* did not exist during the period prior to the *ESA* decision. The question of the relative bargaining power of the "right of making available" and the "pre-*ESA* communication right" is not one that can be addressed as a simple matter of "hold-up."[68]

[151] Second, even if the question of relative bargaining power were addressed, it is not self-evident that the correct value of the pre-*ESA* communication right is 3.4 per cent. In *Online Music Services (2012)*, the Board wrote that "we would have found that using the 22.A model generally, and a bundled approach specifically, would have been inappropriate."[69] Had the pre-*ESA* communication right existed in 2012, it is not clear what rate the Board would have set. What is clear is that the Board would not have used SOCAN's proposed model to arrive at a rate. Had the Board certified a rate of 3.4 per cent, it would have been little more than mere coincidence.

[152] The evidence filed by the Objectors suffers from similar deficiencies. As Dr. Singer wrote on behalf of Apple:

> Accordingly, for songs downloaded, it would be inappropriate to assign even half of the pre-*ESA* value to the posting rights; the posting rights holders would command at most one third of the value secured by the transmission rights holder. For example, at 10 per cent of the transmission rights, the posting rights would be worth approximately 0.31 per cent of the price of a download; at 33.3 per cent of the transmission rights (the upper bound of the reasonable range), the posting rights would be worth approximately 0.85 per cent.[70]

[153] Dr. Singer's argument has the same problem as that of Dr. Liebowitz. It assumes a bargaining model and assumes relative bargaining power (in this case between one-tenth and one-third). It also starts with the hypothetical rate of 3.4 per cent for the pre-*ESA* communication right.

[154] Since there is insufficient usable economic evidence on how to price the act of making available distinct from other acts of communication by telecommunication or on how to adjust

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[67] Exhibit SOCAN-7 at para 30.
[68] http://en.wikipedia.org/wiki/Hold-up_problem
[69] *Supra* note 6 at para 83.
[70] Exhibit Apple-3 at para 31.

the price for communication by telecommunication to account for its broadening in scope, we are unable to do so in this matter.

[155] We anticipate and hope that there will be substantially more and better evidence for the Board's next opportunity to set such a rate. Evidentiary elements that could be useful in the future might include whether there should be a link between the value of the act of making available and the value of a subsequent resulting transmission, whether the price for the act of making available should differ with the type of subsequent resulting transmission, how to value the act of making a work (or other subject-matter) available where no subsequent resulting transmission occurs in a relevant period, and whether the price for the act of making available should have an effect on the price of other activities or royalty apportionment between rights holders whose rights are involved in the operation of an online music service.

B. *ESA* AND LIMITED DOWNLOADS

[156] In *ESA*, the Supreme Court concluded that permitting a person to download a musical work does not trigger the right to communicate to the public by telecommunication. It stressed the difference between streams and downloads, and that a download is more akin to a delivery of a copy,[71] while a stream is more akin to a performance, being "impermanent in nature, and does not leave the viewer or listener with a durable copy of the work."[72]

[157] In our opinion, the conclusions of the Supreme Court of Canada in the *ESA* decision apply to limited downloads just as they do to permanent downloads. The essential difference between these two types of downloads relates to the condition of retention and/or access of the resulting reproduction rather than the way such reproduction is transmitted or whether the work contained therein can be perceived or not during the transmission, an important element in *ESA*. Both limited and permanent downloads are intended to deliver a durable copy of the work to the customer. The subsequent restrictions that are placed on the use of that copy, be they technical or legal in nature, are not so drastic in the fact scenario before us as to completely change the nature of the activity.

[158] To the extent the Supreme Court used the expression "permanent,"[73] we understand this to be synonymous with the expression "durable,"[74] and not directly comparable to the nomenclature used by the Parties in this matter. The reference to permanency in *ESA* was to distinguish such copies from ephemeral, transient, or other temporary copies. Under such a nomenclature, the

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[71] *Supra* note 4 at paras 5, 12, 19, 32 and 43.
[72] *Ibid* at para 35.
[73] *Ibid* at paras 12, 19, 23, 32 and 43.
[74] *Ibid* at paras 5, 10, 31 and 35.

downloads being referred to as "limited" in this matter are still permanent, in the sense given to that word in *ESA*.

[159] Therefore, the downloads at issue in this matter, whether limited or permanent, involve the same right: the reproduction right.

C. CLOUD-BASED STORAGE

[160] CSI states that its proposed tariffs target services that deliver on-demand streams, limited downloads, permanent downloads or webcasting to consumers, including a service that delivers files that are uploaded by consumers, as well as hybrid services, which "in addition to offering on-demand streams and/or webcasting, also provide users with the option to save files as limited downloads to enable offline listening."[75]

[161] SOCAN's proposed tariffs target services "that deliver[s] streams (recommended or on demand) and downloads (limited or permanent) to subscribers." It provides that

> [f]or greater certainty, "online music service" includes cloud-based music services and other services using similar technology, but excludes a service that offers only streams (other than recommended) in which the file is selected by the service, which can only be listened to at a time chosen by the service and for which no advance play list is published.

[162] SODRAC's proposed tariffs target services that "[offer] and [deliver] permanent downloads to consumers."

[163] Through the coming into force of the *CMA*, new provisions were enacted which could be relevant to the issue of cloud-based storage. Subsections 31.1(4)–(6) of the *Act* read as follows:

> (4) Subject to subsection (5), a person who, for the purpose of allowing the telecommunication of a work or other subject-matter through the Internet or another digital network, provides digital memory in which another person stores the work or other subject-matter does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.
>
> (5) Subsection (4) does not apply in respect of a work or other subject-matter if the person providing the digital memory knows of a decision of a court of competent jurisdiction to the effect that the person who has stored the work or other subject-matter in the digital memory infringes copyright by making the copy of the work or other subject-matter that is stored or by the way in which he or she uses the work or other subject-matter.
>
> (6) Subsections (1), (2) and (4) do not apply in relation to an act that constitutes an infringement of copyright under subsection 27(2.3).

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[75] Exhibit CSI-1 (highly confidential) at para 7.

[164] Since it is possible that some of the activities captured by the proposed tariffs are covered by these provisions, on March 28, 2014, the Board issued the following Notice:

> Parties are invited to comment on whether subsection 31.1(4) of the *Copyright Act* dealing with Hosting applies to any activities targeted by the proposed tariffs in the file mentioned above and explain why […]

[165] In response to the Board's Notice, CSI submitted that subsection 31.1(4) of the *Act* does not apply to the activities targeted by CSI's tariffs. It further stated that it is not making any submissions on the possible application of subsection 31.1(4) to music cloud services, as these are not targeted by CSI's proposed tariffs. SODRAC stated that it adopts CSI's position, and that subsection 31.1(4) does not apply to any activity targeted by its proposed tariffs.

[166] SOCAN made no submissions in response to the Board's Notice.

[167] The Networks submitted that while SOCAN's and CSI's proposed tariffs clearly target cloud-based services, it is possible that SODRAC's proposal may capture such services as well.[76]

[168] The Networks pointed to statements made by the Government in relation to the *CMA* to argue that the *Copyright Act* now permits the provision of services that allow users to download material they have stored in online personal storage space they control, network personal video recorders, format-shifting to and from personal storage spaces, and on-line back-up services.[77]

[169] The Networks argued that the service providers at issue

> allow their users to store their music in digital format without having to purchase and maintain hard disks themselves. The practical result of a user's storing and accessing her music online is not the creation of a new type of online music service. It is that the user saves space in her home and can store her music in a secure format.[78]

[170] They rely on the Supreme Court's decision in *ESA* for the proposition that

> SOCAN and CSI's members have never received royalties triggered by the placing of a compact disc in a cupboard or the pressing of the "play" button on a cassette player. Consumers' use of online storage services to store their music should not trigger any different liability.[79]

[171] In response, CSI submitted that

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[76] Letter from the Networks (23 April 2014) in response to the Board Notice of March 28, 2014 at paras 16-20.
[77] *Ibid* at paras 8-9.
[78] *Ibid* at para 13.
[79] *Ibid* at para 14.

> it is still early in the product lifecycle of music cloud services and that features differ dramatically from service to service. While it is possible that some music cloud services or online storage services may comply with subsection 31.1(4), others may not.
>
> Accordingly, it would be inappropriate for the Board to explicitly exclude the application of the proposed tariffs to online storage providers, as the Networks propose. […] [A] service that wishes to claim the benefit of that exception should be required to demonstrate that it offers the type of storage service contemplated by subsection 31.1(4) and, if it offers any other features, that those features do not disqualify it from the benefit of the exception. However, since the proposed CSI tariffs at issue in this proceeding do not target "online storage providers" or music cloud services *per se*, the question is moot for the tariff period under consideration.[80]

[172] While we agree with CSI that it is not only in the cases enumerated in subsections 31.1(5) and (6) of the *Act* that subsection 31.1(4) is no longer applicable, we are not convinced that the mere offering of other features creates a real risk that the provision is no longer applicable. While the exact phrase "by virtue of that act alone" is novel to this provision, it is similar to paragraph 2.4(1)(*b*), which states that

> a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public.

[173] In its consideration of this provision, the Board has previously concluded that insofar as the Internet service provider furnishes "ancillary" services to a content provider or end user, it could still rely on paragraph 2.4(1)(*b*) of the *Act* as a defence to copyright infringement, provided any such "ancillary services" do not amount in themselves to communication or authorization to communicate the work.[81] This approach was later endorsed by the Supreme Court of Canada.[82]

[174] We also note that, even in situations where subsection 31.1(4) of the *Act* may not apply, there is some question as to whom actually effects a communication in the situation where a user stores music on a service providers' server or re-accesses music so stored.

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[80] Letter from Re:Sound (2 May 2014) in reply to the Board Notice of March 28, 2014 at 2.

[81] *Tariff 22 – Transmission of musical works to subscribers via a telecommunications service (Phase I: Legal Issues)* (27 October 1999) Copyright Board Decision at 39 ("Neither does the exemption cease to apply for the sole reason that the intermediary may have a contractual relationship with its subscribers. As long as its role in respect of any given transmission is limited to providing the means necessary to allow data initiated by other persons to be transmitted over the Internet, and as long as the ancillary services it provides fall short of involving the act of communicating the work or authorizing its communication, it should be allowed to claim the exemption").

[82] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427 at paras 95-103.

[175] We conclude that where the music was stored at the direction of the user, and it is the user who controls what is stored in the space allocated to that user, it cannot be said that an eventual retrieval of that music by the user is a communication by the service provider. Furthermore, even if it could be said that the service provider authorizes the transmission, the communication would be one from the user to the user, not an instance where the communication is to the public. As such, the service provider would not be authorizing an activity contemplated in subsection 3(1) of the *Act*.

[176] This is so whether the music is stored as is, whether it is compressed, whether it is stored in a different format, or whether the copy is virtual (and simply points to a "master" copy). Technological means of storing a work, such as data deduplication, should not alter the liability of the person storing the work. An interpretation whereby a service provider would have to adopt a less efficient and more costly means of storage solely to avoid incurring copyright liability, and likely passing such additional costs to the end user, would likely run contrary to the intention of parliament. The principle of technological neutrality expressed by the Supreme Court of Canada in *ESA*, *Rogers*, and recently in the *CBC v. SODRAC* decision, also strongly supports the approach we adopt here.

[177] In any case, as noted by CSI, features differ dramatically from service to service. As such, it is nearly impossible for us to make a determination about how often subsection 31.1(4) of the *Act* is applicable, or how often a communication to the public by telecommunication is actually made. We do not consider it to be reasonable or practical at this point to certify a tariff that targets users "scattershot" and leave it upon individual users to demonstrate to CSI or other collectives that they are not subject to (or do not require the benefit of) the tariff.

[178] Given that:

- CSI states that its tariff does not target online storage providers (or cloud services) (and that SODRAC stated that it adopts CSI's position);
- the evidence suggests that there is significant variation in the manner in which services are offered; and
- there is a real likelihood that many such services could benefit from subsection 31.1(4) of the *Act* and/or do not communicate works to the public by telecommunication,

we conclude that it would be premature and inappropriate at this point to certify a tariff that includes services, or those portions thereof, that allow users to store and retrieve music.

[179] We therefore exclude from the application of this tariff those services that allow a user to store and/or retrieve (or direct the service to store and/or retrieve) a sound recording, or a musical work or performer's performance contained in such a sound recording. Whether the retrieval is in the form of a stream or download has no bearing on our conclusion, as subsection

31.1(4) of the *Act* is not an exception solely for the communication to the public by telecommunication but rather an exception to infringement of copyright.

D. SCOPE OF SOCAN'S PROPOSED TARIFFS

[180] In its proposed tariffs published in the *Gazette*, SOCAN proposed an "add-on" royalty-rate for free webcasts. In the proposed tariffs' language, where a person who offers on-demand streams, limited downloads, permanent downloads, or (for 2012-2013), recommended streams—and also offers streams free of charge—an additional amount of 4.6¢ per such stream would be payable.

[181] This structure was not put forward by SOCAN in its statement of case. However, the structure of the proposed tariffs raises several questions. First, do the proposed tariffs cover non-interactive webcasts, and to what extent? Second, do the proposed tariffs cover semi-interactive webcasts, and to what extent? We consider these questions in turn.

i. Non-Interactive Webcasts

[182] SOCAN's proposed tariffs proposed royalties for the communication to the public by telecommunication in connection with the operation of an "online music service." The proposed tariffs defined "online music service" to include a service that delivers "streams (recommended or on demand)," but excluded "a service that offers only streams (other than recommended) in which the file is selected by the service, which can only be listened to at a time chosen by the service and for which no advance playlist is published."

