

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Citation Totem Médias Inc. v CONNECT Music Licensing Service Inc., 2025 CB 8

Member The Honourable Luc Martineau

Application to Fix Royalty Rates for the Reproduction of Musical Works in the Repertoire of CONNECT Music Licensing Service Inc. by Totem Médias Inc.

Reasons for Decision

I. Overview

[1] On May 5, 2023, Totem Médias Inc. (“Totem”), applied to the Board pursuant to subsection 71(1) of the *Copyright Act* to fix the royalties that it pays to CONNECT Music Licensing Service Inc. (“CONNECT”) for the right to reproduce published sound recordings in CONNECT’s repertoire for the purpose of providing a background music service (the “Application”).

[2] For the reasons below, I fix the following from July 1, 2022, to June 30, 2025:

- a royalty rate of [Redacted text] of Totem’s revenues, with no minimum;
- terms that permit Totem to continue its current arrangement with Création Newmood Inc. (“Newmood”).

A. Background

[3] Totem is a background music supplier that provides services to business customers (“Customers”) that play recorded music to the public in their commercial establishments, such as grocery stores, barbershops, and other retail locations. Totem works closely with Newmood, which is not a party to this proceeding.

[4] CONNECT is a “collective society” within the meaning of s. 2 of the *Copyright Act*. CONNECT administers its members’ copyright—in this case, the reproduction right—in sound recordings in Canada.

[5] Totem (and its predecessor, PJJ Productions) has held a licence from CONNECT for the right to reproduce sound recordings from September 1, 2006, to June 30, 2022.¹ During this period, the licence had the following royalty rates:

- 15% of revenues, with a minimum of \$6 per customer for programs without in-store advertising; or
- 20% of revenues for programs with in-store advertising, with a minimum of \$8 per customer.

[6] On December 2, 2022, CONNECT provided Totem with a proposal—with those same rates—to renew the licence retroactively to July 1, 2022, in the form of a ready-to-sign electronic agreement to renew as of July 1, 2022.²

[7] Totem and CONNECT engaged in negotiations to renew the licence, but failed to reach an agreement.³

B. Position of the Parties

[8] In its application, Totem requests that the Board fix a royalty rate at [Redacted text] of revenues with no minimum fee.⁴

[9] Totem's main argument is that its effective royalty rate under the licence proposed by CONNECT amounts to [Redacted text] of its revenues, and that this is not only higher than all other copyright royalties it pays to a single collective, but also more than all other copyright royalties combined.

[10] CONNECT's position is that Totem should pay in accordance to the licence it provides to other background music services (the "CONNECT Licence").⁵ In practice, this means that Totem should pay [Redacted text] per Customer, and [Redacted text] per Customer if the programming includes in-store advertising.

[11] CONNECT's main argument is that the rates in the CONNECT Licence are accepted by many other similar users, and have been accepted over an extended period.⁶ Secondly, it argues that Totem's arrangement with Newmood artificially lowers Totem's revenues.

¹ Agreed Statement of Facts (February 6, 2024) at para 9 [*Agreed Statement of Facts*].

² *Agreed Statement of Facts*, *supra* note **Erreur ! Signet non défini.** at para 22.

³ *Agreed Statement of Facts*, *supra* note **Erreur ! Signet non défini.** at paras 23–29.

⁴ Totem, Case Record, Statement of Case (April 24, 2024) at para 34 [Totem, *Statement of Case*].

⁵ CONNECT, Case Record, Statement of Case (April 24, 2024) at para 2 [CONNECT, *Statement of Case*]. (CONNECT refers to this licence as the "MSS HD Licence.")

⁶ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at paras 2, 70.

C. Issues

[12] Given the filings by the Parties, I have identified the following main issues:

1. How should the Totem-Newmood relationship be treated? (Part II)
2. What is the appropriate rate base? (Part III)
3. What is the most appropriate proxy for the uses under consideration? (Part IV)
4. Should the proxy be adjusted for repertoire-use? (Part V)
5. Should there be a higher rate for advertisting? (Part VI)
6. Should there be a minimum fee? (Part VII)
7. What should the terms of the licence be? (Part VIII)
8. Public interest considerations (Part IX)

II. How should the Totem-Newmood relationship be treated?

[13] The relationship between Totem and Newmood was raised by CONNECT as an issue intrinsic to several other issues in this proceeding. I consider it first.

[14] CONNECT argues that the arrangement between Totem and Newmood is improper, intended to reduce the royalties paid to CONNECT by reducing the revenue base from which royalties should be calculated.⁷ The Board should treat Totem and Newmood as a single joint enterprise - sometimes referring to them jointly in its submissions as the “Totem/Newmood enterprise.”

[15] Based on the evidence in this proceeding, I conclude that Totem and Newmood are sufficiently close such that transactions between them cannot be presumed to be arm’s length.

A. Totem’s and Newmood’s business activities

[16] Information about Totem and Newmood’s business activities and relationship was primarily provided by Totem’s witness, Bruno Fréchette, Vice-President of Totem.⁸ Additional information was also contained in Totem’s responses to questions from the Board and in Totem’s responses to interrogatories that CONNECT filed with the Board.⁹

[17] Newmood enters into agreements with Customers, which each pay [Redacted text]/month. Totem places licensed copies of sound recording of musical works on the hard drive of a computer provided by Newmood. Newmood then installs the computer at

⁷ CONNECT, Responding Case Record, Responding Statement of Case (May 14, 2024) at paras 3–4 [CONNECT, *Responding Statement of Case*].