[183] In other words, the tariff would apply to telecommunications in connection with a service that delivered interactive or semi-interactive webcasts, but not a service that offers only non-interactive streams. Indeed, in the proposed tariffs, there was no stand-alone rate proposed by SOCAN for non-interactive webcasts.

[184] A question remains whether the tariff we are certifying should include an add-on rate for free non-interactive webcasts. There is ambiguity as to whether the proposed add-on rate actually intended to cover free non-interactive webcasts. While the proposed definition of "stream" is broad enough to capture non-interactive webcasts, the application section states that the tariff sets royalties to be paid for the communication of works in connection with the operation of an "online music service," which includes "a service that delivers" interactive and semi-interactive webcasts, but not non-interactive webcasts.

[185] Second, the proposed tariffs state that they do not apply to uses covered by other tariffs. This would include *Tariff No. 22 – Internet – Other Uses of Music (Part F – Audio Websites)*[83] for the years 1996-2006, which applies to internet websites ordinarily accessed to listen to audio-only content, other than interactive webcasts or downloads. SOCAN has also proposed separate tariffs (such as *Tariff No. 22 – Internet – Other Uses of Music (Part B – Audio Webcasts)*) for the years under consideration in this instance that appear to apply to non-interactive webcasts.

[186] Given that there is ambiguity in the proposed language, and given that existing and proposed SOCAN tariffs would cover non-interactive webcasts, and that it is important to avoid the certification of tariffs with overlapping application, we resolve the ambiguity in favour of excluding non-interactive webcasts from the scope of this tariff.

ii. Semi-Interactive Webcasts

[187] We note that in its proposed tariffs, SOCAN proposed royalty rates for semi-interactive webcasts for 2012 and 2013. It did not propose a separate rate for semi-interactive webcasts for 2011, despite the fact that such activity is covered by the proposed tariff. Thus, we only set a stand-alone rate for semi-interactive webcasts for 2012 and 2013.

VI. ECONOMIC ANALYSIS

A. ROYALTY-SETTING METHODOLOGY

[188] All Parties made submissions on royalty rates based on previously certified rates by the Board. As such, there was no significant dispute as to the general methodology to be used by the Board: to examine royalties set in previous tariffs for the same or similar activities, and to adjust these as necessary. While some evidence was adduced on the rates that some online music services pay in the U.S. for certain rights, these were not argued to be reliable proxies.

[189] CAB and Pandora proposed that the rates for semi-interactive webcasters be tiered as follows: 1.66 per cent of relevant revenue exceeding $1.25 million; 1.11 per cent of revenue between $625,000 and $1.25 million; and 0.55 per cent of revenue under $625,000, all subject to an appropriate repertoire adjustment.[84] However, Dr. Reitman did not justify tiering in his expert report.

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[83] *SOCAN Tariffs 22.B to 22.G (Internet – Other Uses of Music) 1996-2006 – Part 22.F – Audio Websites* (24 October 2008) Copyright Board Decision at para 122. [*SOCAN Tariff 22.F*]
[84] Exhibit Pandora-5 at para 9; Exhibit CAB-4 at para 17.

[190] CSI opposed a tiered rate structure for two reasons. First, there is no economic basis for the tiering proposal. Second, the Board has already refused to tier a webcasting tariff in the *SOCAN 22.B-G (2008)* decision.[85]

[191] We generally agree with CSI's first argument. CAB and Pandora have led no evidence about the structure of the webcasting market. We do not know if $1.25 million is a meaningful dividing line between medium-sized webcasters and large ones, nor do we know if $625,000 is a meaningful dividing line between small webcasters and medium-sized ones.

[192] SOCAN's commercial radio tariff was tiered in 2005 after hearing evidence and reading financial filings from small radio stations.[86] CSI's commercial radio tariff was tiered in 2003 on consent from all Parties.[87] In this matter, we neither have evidence that there is a need for tiering, or an agreement among the Parties that there should be tiering. Thus, there is no economic rationale for tiering.

B. Royalties for Making Available

[193] We set no royalties for the act of making available in this decision. As explained above, SOCAN is not entitled to a tariff for the making available of musical works since it did not propose a tariff for the act of making available until 2014. Even if it had adequately proposed a tariff for the making available of musical works for the year 2013, we would have nevertheless concluded that SOCAN did not lead sufficiently reliable evidence to allow us to value the act of making musical works available to the public.

C. CSI's Repertoire

[194] The last certified CSI Tariff for online music services included a rate expressed as a formula for on-demand streams and limited downloads. The rate certified by the Board for a particular category of service had to be multiplied by the percentage of files used by the service that are part of CSI's repertoire. This manner of determining the royalty was different from that used by the Board in other instances. In those instances, the Board applied a repertoire adjustment to the rate, which, in turn, was applicable to all works or other subject-matter.

[195] However, on February 21, 2014, in response to a question of the Board, CSI proposed abandoning the "percentage of files" approach in favour of a repertoire-adjusted rate approach.

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[85] Exhibit CSI-19 at para 71.
[86] *SOCAN-NRCC Tariff 1.A – Commercial Radio stations, 2003-2007* (14 October 2005) Copyright Board Decision at 32.
[87] *CMRRA/SODRAC Inc. – Commercial Radio Stations, 2001-2004* (28 March 2003) Copyright Board Decision at 16.

[196] CSI believes that this latter approach may be easier and more efficient for both CSI and its licensees, and would certainly facilitate quicker and more efficient distribution to rights holders. Among other things, CSI anticipates that, as the volume of webcasting activity in Canada increases, the transaction costs associated with conducting a play-by-play, share-by-share repertoire analysis for each active service, which also involves the ongoing delivery and validation of quarterly reports, invoices, and payments as new shares are identified as part of the CSI repertoire, may be unacceptably high.

[197] CSI submitted that while it does not object in principle to applying a repertoire-adjusted rate in the tariff to be certified for 2011 to 2013, it has not conducted a repertoire analysis for that period and, for the reasons already indicated, has not proposed a percentage repertoire adjustment. If the Board considered it appropriate, CSI would not object to abandoning the A × B / C formula in favour of a repertoire-adjusted flat rate model and applying the same 90 per cent adjustment as has been applied in the commercial radio tariff for the tariff period of this proceeding. However, there is no evidentiary basis in the record for that or any other repertoire adjustment.[88]

[198] No other party has provided comments on this issue. Based on the information we have, we agree with CSI that adopting a repertoire-adjusted rate will likely result in a more efficient administration of the tariff. CSI proposes to use the 90 per cent repertoire adjustment the Board has been using in other instances. We agree, and will use it where appropriate.

D. PERMANENT DOWNLOADS

i. SOCAN Rate

[199] As the Board did in *Online Music Services (2012)*, we set no rate for SOCAN in respect of permanent downloads. This is both because SOCAN is not entitled to a royalty for the making available of musical works for this tariff and our finding that the communication right is not otherwise engaged in the provision of permanent downloads.

ii. CSI Rate

[200] CSI proposed a rate of 9.9 per cent of revenues for permanent downloads. This proposal is unopposed. However, Drs. Boyer and Blit apply the mechanical royalty model and arrive at rates of 10.2 and 10.3 per cent of revenues. Just as the Board said in 2007, we are of the opinion that CSI should receive equivalent royalties from a permanent download as it does from the mechanical pressing of a CD. We would thus have been inclined to certify these rates. However, since CSI only asked for a rate of 9.9 per cent, we accept this as the starting rate. Using the

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[88] Letter of CSI to the Board (February 21, 2014) at 1-2.

repertoire adjustment of 90 per cent results in a royalty rate of 8.91 per cent for permanent downloads.

iii. Song Previews

[201] Some entities offer free previews of musical works that they offer for sale as downloads. The evidence does not suggest that such previews are qualitatively different from those considered by the Supreme Court of Canada in *Bell*, aside from the duration of some previews.

[202] In *Bell*, the Supreme Court considered previews of 30 seconds; in this matter, there is evidence that certain previews are 90 seconds in length. In respect of those longer previews, the factor evaluating the amount of the dealing may tend more towards unfairness (or less towards fairness) than in cases where the preview is only 30 seconds in length. *CCH* teaches us that there are situations where it may be possible to deal fairly even with an entire work;[89] thus, even where the factor considering the amount of the dealing tends significantly towards unfairness, the overall conclusion, based on all the factors enumerated in *CCH*,[90] may still be one of fairness.

[203] We conclude that in this instance, overall, the provision of previews remains fair dealing for the purpose of research. As such, we do not modify the royalties for CSI, nor set any royalties for SOCAN in regard to such activity.

iv. Pre-Release Webcasts of Albums

[204] As Ms. Walsh testified, Apple provides free, pre-release webcasts of albums. These are only available in the week prior to the release of the album and they consist of streams of the entire album, without the ability to play an individual song.

[205] These webcasts of albums compete poorly with downloads of individual musical works, sales of the albums on CDs—and even with interactive webcasts, given that the album must be streamed straight through (a customer has no ability to select individual tracks, skip, rewind, or repeat a particular song).[91]

[206] The evidence we have on these activities shows that the practice is to obtain authorization directly from the relevant rights holders.[92] Persons who have obtained such authorization do not require a tariff for those activities. This makes the certification of provisions specifically

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[89] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 at para 56.
[90] *Ibid* at para 53 ("(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.")
[91] Exhibit Apple-8 at para 45.
[92] *Ibid*.

intended to capture the pre-release webcasts of albums, even were such provisions appropriate, unnecessary.

[207] If such webcasts are non-interactive webcasts, then, with respect to SOCAN, as we conclude below (see paragraphs 242-243), it is not appropriate for us to set a rate for free webcasts as an "add-on" to another service.

[208] Furthermore, in any case, even if we were to attempt to set a non-flat minimum fee for webcasts, for either SOCAN, CSI, or both, there would be significant difficulties in doing so.

[209] The evidence used to justify such a minimum was filed by CSI. CSI submitted the economic evidence of Drs. Boyer and Blit, who analyzed a set of ten confidential agreements between Astral and various record labels. This analysis was, however, confined to content fees and related terms.

[210] First, the Astral agreements contain other clauses that, if properly considered and analyzed, are a transfer of value from Astral to the labels. Even if the amount of transferred value were taken into account, the fact that the Astral agreements cover activities other than free interactive webcasts complicates this calculation; revenue not directly accrued for free interactive webcasts would need to be allocated thereto.

[211] Second, the representativeness of a single payor, albeit in several transactions, is questionable. We do not know if Astral's bargaining power led to agreement prices above, below, or at market prices that would prevail between two, equally positioned bargainers. Moreover, provisions such as "most favoured nation" clauses can lead to overestimating the relevance of a rate "artificially" common to a number of agreements.

[212] Third, and specifically for SOCAN, such an analysis is best suited for the consideration of a stand-alone rate; more information would be required to price free webcasting as an add-on activity, as contemplated in the proposed SOCAN tariffs. As described above at paragraph 34, such joint pricing is not a trivial exercise.

[213] Given that this analysis constituted the bulk of the evidence on this issue, and given that the analysis of Drs. Boyer and Blit would not be a sufficient basis on which we could set a non-flat minimum fee for webcasts for CSI, or a free webcast rate for SOCAN, we do not do so.

E. LIMITED DOWNLOADS

i. SOCAN Rate

[214] As we explained above, as a result of the *ESA* decision, there is no communication right involved in the transmission of limited downloads, just as there is no communication right involved in permanent downloads. Again, because of our finding that SOCAN is not entitled to

royalties for the making available of musical works, we set no rate for SOCAN in respect of limited downloads.

ii. CSI Rate

[215] In *Online Music Services (2012)*, the Board enunciated the principle that the CSI rate for permanent downloads and limited downloads should be the same. In this matter, CSI proposed that this principle continue to apply; this proposal is unopposed.

[216] If, as the Board expects, a limited download is less valuable to consumers than a permanent download, then this will be reflected in the revenues generated by such services. Given the little evidence about the state of the market for services providing limited downloads,[93] we conclude that keeping the same rate of 9.9 per cent as previously certified in *Online Music Services (2012)* is appropriate, but adjusting it for repertoire (90 per cent). Accordingly, we set the CSI rate for limited downloads at 8.91 per cent of revenues, the same as for permanent downloads.

F. Non-Interactive, Semi-Interactive and Interactive Webcasts—Common Issues

[217] Before considering the rates for non-interactive, semi-interactive, and interactive webcasts, we first examine four issues: the definitions of terms used by Parties to describe these services, the use of the bundled approach by the Board in past decisions, the per-play rate, and the interactivity premium.

i. Definitions

[218] In May 2014, the Board certified Re:Sound's inaugural tariff for webcasting, *Re:Sound Tariff 8 (2014)*. That tariff contained the following three definitions:

> "interactive webcast" refers to any webcast through which a specific file can be communicated to a member of the public at a place and at a time individually chosen by that member of the public;
>
> "non-interactive webcast" refers to a webcast – other than a simulcast of programming to which the *CBC Radio Tariff (SOCAN, Re:Sound)*, the *Commercial Radio Tariff (SOCAN, Re:Sound, CSI, AVLA/SOPROQ, ArtistI)*, the *Pay Audio Services Tariff (SOCAN, NRCC)* or the *Satellite Radio Services Tariff (SOCAN, NRCC, CSI)* applies—over which the recipient exercises no control over the content or the timing of the webcast; and

[93] Exhibit SOCAN-1 at para 69 ("it is not currently clear that there continues to be a stand-alone market for limited downloads"). See also Transcripts, Vol. 5 at 1098 (Apple claims to offer concert film rentals as limited downloads, but did not file any information about pricing).

> "semi-interactive webcast" refers to a webcast – other than a simulcast of programming to which the *CBC Radio Tariff (SOCAN, Re:Sound)*, the *Commercial Radio Tariff (SOCAN, Re:Sound, CSI, AVLA/SOPROQ, ArtistI)*, the *Pay Audio Services Tariff (SOCAN, NRCC)* or the *Satellite Radio Services Tariff (SOCAN, NRCC, CSI)* applies, an interactive webcast or a non-interactive webcast – over which the recipient exercises some level of control over the content of the webcast or the timing of the webcast.

[219] For the purposes of consistency, we adopt the same definitions in the present file, with the following mapping to the terms used by the Parties.

[220] Both SOCAN and CSI proposed tariffs for "on-demand streams." Both SOCAN's and CSI's definitions of on-demand streams correspond to the definition of interactive webcast the Board used in *Re:Sound Tariff 8 (2014)*. We will thus use the term "interactive webcast" to refer to on-demand streams.

[221] SOCAN also proposed a tariff for "recommended streams" while CSI proposed a tariff for "interactive webcasts." In both cases, the definitions of these terms correspond with what the Board called semi-interactive webcasts in *Re:Sound Tariff 8 (2014)*. We thus use the term "semi-interactive webcasts."

[222] Finally, CSI proposed a tariff for "non-interactive webcasts." We will use this term as proposed. These definitional re-mapping are summarized in the following table:

Proposed by SOCAN / Proposé par la SOCAN	**Proposed by CSI / Proposé par CSI**	**Board terminology / Terminologie de la Commission**
	Non-Interactive Webcasts / Webdiffusions non interactives	Non-Interactive Webcasts / Webdiffusions non interactives
Recommended Streams / Transmissions en continu recommandées	Interactive Webcasts / Webdiffusions interactives	Semi-Interactive Webcasts / Webdiffusions semi-interactives
On-demand Streams / Transmissions en continu sur demande	On-demand Streams / Transmissions en continu sur demande	Interactive Webcasts / Webdiffusions interactives

ii. Bundled Approach

[223] In *CSI Online Music Services (2007)*, the Board set the CSI rate for on-demand streaming (now called "interactive webcast") at 4.6 per cent of revenues. In that case, the Board set the rate for on-demand streaming by considering what it termed a "bundle" of rights. That is, it determined the total amount of royalties to be paid for all the rights engaged in a particular activity (i.e., the "bundle") and then distributed this amount among the collectives representing those rights. (Note that the word "bundle" in that matter referred to a set of rights, not a set of files, as it does in the certified tariff.)

[224] In *Online Music Services (2012)*, the Board did not use this methodology. It stated that the bundled approach works best when all the rights holders are present at the same hearing, so that all of their rights can be considered at once. In the absence of some of them, it may be difficult—if not impossible— to decide how much should be "left on the table" for them.

[225] Given that not all rights holders are represented in the matter before us, this obstacle remains present, and we therefore do not rely on the bundled approach in this matter.

iii. Per-play rates

[226] After careful examination of the issues raised, we have decided to set the webcasting (interactive, semi-interactive and non-interactive) royalty rates in this matter as a percentage of revenues, just as it is the case in *SOCAN Tariff 22.F* [94] for non-interactive webcasting. We are aware that this may be seen as a departure from the approach the Board used in the *Re:Sound Tariff 8 (2014)* decision,[95] dealing with non-interactive and semi-interactive webcasting, where a per-play rate was preferred. While the justifications in that case for favouring a per-play approach over a percentage of revenues may still be valid, other considerations in the present case lead us to a different conclusion.

[227] First and foremost, we need to address the issue of quantifying the value of interactivity in semi-interactive webcasting services. As we conclude below, while it is almost certain that such a feature associated with music use carries a certain value for the consumer, establishing this value is impossible given the lack of evidence in this matter. The evidence provided on this issue is sparse, and does not provide much assistance in measuring the value attributable to interactivity (as distinct from other value-added features). Also, the level of, and features related to, interactivity vary considerably from service to service and, in principle, so should their respective value. In the extreme, this could lead to a different per-play rate for each particular implementation of interactivity.

[228] The benefit of a rate set as a percentage of revenues is that the amount of royalties self-adjusts to the different revenue-generating attributes of each service. That being the case, it is reasonable and logical to have the same percentage rate for different services. This, in effect, provides a certain internal coherence among the various types of services.

[229] Second, and flowing from the previous point, revenue allocation becomes less of an issue where a unique rate is set for various types of services offered by the same service provider. Where a different rate or rate base is set for various types of services emanating from a single service provider, more than one revenue allocation method could be deemed reasonable or

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[94] *Supra* note 83 at para 122.
[95] *Supra* note 36 at para 115.

appropriate, but each would result in a different calculation of royalties owed, a result that could create various enforcement issues and should be avoided if possible.

[230] Third, the Parties did not propose a per-play methodology, other than CSI's proposals for setting some minimum fees.[96]

[231] Fourth, these proceedings result in a tariff that encompasses several new types of services and new amalgamations of existing services, probably adding a level of complexity in its administration. A rate based on a percentage of revenues alleviates the administrative burden on all Parties. Although not a determining factor in and of itself, facilitating the administration of a tariff to ensure it results into the proper implementation of the Board's decision is not an unimportant consideration.

[232] Finally, we do not have information on how the approach adopted in the *Re:Sound Tariff 8 (2014)* decision actually worked out in practice, including the challenges and difficulties for the Parties and its shortcomings. The Board may have such information in future proceedings dealing with the activities subject to the present proceedings.

iv. Interactivity Premium

[233] "Interactivity" is used to describe various features provided by webcasters that allow consumers to influence the music they hear, such as by selecting specific music and genres that correspond to each individual's tastes. There is value to the consumer, possibly substantial, in the different features present in a semi-interactive or interactive webcast, such as the possibility to skip a song, or to indicate whether she liked it, or disliked it. Such features may make the resulting sequence of transmitted sound recordings more attractive to the consumer than a sequence of sound recordings not influenced by consumer interactions found in a non-interactive webcast. This could justify an "interactivity premium."

[234] We think that the added value that such features represent is, at least partially, attributable to the copyright in the musical works. This being the case, greater royalties should flow to rights owners for such interactive uses than for passive uses such as non-interactive webcasts. The difference between the royalties is the "interactivity premium."

[235] CSI proposed to set the interactivity premium equal to the ratio of the price of a single track to the price of a bundled track. This would represent a premium of 92 per cent.

[236] The premium proposed by CSI might be partly a reflection of an interactivity premium. But it may also be indicative of a volume-discount price of albums, the importance of which

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[96] Exhibit CSI-3, see e.g. para 66.

cannot be assessed in relation to the overall 92 per cent premium. In addition, a bundle often includes tracks that the buying consumer would not otherwise buy, so evenly distributing the price to individual tracks bought as part of a bundle could lead to valuation errors. Lastly, the level of interactivity can vary greatly among various semi-interactive services, which strongly suggests that any interactivity premium may also vary greatly. The basis and the amount of the 92 per cent premium proposed by CSI is of little help and we would require significant data in order to set an appropriate interactivity premium as a percentage or dollar amount to be added to a non-interactive rate.

[237] We believe that the revenues of a webcaster would be higher for semi-interactive and interactive services than they would be for non-interactive services. In his report, Dr. Reitman argued the following:

> Since the audio content is of higher value to the listener, semi-interactive webcasters would capture part of that greater value through increased usage and higher prices for subscriptions and advertising, all of which would increase revenues. Thus a constant percentage of revenue tariff rate that applies to both semi-interactive and non-interactive services would end up generating a higher payment to copyright holders for music used in the semi-interactive service. In other words, a percentage of revenue tariff rate automatically results in higher compensation to copyright holders for semi-interactive webcasts as long as those services generate greater revenue than non-interactive services.[97]

[238] We agree with Dr. Reitman. To the extent the revenues generated by these services increase because of the interactivity value, a proportionate share of these will flow back to rights owners as royalties. Assuming, for the purposes of setting a royalty rate, that the additional value from interactivity is attributable to the copyright in the musical work at the same rate as any value derived from non-interactive listening, we conclude that applying the same rate for interactive and semi-interactive webcasts as for non-interactive webcasts will adequately reflect the interactivity premium.

v. Free "Add-on" Webcasts

[239] In its proposed tariffs, SOCAN proposed a per-play rate for "streams free of charge," to be paid by a licensee who is already obliged to pay royalties under the tariff.

[240] We do not certify additional specific rates for free webcasts in this matter—whether interactive, semi-interactive, or non-interactive—as we include in the rate base for webcasting both advertising and subscription revenues (See section on "Rate Base," below). While an

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[97] Exhibit CAB-2 at para 41.

interactive webcast can be offered free to the listener, it is not free to the advertiser. In a well-functioning market, advertisting revenues monetize the webcast of musical works.

[241] Lastly, even if we concluded that it was appropriate to set an add-on rate for free webcasts, the analysis of the evidence presented by the Parties does not provide us with a reliable basis for doing so, as we concluded above at paragraphs 209-213.

G. NON-INTERACTIVE WEBCASTS

i. SOCAN Rates

[242] As described above, SOCAN did not propose a separate rate for non-interactive webcasts as part of this matter. Rather, in its proposed tariffs, SOCAN proposed a per-play rate for "streams free of charge," to be paid by a licensee who already is obliged to pay royalties under the tariff. We concluded that the proposed tariffs do not cover non-interactive webcasts even in the form of an "add-on."

[243] If we are incorrect in this conclusion, and the proposed tariffs do cover non-interactive webcasts in the form of an add-on, the Board nevertheless still lacks evidence to meaningfully set an "add-on" rate for free webcasts. While SOCAN modified its requested rate for free webcasts to 0.13¢ per file to reflect the Board's decision in *Online Music Services (2012)*, it did not provide support for this requested rate in its submissions and evidence. As concluded above, even evidence submitted by Parties other than SOCAN that the Board could potentially use to attempt to set such a rate does not provide a sufficient basis therefor.

ii. CSI Rates

[244] As described before, CSI proposed for non-interactive webcasts a rate based on the commercial radio tariff, and applied the principle that the ratio of copyright payments to music programming be the same for commercial radio and webcasting. Copyright expenses are 41.03 per cent of music programming expenses. The total, repertoire-unadjusted copyright rate is 11.15 per cent (including musical works and sound recordings, communication and reproduction thereof). Adjusting the 11.15 per cent rate for the share of copyright expenses yields a rate of 27.18 per cent. CSI first allocates half of this rate to musical works, since the Board has consistently valued musical works and sound recordings equally, before repertoire adjustment. Second, CSI allocates a proportion of 1:3.2 of the resultant rate to the reproduction of musical works, to reflect the Board's consistent ratio between the reproduction right and the communication right. This yields the rate proposed by CSI, 3.24 per cent.

[245] Dr. Reitman, CAB's expert, noted that there were at least three problems with this approach. In particular, he mentioned that in order to properly use a cost proxy as proposed by CSI, one would have to know the full range of programming expenses for webcasters, in addition

to their copyright costs. Quoting the Collectives' expert Dr. Michael Murphy, he noted that there is a "range of activities that websites undertake to provide attractive webcasting services to customers, including curating playlists, creating software, and cataloging song characteristics."[98] However, none of those activities were counted by CSI's experts as program costs. We agree with CAB that they should be. Thus, we will not use a cost proxy as proposed by CSI.

[246] We turn to the issue of the appropriate proxy. A non-interactive webcast, as we have defined it, is a webcast over which the recipient exercises no control over its content or its timing. This is clearly an important characteristic shared with commercial radio when transmitting conventional, over the air, signals. Therefore, once adjusted for differences in music use, we find that the SOCAN commercial radio rate could be an appropriate proxy to establish the non-interactive webcasts rate. However, in our opinion, *SOCAN Tariff 22.F* is a more appropriate proxy as it relates to the same activity under consideration: non-interactive webcasting. Of course, choosing either of these proxies would lead to the same rate.

[247] The *SOCAN Tariff 22.F* rate was certified at 5.3 per cent of revenues. This rate was derived from the SOCAN rate for commercial radio of 4.2 per cent, to which an adjustment of 25 per cent was brought to take into account the higher use of music. This is our starting point for the CSI rate.

[248] In *Commercial Radio (2010),*[99] the Board used the ratio of 1:3.2 applied to the SOCAN rate to determine the rate for CSI. At the time, the Board had previously increased the SOCAN rate on account of three reasons, all three of which were equally applicable to CSI. The Board then decided to continue to use the same ratio and maintain the relative value of the rights administered by CSI and SOCAN respectively for their use in commercial radio.

[249] In a more recent decision, *Commercial Radio (2016),*[100] the ratio of the SOCAN to CSI rates was altered. Although the Board did not explicitly use the ratio to derive the rates, it lowered the rates for the reproduction of both musical works and sound recordings, in particular on account of the new exceptions introduced in the *Act* in November 2012. The exceptions applied to specific types of reproduction to which the Board was able to attribute a specific value, and deduct this value from the CSI rate (as well as the Connect/SOPROQ and the Artisti rates applying to commercial radio). A blanket reduction of about 22 per cent was applied to the CSI rate on account of exceptions for the music evaluation copies, the streaming copies and the backup copies. The repertoire-unadjusted rate for CSI was set at 1.053 per cent. Since the

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[98] Exhibit CAB-2 at para 36.
[99] *Commercial Radio Tariff (SOCAN: 2008-2010; Re:Sound: 2008-2011; CSI: 2008-2012; AVLA/SOPROQ: 2008-2011; ArtistI: 2009-2011)* (9 July 2010) Copyright Board Decision at para 223. [*Commercial Radio (2010)*]
[100] *Commercial Radio Tariff (SOCAN:2011-2013); (Re:Sound: 2012-2014); (CSI: 2012-2013); (Connect/SOPROQ: 2012-2017); (Artisti 2012-2014)* (21 April 2016) Copyright Board Decision. [*Commercial Radio (2016)*]

SOCAN rate was unchanged, and the CSI rate decreased, the resulting ratio was lower than 1:3.2 (0.3125).

[250] However, this new, lower ratio of relative value should not be used in this instance. The reductions to the CSI rate were the result of the application of specific exceptions to specific types of reproductions that the evidence showed were clearly made by commercial radio stations in compliance with such exceptions. Evidence was also used to derive the relative value of each type of reproductions.

[251] In the present proceedings, we have no evidence as to the types and nature of the reproductions made by webcasters. It would therefore not be reasonable to assume that the reductions applied to the reproduction rates in commercial radio apply equally to webcasters. Many parties submitted that the Board should use a ratio of 1:3.2.[101] In the absence of convincing evidence to the contrary, we accept the parties' position, and set the initial ratio 0.3125 (1:3.2), reflecting the relative overall value of the reproduction right to that of the communication right.

[252] As mentioned above, our starting point for the CSI rate is the *SOCAN Tariff 22.F* rate of 5.3 per cent. Applying the ratio of 0.3125 to this rate leads to a CSI rate of 1.66 per cent, unadjusted for repertoire.

[253] We have established earlier in this decision that the reporting procedures certified in *CSI Online Music Services Tariff, 2008-2010* would be replaced by a simpler approach, where an average repertoire adjustment of 0.9 would be applied, where relevant. The CSI rate of 1.66 per cent we have just established for non-interactive webcasts needs to be adjusted for CSI's repertoire, which brings the final rate to 1.49 per cent. This is the rate we certify.

[254] We consider that this rate-setting analysis comports with the Supreme Court of Canada's statements that the *Act* has a fundamental requirement to recognize technological neutrality and balance between user and right holder interests.[102] The technologies used by commercial radio broadcasters and the ones used by non-interactive and semi-interactive webcasters to communicate music to their respective listeners are similar and their functions, although achieved differently, are equivalent. We see no reason in the present case to implement a differential treatment, from a copyright valuation standpoint, between radio broadcasting and corresponding webcasting technologies.

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[101] See e.g. Exhibit CSI-03 at paras 121, 122, 140, 153 and 172; Exhibit CAB-2 at para 52; Transcripts, Vol. 1 at 9 (CSI), at 62 (Pandora); Transcripts, Vol. 2 at 546-548 (CSI Expert Boyer); Transcripts, Vol. 3 at 608 (CSI Expert Blit); Transcripts, Vol. 3 at 714-716 (CSI Expert Boyer); Transcripts, Vol. 7 at 1699-1702 (CAB Expert Reitman); Transcripts, Vol. 10 at 2260 (CAB, Pandora), at 2300 (Pandora).
[102] *CBC v. SODRAC, ESA, Rogers, Bell*.

H. INTERACTIVE WEBCASTS

i. SOCAN Rates

[255] In these proceedings, SOCAN has proposed a new model for interactive webcast (which was also applied to non-interactive webcast) based on a commercial radio proxy; the Objectors supported it in part. It is useful to separate, as the Objectors did, the new methodology proposed by SOCAN into three parts.

[256] First, SOCAN proposed to increase the commercial radio blended rate of 4.2 per cent by 25 per cent to account for the greater use of music by webcasters relative to commercial radio. Second, SOCAN proposed to increase this rate by a further 50 per cent to account for music's greater relative revenue-generating capability as compared to "talk" programming. Finally, SOCAN proposed an additional increase of between 0.6 and 2.6 percentage points to account for the making available to the public of musical works. In the end, SOCAN proposed a rate of 8.6 per cent.

[257] The Objectors saw no reason to oppose the first increase. Neither do we. If we adopted this methodology, we would find this adjustment appropriate and reasonable. Webcasters use, on average, 25 per cent more music than commercial radio broadcasters; it makes sense that this translates into a corresponding increase in royalties. The Board previously accepted this adjustment when it certified *SOCAN Tariff 22.F*. This adjustment would take the rate from 4.2 per cent to 5.3 per cent of revenues.

[258] The second increase is more debatable. We assume, as do experts in this matter, that radio stations allocate their broadcast time optimally between music and talk, on a continuous marginal basis. This means that the last dollar spent on music is as productive as the last dollar spent on talk; if this were not the case, radio stations could improve their productivity by reallocating their broadcast time. This economic principle was highlighted in Dr. Reitman's testimony.[103] Dr. Singer made several related, if not identical, points.[104] Hence, since the marginal productivity of music and talk is the same for commercial radio, we think there is no need for there to be a productivity adjustment for the increase use of music in webcasting.

[259] The third part of SOCAN's methodology relates to the value of the making available to the public of musical works, which we have already decided would not be applied for the period under consideration for these proceedings for reasons already explained.

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[103] Transcripts, Vol. 7 at 1790-1796.
[104] Transcripts, Vol. 5 at 1320-1326.

[260] Accordingly, our application of SOCAN's methodology would lead us to certify SOCAN's royalties in respect of interactive webcasts at 5.3 per cent of revenues. This would be consistent with the rate set above for non-interactive webcasts of audio tracks for CSI.

[261] The approach we adopt is different, but leads to the same rate. The proxy we consider to be the most appropriate for setting the royalties for interactive webcasts is *SOCAN Tariff 22.F*. Interactive and non-interactive webcasters of audio tracks use similar business methods, and operate in the same industry. The only major difference between the services provided by the two is the interactivity features. As we concluded above at paragraph 238, the rate for interactive services should be the rate for non-interactive services. Therefore, the SOCAN rate we set for interactive webcasts is 5.3 per cent.

ii. CSI Rates

[262] CSI proposed a rate of 5.39 per cent, based on the rate of 5.18 per cent last certified by the Board. The starting point of 5.18 per cent for this approach is based on the bundled model used by the Board in a previous decision. However, for the reasons mentioned above, we do not think it is appropriate to use as a starting point a rate that was established using such an approach. The Networks proposed a CSI rate of 1.238 per cent, the same as the CSI commercial radio rate. In our opinion, this rate appears to be too low. At the very least, we consider the rate should be adjusted to take into account the fact that webcasting generally uses music continuously, unlike commercial radio which uses music 80 per cent of the time, on average. As such, we reject the Networks' proposal.

[263] For SOCAN, we have set the rate for interactive webcasts equal to the rate certified for non-interactive webcasts in *SOCAN Tariff 22.F*. For CSI, we also set the rate for interactive webcasts equal to the rate we set for CSI for non-interactive webcasts in this matter. The reasons for doing so for CSI are the same as the reasons for doing so for SOCAN. We therefore set the rate for CSI for interactive webcasts at 1.49 per cent.

I. SEMI-INTERACTIVE WEBCASTS

i. SOCAN Rates

[264] For semi-interactive webcasts, SOCAN proposed that it receive the same as for interactive webcasts. We agree with SOCAN, although not for the same reasons.

[265] For the same reasons we think *SOCAN Tariff 22.F* is a good proxy for interactive webcasts, we consider it to be a good proxy for semi-interactive webcasts. The major difference between the three types of webcast is the degree of interactivity. For the reasons given above, we do not adjust this proxy for interactivity.

[266] Thus, the rate we set for SOCAN for semi-interactive webcasts is 5.3 per cent.

ii. CSI Rates

[267] CSI put forward a model with three components. First, it uses commercial radio as a starting point. Second, it uses the ratios that the Board has certified in its previous tariffs. Third, it proposes an interactivity adjustment. Were we to use CSI's model, we would accept the first two components for the following reasons, and reject the third for reasons already given in the interactivity premium section above.

[268] As we concluded for SOCAN, while the use of the commercial radio tariff as a proxy may be appropriate, we prefer to use *SOCAN Tariff 22.F*, which happens to yield the same result.

[269] The two ratios CSI puts forward are the 1:1 ratio between the value of musical works and sound recordings embodying such musical works and the 1:3.2 ratio between the value of the reproduction right and the communication right. The 1:1 ratio between the value of musical works and sound recordings goes back to the first Re:Sound decision in 1999 pertaining to commercial radio.[105] The 1:3.2 ratio had been used in some previous decisions, including, most recently, in *Commercial Radio (2010)*.[106] The 1:3.2 ratio is the relevant one in a decision relating to CSI and SOCAN since the relative role and importance, and hence value, of the reproduction right to the communication right is comparable in semi-interactive webcasting and commercial radio broadcasting. As explained above, the use of this ratio in the present proceedings was accepted by multiple parties.

[270] However, for the reasons explained above, we do not use commercial radio as a proxy. Rather, we treat the rate for non-interactive webcasting as a proxy for the semi-interactive rate. As is the case in the determination of the SOCAN semi-interactive webcasting rate, we do not adjust this proxy for interactivity. Therefore, we set for CSI the same rate for semi-interactive webcasting as we set for the other types of webcasting, namely 1.49 per cent. We note that this rate is the same rate we would have arrived at, had we used the first two components of CSI's model to derive it directly.

J. HYBRID WEBCASTS

i. Description

[271] Some online music services add functionality to their webcasting service by creating copies (or permitting the creation of copies) of sound recordings on the subscriber's device—

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[105] *NRCC Tarif 1.A – Commercial Radio, 1998-2002* (13 August 1999) Copyright Board Decision at 32.
[106] *Supra* note 98 at para 223.

typically a mobile device. The purpose of these copies is to serve as a cache in situations where the subscriber does not have access to an Internet connection, or where the connection is intermittent. In these situations, the subscriber would play the sound recordings from such a cache.[107]

[272] In terms of functionality, such cached copies are similar to limited downloads.[108] However, they differ from limited downloads by intention: while cache copies are made to supplement a webcasting service, limited downloads are meant as stand-alone sources of sound recordings. Furthermore, cache copies may be made automatically in some cases, to avoid an interruption in playback during interruptions in Internet connectivity.

[273] During these proceedings, a service that provided webcasts with the possibility of making cache copies for offline listening was referred to as a "hybrid" service. While most submissions relating to hybrid webcasting services spoke about semi-interactive webcasting, such services could also be offered in both non-interactive and fully-interactive form.

[274] Hybrid webcasting services are often provided at a premium compared to an equivalent webcast service (that does not create cached copies) provided by the same online music service. For example, a particular online music service may charge per month $10 for a webcasting service, and $15 for a hybrid service. These premium tiers often provide additional features than the mere possibility of making cached copies.[109] For example, a premium tier may permit subscribers to use an app on their mobile device to receive the webcast.

[275] In his comparison of selected online music services, Mr. Paquette identified four services that provided hybrid webcasts. All four of these services provided the hybrid as part of a premium or mobile tier.[110]

ii. Proposed Tariffs

[276] The tariffs proposed by CSI for 2011 and 2012 set royalties payable by any "online music service that offers limited downloads— with or without on-demand streams or webcasting." The Collectives took this to mean that hybrid services, which they characterize as providing webcasting with some limited download features, would pay the royalties for limited downloads in addition to all the royalties payable for webcasting. All the Parties agreed that this was an unintended consequence of the tariff wording. Parties later proposed rates for hybrid on-demand streams, consisting of on-demand streams and limited downloads, which addressed this issue.

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[107] See e.g. Exhibit SOCAN-6 at para 17.
[108] *Ibid*.
[109] Exhibit SOCAN-6 at para 19.
[110] Exhibit SOCAN-5 at 1.

iii. Exceptions to Reproduction

[277] In their statement of case, the Networks argued that the exceptions in sections 29.22 (reproduction for private purposes), 29.23 (reproduction for later listening or viewing), and 30.71 (temporary reproductions) of the *Act* may be applicable in this matter. However, they only made legal submissions in relation to the applicability of s. 29.22 to the creation of locally cached playlists for webcasts. The Networks argued that because s. 29.22 makes such copies non-infringing, the rate for such services should not be higher than for services without such functionality.

[278] The Collectives disagreed with the applicability of s. 29.22 of the *Act* to such situations,[111] but SOCAN agreed with the Networks that the total royalty rates can be the same for such services; only the allocation of the royalties among the Collectives would be an issue.[112]

[279] Given our conclusion below, that the rate (as a percentage) for hybrid webcasting services is the same as for webcasting services without caching functionality—and therefore reach the same conclusion on rates as proposed by the Networks and SOCAN—it is unnecessary for us to decide the applicability of s. 29.22 of the *Act* in this matter.

iv. Setting a Royalty Rate

[280] Given the evidence canvassed above, we conclude that hybrid webcasting services are, fundamentally, webcasting services with some increased functionality.

[281] Furthermore, the evidence demonstrates that this increased functionality which includes the ability to make temporary copies for offline listening is monetized in the market. Online music services typically price their hybrid webcasting services at between one (when a discount is given for an annual subscription) to two times the amount of their non-hybrid webcasting services.[113]

[282] Therefore, we conclude, just as we concluded in relation to interactivity, that it is appropriate to use this increase in revenue to determine the increase in royalties payable to rights holders. By setting the total CSI + SOCAN royalty rate (as a percentage) for hybrid webcasting services the same as for webcasting services, we allow the market to establish any increase in royalties payable by online music services for the increase in functionality, since any increase in revenues will result in an increase in royalties.

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[111] Transcripts, Vol. 9 at 2181:12-2185:23.
[112] Transcripts, Vol. 10 at 2419:6-2420:23.
[113] Exhibit SOCAN-6 at paras 5-6.

[283] If we were to set a royalty rate for hybrid webcast services that is higher than for webcast services, the increase in both rate and rate base (i.e., the increase in revenues), would amount to a "double premium." We are not convinced that the added functionality provided by hybrid webcasting services is more attributable to copyrighted works then the functionality provided by non-hybrid webcasting services. Consequently, we are not convinced that a double premium is warranted in relation to hybrid webcast services.

[284] That being said, we are aware that the relative importance of the rights administered by CSI and SOCAN, the reproduction right and the right to communicate to the public by telecommunication, respectively, may not be the same for hybrid and non-hybrid webcasting services. A difference in importance of these rights can lead to a different allocation of the royalties. We consider the issue of allocation between CSI and SOCAN below.

[285] Lastly, as discussed above given the Parties' submissions—or lack thereof—on the effect of the *CBC v. SODRAC* decision of the Supreme Court, we are unable to make any informed adjustments based on the factors enunciated in that decision, and we do not do so.

v. Allocating the Royalty Rate between CSI and SOCAN

[286] CSI implicitly proposes that the allocation of royalties as between itself and SOCAN be based on considering a hybrid webcasting service as being equally composed of a webcasting service and a limited download service. Using the rates for these services certified by the Board in these proceedings, this would imply a royalty rate of 5.695 per cent to CSI and 2.65 per cent to SOCAN, resulting in a ratio of CSI to SOCAN royalties of approximately 68.2 per cent to 31.8 per cent.[114]

[287] SOCAN proposes an allocation of royalties of 50 per cent payable to CSI and 50 per cent to itself. Using the rates certified by the Board in the current proceedings, this would imply that a hybrid webcasting service can be characterized as being approximately 72 per cent a webcasting service, and 28 per cent a limited download service.

[288] In reviewing the evidence, we conclude that there is little to support CSI's proposed allocation. While it may be simple to assume that a hybrid service is basically one-half webcast and one-half download, the evidence suggests that this allocation is not appropriate.

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[114] The sum of SOCAN webcast rate and of SOCAN limited download rate is 5.3% (5.3% + 0%). The sum of CSI webcast rate and of CSI limited download rate is 11.39% (1.49% + 9.9%). The total of SOCAN's and CSI's rates being 16.69%, the SOCAN share is 31.8% (5.3% ÷ 16.69%) and the CSI share is 68.2% (11.39% ÷ 16.69%).

[289] Mr. Paquette's review of online music services shows that the price of a hybrid tier is often twice the amount of the non-hybrid tier, and typically falls within the range of one (in the case of annual subscriptions) to two times the price of the non-hybrid tier.

[290] Given the evidence, including that of Mr. Paquette, we agree with SOCAN that

> [t]he additional functionality that allows a user to download songs for a limited time for mobile listening when not connected to the Internet is usually added as one of a number of value-added options in a premium-priced tier, along with, for example, ad-free listening and more user control. As a result, the value to be ascribed to the portability function is difficult to segregate from the value of the streaming uses to which the user also has access.[115]

[291] Since offline caching usually represents only one additional feature of hybrid tiers, we conclude that only some portion of the increase in price is attributable to the availability of the caching itself. Therefore, we cannot simply use the difference between hybrid and non-hybrid webcasting services to estimate the relative importance of the webcasting and downloading components of a hybrid webcasting service.

[292] Mr. Breton provided evidence with respect to downloads and streams on Zik.ca, the interactive webcast service for which he had responsibility at *Groupe Archambault*.[116] These figures suggest one limited download for every four streams. However, the number of downloads is based on a 9-month period and the number of streams pertains to a 12-month period. As counsel for CSI explained in oral argument, these figures are not comparable,[117] and we could not rely on them in our determination. Nevertheless, given the witnesses' description of hybrid services, we conclude that it is more likely than not that users do not download one song for every song they stream—something implied by CSI's proposal. SOCAN's proposal implies that about 2.7 songs are streamed for every song downloaded, an assumption we find more reasonable.

[293] Given the above, we are of the opinion that SOCAN's proposal is more reasonable than that of CSI. Furthermore, given that we do not have sufficiently detailed and reliable data by which we could estimate more rigorously the relative importance of the webcasting functionality as compared to the limited download functionality of a hybrid service, we accept SOCAN's proposal as a reasonable allocation of royalties.[118]

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[115] Exhibit SOCAN-1 at para 69.
[116] Exhibit Networks-2.
[117] Transcripts, Vol. 9 at 2180.
[118] This allocation implies a relative importance of 2.5 (webcasting) to 1 (limited downloads).

vi. SOCAN Rate

[294] Given the total CSI and SOCAN rate, unadjusted for repertoire, is 6.96 per cent (1.66 + 5.3) of revenues, and having accepted an allocation of 50 per cent to SOCAN, SOCAN's rate for hybrid webcasting services is 3.48 per cent of revenues.

[295] This allocation, having been proposed by SOCAN, results in a lower rate for hybrid webcasting than for non-hybrid webcasting when considered as a percentage. However, given the evidence that hybrid webcasting services are priced higher, we expect that in many, if not most, situations, the actual royalties (in dollars) collected by SOCAN will be greater for hybrid webcasting services than their non-hybrid equivalent.

vii. CSI Rate

[296] Similarly, given a total CSI and SOCAN rate of 6.96 per cent of revenues, and having accepted an allocation of 50 per cent to CSI, CSI's unadjusted rate for hybrid webcasting services is 3.48 per cent. Adjusting this for CSI's 90 per cent repertoire share, results in a rate of 3.13 per cent of revenues.

K. MUSIC VIDEOS

i. SOCAN Rate

[297] As is the case for audio downloads, SOCAN is not entitled to receive royalties for video downloads. Thus, we do not set a SOCAN rate for video downloads, permanent or limited.

[298] In its statement of case, SOCAN proposed a rate of 5.67 per cent of revenues for interactive and semi-interactive webcasts of music videos. The Networks proposed a rate of 3.02 per cent for interactive webcasts and did not address semi-interactive webcasts of music videos.

[299] In respect of video webcasts, and as the Board did in 2012, we assume that the price differential between an audio track and a music video is attributable to non-audio inputs. We can thus apply the ratio of the median prices of the audio track and the music video to extract the audio content from the video.

[300] A certain amount of confusion might have emerged from the Board's 2012 decision. In 2012, the Board wrote: "[Apple and the Cable/Telcos] propose that the price of a video-clip be set at the ratio of the mid-price audio track to the mid-price video-clip."[119] The French version of

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[119] *Supra* note 6 at para 108.

the same sentence reads “Ils proposent de fixer le taux pour les vidéoclips en fonction du ratio entre le prix médian des pistes audio et celui des vidéoclips.”

[301] There is a difference between a mid-price and a median price. In particular, a mid-price is independent of sales volume, whereas a median price is not. For example, suppose that an online music service sold 10 tracks at $1, 1 track at $2, and 100 tracks at $3. The mid-price is $2, since it is the middle of the three prices at which tracks are sold. But the median price is $3, since the 56th track is sold at $3 (a total of 111 tracks are sold). In our opinion, the median price is more meaningful than the mid-price, since it takes sales volume into account.

[302] In its statement of case, Apple adduced new evidence regarding the mid-price of audio tracks and of video-clips (music videos each containing one musical work); the former is $0.99 and the latter is $1.74. The ratio of these two is 0.5690.[120] Apple supplied sales data at each price point for audio tracks and video-clips as part of its response to SODRAC interrogatories.[121] While the sales data themselves are highly confidential, the price points are not. The Board calculates the median price of an audio track to be $1.29 and the median price of a video-clip to be $2.29. The ratio of these two medians is 0.5633. Even though the two ratios are close, we will use the latter in our calculations. While this ratio is derived from sales of video-clips, and not concert videos (music videos containing more than one musical work), given that the vast majority of music videos sold by Apple are video-clips, we will use this ratio for both video-clips and concert videos.

[303] SOCAN’s rate for interactive webcasts of audio tracks is 5.3 per cent of revenues. This translates into a rate of 2.99 (5.3 × 0.5633) per cent of revenues for interactive webcasts of music videos.

[304] For webcasts of audio tracks, we have set the same rate for semi-interactive webcasts as for interactive webcasts. We do the same for music videos.

ii. SODRAC Rate

[305] In its statement of case, SODRAC proposed a rate of 6.5 per cent of revenues for permanent downloads. Apple and the Networks proposed a rate of 5.6 per cent. SODRAC did not propose royalties for the webcasting nor for limited downloads of music videos.

[306] In its final arguments, SODRAC addressed separately rates for music videos containing only one musical work (referred to as “video-clips” by SODRAC) and the rates for music videos containing more than one musical work (referred to as “concert videos” by SODRAC).

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[120] Exhibit Apple-1 at para 30 and footnote 9 thereto.
[121] Exhibit SODRAC-3 (Apple’s response to Interrogatory 46) at 20.

SODRAC submitted that the term "concert videos" should be used instead of "bundle," as this better represented commercial realities, and framed its submissions around the number of works in a music video, as opposed to the number of files sold together.

[307] For video-clips, SODRAC proposed a rate of 5.64 per cent, as this was the rate that Apple calculated using the mid-price concept. While we would have preferred to use the median price concept (which would have generated a rate of 5.58 per cent (9.9 × 0.5633)), we certify for permanent downloads a rate of 5.64 per cent, as this was a rate both parties put forward.

[308] SODRAC also proposed that the rate of 5.64 per cent apply to concert videos, claiming that Apple also agreed on this rate. In its reply, Apple contended that SODRAC misrepresented its position and that in fact, "concert films should attract a lower percentage rate than video-clips, reflecting their lesser use of music."[122] Apple argued that based on an analysis of concert films done by SODRAC, an average of 10 per cent of the running-time of concert films did not consist of musical elements. The rate for concert films then should be the rate for video-clips to which a 10 per cent reduction is applied.

[309] SODRAC contests this argument, stating that the methodology to calculate the relevant rate for video-clips or concert videos already takes into account and removes the non-musical elements. We agree with SODRAC that the rate for concert videos should be the same as for video-clips rate, i.e., 5.64 per cent. We therefore set a single rate of 5.64 per cent for all music videos, whether containing only one musical works, or more.

[310] We note that this rate only applies to works wholly in the SODRAC repertoire. Any work that is not in the SODRAC repertoire does not attract this royalty; any work that is only partially in the SODRAC repertoire only attracts a proportional part of this royalty.

L. RATE BASE

[311] In its last decision in respect of online music services, the Board was of the opinion that

> [i]n the long run, all the services' income linked to the provision of music should be included in the rate base. A correlation almost certainly exists between non-user revenues and users' enjoyment of music. Viewed another way, online business models are sufficiently diversified that user revenues do not always account for the full value of the music used.[123]

[312] SOCAN and CSI now argue that both subscription revenues and advertising revenues should be part of the rate base. SOCAN argues that doing otherwise would lead to an underestimation of the value of music. CSI states that a correlation exists between non-user

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[122] Exhibit Apple-9 at para 22.
[123] *Supra* note 6 at para 112.

revenues and user's enjoyment of music, a situation that should lead to the integration of all sources of revenue in the rate base. CSI also argues that there is now such a variety of business models that user revenues do not always account for the full value of the music used.

[313] Apple argues that the rate base for downloads should remain the same. Apple is paying rights holders separately for downloads and iTunes Radio, based on different revenue streams (download fees and advertising revenues, respectively). A rate base comprising the two sources of revenues would lead to double-counting, according to Apple.

[314] We agree that the evidence shows that there is a large variety of business models in the industry, and that restricting the rate base only to user-generated revenues, whether subscription or transactional, could, in some cases, underestimate the fair amount of royalties to be paid. The evidence also shows that advertising revenues have become an important source of revenues for some services, particularly in the cases of subscription-based revenues. For these reasons, in respect of all webcasts services, including hybrid webcasts services, we set the rate base as all revenues attributed to the operation of that service, including subscription and advertising revenues.

[315] In the case of permanent downloads, we agree with Apple that combining the two sources of revenue could lead to some degree of double-dipping. In addition, our equivalence principle between the mechanical royalties paid for physical CDs and for permanent downloads would be violated if we were to include advertising revenues in the rate base. Hence, for permanent downloads, the rate base will remain the amount paid by the consumer.

[316] For limited downloads, the last certified tariff used as the rate base the amounts paid by subscribers. For the reasons that follow, there is no need to expand the rate base for limited downloads *vis-à-vis* permanent downloads, in this instance.

[317] First, based on the evidence before us, limited download offerings active during the tariff period did not use advertising. Second, we do not have any evidence or argument to support changing the rate base for limited downloads; Drs. Boyer and Blit addressed the rate-base issue only for permanent downloads.

M. MINIMUM FEES

i. Permanent Downloads

[318] In *CSI Online Music (2007)*, the parties agreed to, and the Board accepted, a formula whereby the minimum fee would be set at two-thirds of the amount paid by the average user.[124]

[319] This formula ensures that the average user does not pay the minimum fee, but small users do. The advantage of this formula is that, under reasonable conditions, about one-third of users pay the minimum fee. In the 2004 decision pertaining to SOCAN Various Tariffs, the Board took the position that fewer than half the users of a tariff should be paying the minimum fee.[125]

[320] While there may be disadvantages to this approach of setting a minimum fee, such as having the potential to restrict the range of prices that competitors may charge and still be profitable, in this matter, CSI used this approach[126] and Apple appears, at least indirectly, to support it.[127] Other parties did not comment on it. We therefore use the two-thirds rule in this matter in relation to downloads.

[321] For CSI, the main rate we certify for permanent downloads of audio tracks is 8.91 per cent of revenues. We do not use the 2012 prices for CSI to calculate its minima. Rather we use the average of the 2011 and 2012 prices, namely $0.60 per bundled track and $1.13 for unbundled tracks. This is because we consider that setting a constant rate is preferable in this case over any precision gain that would be obtained by setting marginally different royalties for each year. The minimum fee for bundled audio tracks is $0.036 ((2/3) × 0.0891 × $0.60). The minimum fee for unbundled audio tracks would be $0.067 ((2/3) × 0.0891 × $1.13). In the latter case however, because CSI only asked for $0.066, this is the rate we certify.

[322] With respect to the Apple's argument that the request for minimum fees is *ultra petita*, since it appears that Apple, subsequent to its statement of case accepted some form of minimum royalties, it is not necessary for us to examine whether there may have been a procedural fairness issue.

[323] Lastly, in regards to the number of tracks that constitute a "bundle," it is not altogether clear that CSI has maintained the request for the number of tracks at 15. Drs. Boyer and Blit wrote: "It is our understanding that, for the purposes of this proceeding, CSI will be amending its

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[124] *CSI Online Music Services (2007), supra* note 1 at para 94.
[125] *SOCAN Various Tariffs* (19 March 2004) Copyright Board Decision at 14.
[126] Exhibit CSI-3 at paras 28-29.
[127] Exhibit Apple-3 at para 57.

proposed threshold from 15 tracks to 13."[128] However, while CSI's tariff for 2014 uses the threshold of 15 tracks, tariffs filed subsequent to this return to 13 tracks in a bundle.

[324] However, even if CSI amended its request, and such a request is actually proper, we reject such a request for the same reasons the Board did in *Online Music Services (2012)*. In that decision, the Board rejected CSI's request to increase the number of files in a bundle from 13 to 15 for the purposes of calculating the minimum fee for permanent downloads.[129] Just as in that decision, there is no evidence in this matter as to why the change is desirable or necessary; neither is there any evidence of the impact of the proposed change.

ii. Webcast, Hybrid Webcast and Limited Download Services

[325] We set a minimum fee on a per-service basis. In *SOCAN Tariff 22.F*, the Board set the minimum fee as $100 per year per audio webcasting site that uses works in SOCAN's repertoire 80 per cent of the time, or more. This fee was based on a comparison of minimum fees among a number of different certified tariffs. In *Re:Sound Tariff 8 (2014)*, the Board again certified a minimum fee of $100 per year. We will do the same here and set for each of SOCAN and CSI tariffs a minimum fee of $100 per year for each applicable type of webcasting subject to this tariff, including hybrid webcasting. A minimum fee of that amount does not need to be adjusted to reflect the differences in both collectives' main rate.

[326] Because of the substantial similarities among the business models of limited download, webcasting, and hybrid webcasting offerings—the subscription-based nature of these, in particular—we set the same minimum fee of $100 per year for limited downloads of audio tracks for CSI.

iii. Music Videos

[327] Given that webcasting of music videos, just as webcasting of audio tracks, typically uses a subscription model, and given that we set the rate-base for both as all revenues attributable to the operation of the service, we also set a minimum royalty of $100 per year for webcasting of music videos.

[328] For permanent downloads of music videos, SODRAC proposed in its submissions minimum fees of 8.09¢ for a video-clip and 2.6¢ per work in a concert video. The figure of 2.6¢ per work is based on the application of the "two-thirds" formula used by some of the Parties, where the minimum fee is set at two-thirds the average royalty. Alternatively, SODRAC proposed 49.61¢ per concert video. This figure is based on the assumption that a concert video

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[128] Exhibit CSI-3 at para 29.
[129] *Supra* note 6 at para 127.

contains on average 19 musical works. This alternative was proposed by SODRAC to respond to Apple's concern that SODRAC's proposal to apply minima individually to each musical work contained within a concert video would be administratively burdensome. SODRAC's original proposal mirrored CSI's tariff for music permanent downloads: a minimum fee for videos sold separately or in a small bundle, with a discount for videos sold in a bundle of 20 or more.[130]

[329] While the minimum royalty SODRAC proposed in its submissions for permanent downloads of music videos containing single musical works would be consistent with the Board's approach in respect of minimum fees of permanent downloads of musical works in audio tracks in this matter, it is greater than the corresponding minimum in its proposed tariffs, being 6.6¢ per work. As such, we set the minimum royalty at this amount, to be adjusted for SODRAC's repertoire share in that work.

[330] With respect to concert videos, Apple raised concerns about applying minima individually to each musical work contained within a concert video. In particular, Ms. Walsh testified that

> for concert films, Apple should not be required to separately identify or pay for individual musical works. We receive cue sheets inconsistently, so we shouldn't be able to separately identify or pay for individual musical works.[131]

[331] In its closing written arguments, SODRAC wrote: "[TRANSLATION] the Objector Apple seems to find that the establishment of a minimum fee per work in a concert video is too complicated."[132] It then proposed an alternative minimum fee of 49.61¢ per file containing multiple musical works. This assumes that a concert video contains on average 19 musical works.

[332] SODRAC then explained why it preferred its initial proposal.

> [TRANSLATION] It becomes more difficult to establish the percentage of [SODRAC] representation in a complete product because each work in a concert video could have different percentages of representation.[133]

[333] In its oral argument, Apple clarified its position:

> Now, SODRAC explains that one of its difficulties with concert films is that if a concert film, for example includes 20 tracks, ownership or rights in each of those tracks may vary. But that's not a problem that's unique to developing the appropriate minimum. That is a difficulty that, frankly, both parties grapple with in the context of concert films.

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[130] Exhibit SODRAC-1 at para 21.
[131] Transcripts, Vol. 5 at 1137.
[132] Exhibit SODRAC-8 at para 10.
[133] *Ibid* at para 12.

> The evidence is that Apple doesn't always get cue sheets for concert films and so this problem would exist regardless. And, in our submission, one doesn't fix the problem by creating a very complex minimum structure applicable below the file level.[134]

[334] In effect, both SODRAC and Apple agree that Apple should only pay for (and SODRAC should only receive payment for) those musical works in a concert video in SODRAC's repertoire, and that only to the proportion of those works in SODRAC's repertoire in the case of partial ownership.

[335] We agree with Apple that a minimum fee established on a per-work basis creates an onerous report obligation, especially in comparison to the relatively small proportion of works that are likely to be in SODRAC's repertoire. However, as Apple notes, this problem is not limited to the calculation of a minimum fee; the same problem of identifying songs is present for general reporting requirements as well. Unfortunately, no party proposed a reasonable solution that would obviate this difficulty. SODRAC, in the spirit of attempting to address Apple's concerns, proposed a minimum of 49.61¢ per music video containing more than one musical work. As well intended as this was, it does not appear to us to obviate the difficulty, as individual works would still need to be identified so that the royalties owed could be adjusted for SODRAC's repertoire share.

[336] In an ideal world, there would be a repertoire study in place that shows the percentage of works in concert videos sold by Apple that are in SODRAC's repertoire. We could then set a single minimum fee per concert video, and not require reporting related to repertoire. This would greatly reduce the reporting burden. Another possibility, given Apple's claim that only a very small number of works will be in SODRAC's repertoire, would have been a transactional licence. The reporting burden could also be significantly smaller under such a framework. However, no party submitted such an option, and we may therefore not have enough evidence to reliably set all parameters of such a licence.

[337] We are forced to certify a minimum fee either by work or by file, which is to be adjusted by the fractional ownership of SODRAC. As counsel for Apple pointed out, both structures require adjustment for fractional ownership. We do not see that one structure is better than the other. However, since Apple is strongly opposed to a minimum fee per work, and SODRAC is willing to have the Board certify a minimum fee per file, we opt for a per-file minimum. We note that Apple's concerns should be somewhat alleviated by the fact that the tariff we certify specifies that the required information— notably the title and author of each work— must only be reported if "it is in the possession or control of the licensee operating the relevant online music service." No additional inquiries or research by the licensee will be required.

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[134] Transcripts, Vol. 10 at 2253.

[338] Accordingly, we certify minimum royalties of 6.6¢ per download of a music video containing a single musical work, and 2.6¢ per work in a music video containing multiple musical works, where both of these amounts are to be adjusted for the partial ownership of the musical works by SODRAC.

VII. CERTIFIED TARIFFS AND ROYALTIES

[339] The rates we certify in this decision are shown in Annex C. The present tariff covers a number of new activities that were not covered by the previous tariffs. The present tariff also has a larger rate base for webcasting services that now includes advertising revenues specifically related to each webcasting activity; the rate base in previous applicable tariffs consisted only of subscription revenues. The Board is usually able to evaluate the total royalties generated by a tariff. However, in this matter, we do not have the required detailed information on the revenues associated with the various specific activities covered by the tariff to do so.

VIII. TARIFF WORDING

A. BACKGROUND

[340] As originally filed with the Board, neither the definitions nor the reporting requirements were standardized in the Proposed Tariffs of the three Collectives (SOCAN, CSI, and SODRAC). Understanding how a particular online music service is treated by the various Proposed Tariffs, including the royalties to be paid and any reporting requirements, was cumbersome. As such, in its Notice of June 6, 2016, the Board invited the Collectives to submit a joint proposed text that would replace the administrative provisions of the various Proposed Tariffs.

[341] On July 11, 2016, the Collectives submitted proposed text that would replace the definitions and administrative provisions of their respective tariff proposals, along with transitional provisions that they believe would be appropriate for inclusion in the certified tariff (the "Joint Proposed Tariff"). The Collectives noted that the Joint Proposed Tariff may require revision depending on the manner in which the Board resolved certain substantive issues. Apple, Pandora, and the Networks agreed with this statement. In addition, Pandora made submissions on the changes made by the Collectives in their proposed text to the definition of "subscriber."

[342] The Collectives' Joint Proposed Tariff was very useful in that it permitted the Board to prepare the terms and conditions of a draft version of a single tariff (the "Draft Tariff") that reflected its preliminary decisions in this matter. In its Notice of December 9, 2016, the Board provided the Draft Tariff to the Parties, inviting them to comment thereon. The Board asked the Parties to address specific issues, and indicated to them what they may assume in relation to the calculation of royalties, including minimum royalties, in relation to the operation of a particular service.

[343] All Parties made submissions pursuant to the Notice. All Parties, save SODRAC, replied to these submissions. We considered all of them. In what follows, we explicitly address only some of these, including those issues for which there was disagreement.

B. SERVICE / OPERATOR OF A SERVICE

[344] Before considering the specific issues raised by the Parties, it is important to note that the point of reference of the Draft Tariff was somewhat different from that of the Proposed Tariffs and the Joint Proposed Tariff. While the Draft Tariff places obligations on the operator of a service, the Proposed Tariffs as well as the Joint Proposed Tariff were drafted such that the service was the entity to which the obligations attached.

[345] However, during the proceedings, the term "online music service" was sometimes used by the Parties to refer to the *person* that provided one or more services; sometimes, the term was used to describe a *business operation* that provided different means of providing access to and copies of musical works; other times it was used to refer to a *particular means* of providing access to and copies of musical works.

[346] As set out in the tariff, every person that operates one of the identified services has the obligations related thereto. Where that same person operates another identified service, the obligations that attach in relation to the operation of the second service are separate and distinct from those that attach in relation to the operation of the first. When properly applied, no overlap or duplication arises.

[347] We are aware that a person may operate more than one type of service identified in the tariff. Furthermore, we are also aware that different types of services (in some circumstances referred to as "tiers" by the Parties) may be provided by the same operation or business, or offered as part of one product. However, given the evidence presented by the Parties, any particular transmission of a music file will be made only via one type of service, as defined in the certified tariff. Only one set of reporting obligations relating to that transmission will be applicable.

[348] Similarly, any transmission of a file will engage royalty payments under only one class of online music service.

C. TERMS AND DEFINITIONS

i. Audio Track—Definition

[349] The Draft Tariff defined the term "audio track" as

> a sound recording of a musical work, except where the sound recording is synchronized with a cinematographic work (as that term is defined in the Copyright Act, RSC 1985, c. C-42);

[350] CSI, Apple and Pandora submitted that the exception referring to the synchronization with cinematographic works should be removed. The Networks supported the submissions of Apple and Pandora.

[351] CSI submitted the following definitions for “audio track” and “sound recording”:

> “audio track” means a sound recording of a single musical work, and, for greater certainty, excludes a music video
>
> “sound recording” has the meaning given to it in the Copyright Act, R.S.C. 1985, c. C-42;

Apple and Pandora agreed with CSI’s proposed definitions.

[352] CSI explains the qualifier “single” when it submits that its tariff has never applied to files containing multiple works, such as medleys and mashups, which in many cases CSI is not authorized to license. We note that CSI’s proposed tariffs contained the limitation that they do “not authorize the reproduction of a work in a medley, [nor] for the purpose of creating a mashup […]” As such, this additional restriction does not seem to be necessary.

[353] On the other hand, if it is, and the expression “single musical work” does more than the limitation that CSI already seeks, the qualifier narrows the scope of the tariff. It is not possible for us to assess what proportion of works would be excluded by virtue of this proposed change.

[354] As such, we do not make this change.

ii. Audio Track / Sound Recording

[355] CSI also submitted that the occurrences of “sound recording” in subsection 6(1) of the Draft Tariff should be replaced with “audio track:” “if subsection 6(1) refers to those terms separately, it would incorrectly suggest a distinction between them and be likely to result in confusion and unintended consequences.” Apple and Pandora appear to agree with this. SOCAN, SODRAC, and the Networks did not make submissions on this point. We replace the terms, as proposed by CSI.

iii. End User / Subscriber / Recipient

[356] The Board specifically asked the Parties to address the appropriateness of the use of the terms “end user” and “subscriber” in the Draft Tariff. SOCAN and CSI submitted that the use of these terms in the Draft Tariff was appropriate. CSI, however, further submitted that the undefined term “recipient” used in the Draft Tariff necessarily has the same meaning as “end user,” and that to avoid unnecessary ambiguity, all references to “recipient” should be replaced with “end user.” We agree, and do so.

iv. Hybrid Webcasting Service

[357] The Parties generally agreed that the definition of "hybrid webcasting service" in the Draft Tariff permitted an interpretation whereby any service that carried out webcasts, as well as any service that carried out transmissions similar to limited downloads, would be captured by that definition. Some Parties offered solutions on how to address this issue. We accept the definition structure as proposed by CSI, whereby the definition of a hybrid webcasting service is based on the concept of a "webcasting service" which also permits transmitted files to be cached by the end user, so that they may listen to the files at a later time.

[358] Some parties submitted that the portion of the definition of hybrid services that includes the caching aspect of such services should be fully harmonized with the definition covering limited download services. However, there is a difference in the purpose for which such copies are made. In the case of a limited download service, copies of musical works are indefinitely stored while a person is a subscriber; in the case of a hybrid webcast service, copies of musical works are temporarily stored (even if this period may vary significantly) for the purpose of listening to them later. Thus, we conclude that differing language is appropriate.

D. MUSIC USE REPORTING

i. Monthly Reports

[359] In their respective proposed tariffs, as well as in the Joint Proposed Tariff, the Collectives sought a variety of information from operators of online music services, including on music usage. The information sought in relation to a particular service is different for each collective. For the purposes of soliciting comments, and to facilitate the creation of a draft tariff, the Board identified the various kinds of information sought by the Collectives in relation to the various services, and applied them all to each service in the section setting out the music usage reporting requirements (section 6 of the Draft Tariff).

[360] However, since it was unclear to what extent this information was actually necessary for the operation of the tariff, the Board identified those reporting requirements that did not appear to be *prima facie* related to the calculation of the tariff, and, asked the Parties, in its Notice of December 9, 2016, to state "which, if any, of the information highlighted in section 6 is required for the calculation of royalties, or for the distribution of royalties, and how (if for distribution, please provide the formula in which the information would be used)."

[361] In response, SOCAN submitted that it requires information regarding the number of plays, number of end users, and amounts paid by end users (partitioned by subscriber type) in order to determine a per-play fee.

[362] CSI submitted that, without additional information, it was difficult to say which of the information in section 6 is necessary for the distribution of royalties. However, CSI proposed that even if some information is not necessary at this time for the distribution of royalties, the information may become useful if CSI were to refine its distribution methodology as a result of this additional information.

[363] SODRAC simply asserted that all the information sought in subsection 6(8) of the Draft Tariff was essential for the calculation of royalties and for distribution purposes.

[364] Apple and Pandora objected to the proposal that information should be reported for the purposes of future tariffs. They submit that

> [t]he reporting provisions of the tariff are strictly for the purpose of compliance with that tariff, and should not be used for purposes relating to future tariffs, let alone a collective's fact-finding or fishing expedition regarding the business models adopted by the user. Indeed, if such information is required, it should be sought by way of appropriate interrogatories, as part of the tariff certification process.[135]

[365] The Networks submitted that the mere fact that the information sought might be beneficial in the future is not a good enough reason to impose the burden associated with the collection and reporting of that information.

[366] Having considered the submissions of the Parties on this issue, we conclude that no information identified by the Board in the Draft Tariff, except for the number of files in a bundle (which appeared in subparagraph 6(5)(*a*)(ii) in the Draft Tariff, and appears in paragraph 6(5)(*b*) in the certified tariff), is necessary for the calculation of royalties.

[367] While the Collectives made assertions regarding which information is required for the distribution of royalties, only SOCAN put forward some form of explanation of how the information may be used in such distributions.

[368] Despite the clear instructions in the Board's Notice of December 9, 2016, none of the Collectives submitted a distribution formula that would clearly demonstrate the manner in which the information sought would be used in determining the amounts that would be distributed to owners of copyright in the works used. This makes it difficult to determine which information is *bona fides* required for royalty distributions.

[369] Despite this shortcoming, we include in the certified tariff reporting requirements that permit Collectives to determine the amount paid for each file, in the case of non-subscription services (e.g., for downloads), and the notional amount for each file, in the case of subscription-

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[135] Letter of Apple to the Board (15 February 2017) at 2; Letter of Pandora to the Board (15 February 2017) at 1.

based services. In our view, these statistics provide a reasonable basis for the distribution of royalties, and are not unreasonably burdensome on the licensee to collect and report.

[370] Lastly, there are some concerns, such as those expressed by SOCAN, that failure to report certain information to SOCAN would permit "some licensees to average subscription revenues across all subscribers, including free subscribers, thus obfuscating the correct per-subscriber revenue figures and lowering the overall royalty payable."[136] Given the rate structure of the certified tariff, where, for subscription services, the rate payable does not differ between free and paying subscribers, the risk of improper revenue allocation is significantly minimized, if not eliminated altogether.

ii. Play Information for Limited Download and Hybrid Services

[371] There was disagreement among the Parties regarding what information operators of hybrid webcasting services should have to report. In particular, the Draft Tariff set out that a person who operates a hybrid music webcast service would have to report "the number of plays of each file" as well as "the number of times each file was copied onto an end user's storage device."

[372] Pandora, Apple, and the Networks, submit that no separate reporting for hybrid services, were proposed in the Collectives' Joint Proposed Tariff. They also submit that it is not feasible to report this information. Pandora submits that

> since the proposal was not before the parties when the evidence on reporting was presented, and since Pandora has only begun to offer caching in the years since then, Pandora has not had an opportunity to address this issue. Nor has the Board received evidence from anyone else as to reporting in respect of cached copies. Limited downloads operate in a materially different manner, and the reporting provisions for limited downloads do not provide a basis for the current proposals for hybrid services.[137]

[373] In fact, Pandora neither tracks caching copies on end users' devices, nor reports such information to any collective in the world. This is partly because the information does not relate to the monetization, or relative value, of the music. It is also because of the manner in which caching occurs. Pandora's caching function permits subscribers to the Plus service to enjoy a dynamic and automatically updated offline listening experience. Listeners may go offline frequently, sometimes, or never. Caching of a certain number of songs and compilations of songs occurs automatically, and is updated automatically, based on a subscriber's listening habits and frequency of online connections. This happens regardless of whether songs are ever played from the cache. Each time a single subscriber's cache is established, refreshed or updated may involve

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[136] Letter of SOCAN to the Board (13 January 2017) at 4.
[137] Letter of Pandora to the Board (13 January 2017) at 2; Letter of Apple to the Board (13 January 2017) at 1; Letter of the Networks to the Board (13 January 2017) at 1.

copying or recopying scores, or even hundreds, of songs on the subscriber's device. The incidence of copying, whether of a given song or overall, and whether or not broken down by subscriber status, is simply not meaningful information in these circumstances, which is why Pandora neither tracks nor reports it.

[374] While the Joint Proposed Tariff did not contain specific reporting requirements for hybrid webcast services, it did clearly contemplate that they may be necessary, noting that "Additional reporting sections may be required for hybrid services." Thus, this in itself cannot be determinative.

[375] That being said, as noted above, the number of plays of cached files is not required for the calculation of royalty rates. Furthermore, while it is conceivable to use plays of cached files as a basis for distribution of royalties, we have not been provided enough evidence that this information is, in fact, required for distributions. This could have been done, for example, by means of providing a distribution formula that uses this information. As such, for the same reasons as above, we do not include the number of plays of a file and the number of times a file was cached in the reporting requirements.

iii. Reporting of price paid for download of file in a bundle

[376] CSI proposed to add a requirement that a person operating a download service describe the manner in which it allocates a share of the amount paid for a bundle to each file in that bundle.

[377] Given the manner in which royalties payable for the operation of such a service are calculated, this information is not required where the bundle consists of only audio tracks.

[378] However, in instances where a bundle contains files of music videos only, or files of audio tracks and files of music videos, allocation does become important. The evidence shows that such bundles of audio tracks and music videos are actually sold; we refer to these as "mixed bundles" and define these in the Tariff. In the case of such mixed bundles, a single transaction involves the application of rates for two different services: a permanent download music service and permanent download music video service; the revenues from the transaction must be appropriately allocated to determine the amount owing in relation to each service.

[379] Informed by confidential evidence filed with the Board, we establish two methods of allocation. The first—to be used where the information necessary for its calculation is available—allocates to each file the bundle price, multiplied by the proportion of its non-bundled price to the sum of the non-bundle prices of all the files in the bundle. Based on the evidence submitted, this is the method predominantly used in the relevant market.

[380] The second—to be used where the information for the first method is not available—gives each music video file in the bundle twice the weight of a file containing an audio track, and

allocates to each file the bundle price times the proportion of the weight of the file to the sum of all weights of the files in the bundle. The evidence suggests that the weighted average price of the video-clip is almost twice the weighted average price of the audio track.[138]

[381] This allocation is established in subsections 4(3) and 4(4) of the tariff we certify.

iv. File-level Required Information

[382] The Board asked the Parties which of the information listed in subsection 6(1) of the Draft Tariff is appropriate for audio tracks and which for music videos, and which for both.

[383] CSI submitted that all the information listed is appropriate for audio tracks, while SOCAN and SODRAC submitted that all the information is relevant to both audio tracks and music videos, with the exception of paragraph 6(1)(*i*), which requires the reporting of information related to physical-format music albums. We adjust paragraph 6(1)(*i*) accordingly.

v. When Information is Available

[384] The Draft Tariff contemplated that all information enumerated in subsection 6(1) must be reported if it is available. The Draft Tariff clarified that information is available "if it is in the possession or control of the licensee operating the relevant online music service, regardless of the form or the way in which it was obtained."

[385] CSI proposed to expand this requirement by also including information that is in the possession or control of "an authorized distributor, or any other person or entity involved directly in operating the relevant online music service."

[386] Apple and Pandora opposed this addition, arguing that it would extend to wireless carriers who might resell the service, from whom it would be unreasonable to expect that the licensee would have the ability to obtain information.

[387] We agree that a person operating a service should not have to seek out information from third parties, and do not expand the scope of this provision.

[388] If there is evidence that this scope of the reporting obligation leads to a frustration of the reporting requirements (e.g., where the licensee routinely does not have most information, but related persons do)—for which we have no evidence to suggest that this is the case—parties are invited to adduce such evidence in future proceedings.

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[138] Exhibit SODRAC-3 at pp 20-21 (calculations by the Board).

E. GROSS REVENUE AND REVENUE ALLOCATION

i. Revenue Allocation

[389] As noted above, a person may operate more than one service. While in most situations, such as the allocation of subscription revenue, allocation will not be difficult, in certain cases (e.g., advertising on a web page or an app which offers multiple services), allocation is a non-trivial exercise. In those circumstances, in what manner is revenue to be allocated to a given service?

[390] In its email of January 13, 2017, CSI suggested, with the addition of sections 5(*h*) and 5(*i*) to its draft tariff, that licensees operating more than one class of service describe how that licensee attributes gross revenue to each service. In its email of February 15, 2017, SOCAN, instead, proposes that if a licensee operates a service that sells access to different types of streams as a single product, it ought to pay royalties under the "highest and best use" of the product.

[391] There is little or no evidence in this matter that persons operating multiple services improperly allocate revenues among the service to minimize the royalties owed. Furthermore, given the rates set under the Tariff (whereby the rates for many kinds of services are the same percentage of revenues), we expect that the incentives for improper revenue allocation are minimal, or non-existent. Therefore, we do not add the various provisions suggested by CSI or SOCAN related to this issue.

ii. Definition of Gross Revenue

[392] In its Notice of December 9, 2016, the Board instructed the Parties to assume that royalties payable by a licensee for the operation of a "non-interactive, semi-interactive, or interactive webcast service for audio tracks, a hybrid music webcast service for audio tracks, or a semi-interactive webcast service for music video shall be a percentage of gross revenues attributable to the operation of that service."

[393] This is, in fact, the case in the certified tariff. However, as noted by SOCAN in its submission, the definition of "gross revenue" in the Draft Tariff excluded revenues from sources other than end users, such as advertisers, sponsors, etc.—or was at least ambiguous on this point. As such, the definition of "gross revenue" in the Draft Tariff did not adequately capture the very assumption that the Board asked the Parties to make.

[394] CSI's proposal, which addressed this issue, also included amounts received by authorized distributors. On this point, Apple and Pandora submitted that a licensee should only be responsible to pay royalties on revenues that it actually receives and not on those, for instance,

that may be charged by a carrier reselling the service, over which the licensee has neither control nor visibility.

[395] We agree that, given our intention that gross revenue be revenues directly attributable to the operation of a service, the definition of "gross revenue," which is relevant only for the determination or royalties payable by webcast services and hybrid webcast services, should not be ambiguous as to its inclusion of revenues from sources such as advertisers and sponsors. We also agree with Apple and Pandora that this does not include revenues received by third parties.

[396] As such, we modify the definition to read as follows:

> "gross revenue" means, in relation to an online music service, all revenues received by a licensee whether in cash, in kind, in barter or contra, including revenues received for use of the service, and revenues received for promotional activities, such as advertising, that are attributed to the operation of the service.

[397] Certain submissions raised the concern that where a person operated several different kinds of services, a risk of double-counting arose. As such, for clarity, we provide the following example: Where an entity operates a service that provides downloads of audio tracks, and also operates a service that provides webcasts of audio tracks, the calculation of royalties payable in relation to the operation of the download service only considers what was paid by end users for the downloads, and the calculation of royalties payable in relation to the operation of the webcast service only considers revenues attributable to the operation of the webcast service, and does not include revenues attributable to the operation of the download service. This is so even if these two services are offered on the same web page, app, or other interface, and even if they have the same branding. For the purposes of the certified tariff, they are distinct services, with distinct obligations and separate revenues.

[398] The certified tariff explicitly identifies the source of the revenues to be used to determine the royalties payable in relation to any particular service. An entity may provide services that are not covered by this tariff. Revenues attributable to the operation of that service are not part of any royalty base considered by this tariff.

F. CONFIDENTIALITY PROVISIONS

[399] In its Notice of December 9, 2016, the Board asked the Parties to address whether provisions subsection 13(4) and paragraph 13(2)(*e*) of the Draft Tariff were both required.

[400] CSI and SOCAN submitted that these two provisions were intended to cover different situations, and that both are required.

[401] However, Apple, Pandora, and the Networks submitted that

> the provision in paragraph 13(2)(*e*) permitting unilateral disclosure of confidential information to "any person who […] is presumed to know" the information is too broad, vague, and unnecessary, and should be removed. A Collective that wishes to disclose to someone it "presumes" already knows the information can always seek the consent of the information provider pursuant to section 13(1).[139]

[402] Apple, Pandora, and the Networks argued that a mere presumption should not be sufficient to permit the sharing of confidential information.

[403] The Parties' submissions on this issue demonstrate that it is likely that they would have significantly different presumptions about who knows the information in question. In such a case, we agree that sharing another persons' confidential information with a third person who is merely presumed to know is problematic. We amend paragraph 13(2)(*e*) accordingly.

G. COMPLIANCE AND TERMINATION

[404] In their Joint Proposed Tariff, the Collectives set out a "Breach and Termination" section, which sets out under which circumstances a person no longer benefits from the Tariff, in part or in its entirety. In short, these provisions provided that a person who fails to pay or file a report within 5 days of it being due, no longer benefits from the tariff. Moreover, failing to comply with any other provision of the tariff would immediately disentitle the person to benefit from the tariff. Lastly, persons that are insolvent or have filed for bankruptcy would retroactively lose the benefit of the tariff as of the preceding day of the relevant occurrence. These provisions were not included by the Board in the Draft Tariff.

[405] In its submissions, CSI proposed to reintroduce these provisions, albeit with modifications. CSI acknowledges that, in previous decisions, the Board concluded that enforcement issues are outside of the jurisdiction of the Board. For example, in *Commercial Radio, 2016,* the Board refused to impose a penalty for late reporting of music use and financial information by a licensee.[140] However, CSI added that the termination provisions in the Joint Proposed Tariff are not a penalty for late reporting. They neither penalize nor create any other positive remedy as against a non-compliant licensee. Rather, they merely stipulate that a licensee that fails to comply with the terms of the Draft Tariff, as specified in the provision, or a licensee described in the proposed subsection 13(3), is not entitled to engage in the acts that are authorized under the Draft Tariff. Thus, the proposed provisions do not involve the enforcement of a right; instead, they serve as a reasonable limitation on the licence afforded by the Draft Tariff.

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[139] Letter of Apple to the Board (13 January 2017) at 5; Letter of the Networks to the Board (13 January 2017) at 6; Letter of Pandora to the Board (13 January 2017) at 3.
[140] *Supra* note 100 at para 405.

[406] Apple, Pandora and the Networks opposed this addition. Apple and Pandora argue such measures have no place in the tariff. Late payment and reporting can, and has always been handled by recourse to the courts, which remains the appropriate vehicle. The Networks submit that "[t]hey impose an unnecessary and onerous potential penalty on services who make administrative errors […] [T]erms such as these, which would deem licensees to be infringers as the result of minor lapses in their reporting, would certainly be likely to result in costly litigation."[141]

[407] We agree that a person who, for example, pays the royalties established by the tariff, but fails to meet some other administrative requirement in a timely manner should not be automatically deprived of the benefits of the tariff. The consequences, as the Networks point out, could be that activities, previously covered by a licence, could suddenly become infringing—despite a payment having been made. Courts are in a better position to consider the relevant circumstances under which a person would lose the benefits of a tariff and provide an appropriate remedy.

[408] We do note, however, that there is some evidence that late payments were an issue during the tariff period. The evidence of Ms. Rioux showed that there was a total of 17 quarterly payments in 2011 and 2012 that were late, of which 13 caused a delay in royalty distribution.[142] Since Ms. Rioux indicated that CSI transacted with a total of 23 online music services,[143] this implies that there would have been 184 quarterly payments, meaning that about 9 per cent of payments were made late. However, since we are simplifying the mechanics of CSI's tariff for permanent downloads by including a repertoire adjustment, we are not convinced that late payments will remain a significant problem. To the extent that they do, we can reconsider the issue of whether to include a termination provision—including the question of the Board's jurisdiction to include such a provision in a tariff—in due course.

[409] For similar reasons, we do not include provisions from the Joint Proposed Tariff that deprive a licensee of the benefits of the tariff if they are insolvent or have filed for bankruptcy. This Board is not an expert tribunal in the area of bankruptcy, and received no submissions or evidence on the interaction of these provisions with applicable legislation. Without these, the Board cannot conclude in this matter whether such provisions are in fact, fair, and to what extent they are aligned with, or run contrary to, the goals of any applicable legislation.

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[141] Letter of the Networks (15 January 2017) at 4.
[142] Exhibit CSI-2 (highly confidential) at para 12(a).
[143] Exhibit CSI-12 at slide 2.

H. LATE REPORTING

[410] In the Joint Proposed Tariff, the Collectives also proposed that a person who fails to provide the information required under the tariff in a timely fashion would pay a penalty of $50 per day to each collective to which information is outstanding.

[411] We reject the inclusion of the late-filing penalty provision for two reasons. First, the $50-per-day penalty may be punitive in most situations; as such, including this penalty would be inappropriate. This is to be contrasted with the usual provisions that set interest to be paid for late payments, which are intended to be compensatory in nature, maintaining the time-value of money. Second, the Board has declined to include such a provision in several of its tariffs, including on the grounds that it does not have the jurisdiction to include such an enforcement provision.[144]

[412] For similar reasons, we do not include a provision that would deem a payment not to have been made until the accompanying report is filed. While we appreciate that a collective cannot readily distribute moneys received without sufficient information, it has the money, and can collect interest pending the receipt of a report. As such, the time value of money will have been respected.

I. TRANSITIONAL PROVISIONS

[413] The tariff we certify contains certain transitional provisions made necessary because it takes effect in the past and because the tariff structure does not necessarily reflect past practices of users subject to the tariff. The tariff establishes two dates. First, twenty days after the end of the third quarter of 2017, reports are due to CSI, SOCAN, and SODRAC, detailing the use that online music services have made of each collective society's repertoire. Second, the first business day after the end of the fourth quarter of 2017, payments are due to these collective societies in regard of the tariff period.

[414] The use of interest factors in Board decisions is now generalized.[145] Unlike in previous decisions pertaining to online music, we include two tables of interest factors—one applying to payments to SOCAN and CSI, and one applying to payments to SODRAC. This is because, given the different schedules for reporting and payment, payments to SODRAC will be due much later after the end of the relevant quarter than payments to SOCAN and CSI. SODRAC's licensees should not be penalized for such "structural lateness." In future decisions, it would be desirable to certify the same reporting structure for SODRAC as we have for CSI and SOCAN; a

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[144] *Commercial Radio (2016)* at para 405; *Re:Sound Tariff 8 (2014)* at para 227; *Online Music Services (2012)* at paras 159-161.
[145] *SOCAN-Re:Sound CBC Radio Tariff, 2006-2011* (8 July 2011) Copyright Board Decision at para 131.

repertoire analysis relating to SODRAC's video tariffs would go a long way towards making that goal possible.

Gilles McDougall
Secretary General

ANNEX A

The rates proposed by the Collectives in the *Canada Gazette* and in their statements of case are as follows:

SOCAN

Activity	***Canada Gazette*, for 2013 (where licensee carries out a single activity)**	**Statement of Case**
Permanent Downloads	6.8% (no previews) 9.8% (with previews) <u>Minimum fee:</u> 3.4¢ per file in a bundle of 13 or more 4.6¢ otherwise	3.4% <u>Minimum fee:</u> 1.7¢ per file in a bundle of 13 or more 2.3¢ otherwise
Limited Download	12.6% (no previews) 15.6% (with previews) <u>Minimum fee:</u> $1.22 per subscriber if portable downloads 79.8¢ otherwise	3.4% <u>Minimum fee:</u> 60.9¢ per subscriber if portable downloads 39.9¢ otherwise
On-demand Streams (including recommended streams)	15.2% <u>Minimum fee:</u> 96.2¢ per subscriber Free streams: 4.6¢ per file	8.6% <u>Minimum fee:</u> 50.67¢ per subscriber Free streams: lowest of 50.67¢ per visitor or 0.13¢ per file
Hybrid On-demand Streams	Not proposed	8.6% plus 50% of the hybrid tier
Downloads of Video files	6.8%	2.24%
Video Streams	15.2%	5.67%

CSI

Activity	***Canada Gazette*, for 2013 (where licensee carries out a single activity)**	**Statement of Case**
Permanent Downloads	Highest of 9.9% or twice the SOCAN rate <u>Minimum fee:</u> Highest of 4.4¢ in a bundle (6.6¢ otherwise) and twice the SOCAN fee	9.9% <u>Minimum fee:</u> 4.0¢ (2011), 3.9¢ (2012-13) per file in a bundle 7.33¢ (2011), 7.6¢ (2012-13) per file otherwise
Limited Downloads	Highest of 9.9% or twice the SOCAN rate	9.9%

	Minimum fee: Highest of 96¢ per subscriber (portable) (63¢ if non-portable) or 0.20¢ per play or twice the SOCAN fee	Minimum fee: Highest of 99¢ per subscriber per month (portable) (66¢ if non-portable) or 0.17¢ per play
On-demand Streams	Highest of 6.8% or the SOCAN rate Minimum fee: Highest of 43¢ per subscriber or 0.15¢ per play or the SOCAN fee Free streams: not proposed	5.39% Minimum fee: Highest of 35.93¢ per subscriber per month or 0.094¢ per play Free streams: lowest of 35.93¢ per visitor or 0.094¢ per stream
Hybrid On-demand Streams	not proposed	7.65% (if SOCAN has a limited download rate) 9.35% otherwise Minimum fee: Highest of 50.96¢ per subscriber or 0.13¢ per play if SOCAN has a rate Highest of 62.31¢ per subscriber or 0.16¢ per play otherwise
Non-interactive Webcasts	3.5% Minimum fee: 0.05¢ per play	3.24% Minimum fee: 0.022¢ per play
Interactive Webcasts	4.5% Minimum fee: 0.065¢ per play	6.22% Minimum fee: 0.042¢ per play
Hybrid Non-interactive Webcasts	Not proposed	6.68%, minimum fee of 0.045¢ per play (if SOCAN has a limited download rate) 8.42%, minimum fee of 0.057¢ per play otherwise
Hybrid Interactive Webcasts	Not proposed	12.83%, minimum fee of 0.088¢ per play (if SOCAN has a limited download rate) 16.17%, minimum fee of 0.110¢ per play otherwise
SODRAC		
Activity	***Canada Gazette*, for 2013**	**Statement of Case**
Permanent Download of Music Videos	Highest of 9.9% or twice the SOCAN rate Minimum fee: Highest of 4.4¢ in a bundle of 15 or more (6.6¢ otherwise) and twice the	6.5% Minimum fee: 2.7¢ per file in a bundle of 20 or more 9.9¢ per file otherwise

	SOCAN fee

ANNEX B

RATES PROPOSED BY CSI'S EXPERTS

Activity	Rate	Minimum fee
Permanent Downloads	10.3% (2011) 10.2% (2012-2013)	7.6¢ (2011) per single file 7.8¢ (2012-2013) per single file 4.1¢ (2011) per file in a bundle 4.0¢ (2012-2013) per file in a bundle
Limited Downloads	10.3% (2011) 10.2% (2012-2013)	Highest of 0.17¢/file and 99¢/subscriber per month if portable downloads Highest of 0.17¢/file and 66¢/subscriber per month otherwise
On-demand Streams	5.39%	Highest of 35.93¢/subscriber per month and 0.094¢/play
Webcasting		
Non-interactive	3.24%	0.018¢/play
Interactive	6.22%	0.035¢/play
Hybrid On-demand Streams	7.65% (if SOCAN has a limited download rate) 9.35% otherwise	Highest of 50.96¢/subscriber per month and 0.13¢/play (if SOCAN has a limited download rate) Highest of 62.31¢/subscriber per month and 0.16¢/play otherwise
Hybrid Webcasting		
Non-interactive	6.68% (if SOCAN has a limited download rate) 8.42% otherwise	0.037¢/play (if SOCAN has a limited download rate) 0.047¢/play otherwise
Interactive	12.83% (if SOCAN has a limited download rate) 16.17% otherwise	0.072¢/play (if SOCAN has a limited download rate) 0.09¢/play otherwise

ANNEX C – CERTIFIED RATES

AUDIO TRACKS

Activity	SOCAN Royalties	CSI Royalties
Permanent Downloads	–	8.91 per cent of revenues <u>Minimum fee</u> 3.6¢ per track if in a bundle of 13 tracks or more

		6.6¢ per track otherwise
Limited Downloads	–	8.91 per cent of revenues Minimum fee $100 per year
Non-interactive Webcasts	–	1.49 per cent of revenues Minimum fee $100 per year
Semi-interactive or Interactive Webcasts	5.3 per cent of revenues Minimum fee $100 per year	1.49 per cent of revenues Minimum fee $100 per year
Hybrid Webcasts	3.48 per cent of revenues Minimum fee $100 per year	3.13 per cent of revenues Minimum fee $100 per year

MUSIC VIDEOS

Activity	**SOCAN Royalties**	**SODRAC Royalties**
Permanent Downloads	–	5.64 per cent of revenues Minimum fee 6.6¢ per music video containing only one musical work 2.6¢ per musical work in a music video containing two or more musical works
Semi-interactive or Interactive Webcasts	2.99 per cent of revenues Minimum fee $100 per year	–