⁸ Totem, Case Record, Witness Statement of Bruno Fréchette (April 24, 2024) [Fréchette Witness Statement].

⁹ Totem, Responses to Board Order CB-CDA 2024-049 (August 1, 2024) [Totem, *Responses to Board Questions*].

the Customer's establishment. Newmood remits [Redacted text] to Totem for each client, on account of the background music service, and keeps [Redacted text] on account of the provision of hardware and related services.¹⁰

[18] Newmood provides monthly reports to Totem on the number of establishments where Newmood has installed a computer, as well as the required client information for licencing purposes (e.g., client name, address, contact name, and number). This information is used by Totem to calculate the royalties it must pay and to file reports.

[19] The computers installed at Customers' establishments connect to Totem's server to receive music updates.¹¹ Each month, the computer at a Customer's establishment communicates with the Totem server to send a list of recordings contained on the hard drive. This information is compiled and used by Totem to produce any required reports.¹²

[20] Newmood also provides its Customers other services, such as on-hold messaging and (royalty-free) music and digital signage.

[21] To-date, Newmood has been Totem's only customer. Although they have a very close business relationship, Totem states that it has no written agreement with Newmood.¹³

[22] Pierre Pothier is the President of both Totem and Newmood. Bruno Fréchette is the Vice-President of both Totem and Newmood.

B. Analysis and Conclusion

[23] There is no meaningful difference in the control of the two companies. Given the common control between Totem and Newmood, I conclude that the relationship between the two companies is sufficiently close that any transactions between them cannot be presumed to be priced at arm's length for the purposes of this proceeding.

III. What is the appropriate rate base?

[24] When a royalty rate is set as a percentage of revenues, the portion of the revenues to which the royalty rate applies is referred to as the rate base.

[25] Totem and Newmood allocate revenues received from Customers as follows: [Redacted text] to Totem for selecting and providing licensed copies of music, and [Redacted text] to Newmood for the hardware, installation, and maintenance. Totem

¹⁰ Fréchette Witness Statement, *supra* note **Erreur ! Signet non défini.** at para 6.

¹¹ Fréchette Witness Statement, *supra* note **Erreur ! Signet non défini.** at para 14.

¹² Totem, *Responses to Board Questions*, *supra* note **Erreur ! Signet non défini.**, Question 2.

¹³ Totem, Responses to Interrogatories, Q2 (August 1, 2024) [Totem, *Reponses to Interrogatories*].

submits that the allocation of revenues they use between themselves and Newmood is appropriate and, as such, Totem's revenues should be the rate base.

[26] CONNECT submits that there is no basis for this allocation, and that the entire amount Customers pay Newmood's per month ([Redacted text]), should be the rate base.¹⁴ This would include revenues associated with any related software and hardware, as well as support for that software and hardware.¹⁵

[27] Given the evidence in this proceeding, I conclude that Totem's revenues are the appropriate rate base.

A. The Board's Jurisprudence

[28] A user may have multiple sources of revenues, and not all of them may be attributable to the use of copyrighted subject-matter at issue. Even where a user has a single source of revenue, there may be many other inputs beyond the copyrighted subject-matter that contribute to the value to the end-user of the good or service provided.

[29] When at issue, the Board attempts to ensure that the revenues to which a revenue-based royalty rate will apply—the rate base—are connected to the use of copyrighted subject-matter covered by the tariff or licence.

[30] For example, in *CMRRA/SODRAC Inc. - Tariff for Online Music Services, 2005-2007*,¹⁶ CSI requested that the rate base for a reproduction tariff include all revenues "received in connection with the products and services that are subject to the licence covered by the tariff, including advertising revenues."¹⁷ One of the reasons why the Board declined to do so was that it did not know "whether, and to what extent, these other revenue streams are attributable to the use of CSI's repertoire."¹⁸

[31] The Board re-iterated this concern of whether certain revenues are attributable to the use of a collective's repertoire in *SOCAN - Tariff 22.A (Internet - Online Music Services), 1996-2006*.¹⁹ In *SOCAN, NRCC, CMRRA/SODRAC Inc. - Tariff for Satellite Radio Services, 2005-2010*,²⁰ the Board excluded revenues from the sale of satellite

¹⁴ CONNECT, Reply to Final Submissions (December 16, 2024) at paras 4–5. [CONNECT, *Reply to Final Submissions*]

¹⁵ CONNECT, *Responding Statement of Case*, *supra* note **Erreur ! Signet non défini.** at paras 24–25.

¹⁶ *CMRRA/SODRAC Inc. - Tariff for Online Music Services, 2005-2007* (reasons) (March 16, 2007) [CMRRA - *Online Music Services (2005-2007)*].

¹⁷ *CMRRA - Online Music Services (2005-2007)*, *supra* note **Erreur ! Signet non défini.** at para 108.

¹⁸ *CMRRA - Online Music Services (2005-2007)*, *supra* note **Erreur ! Signet non défini.** at para 109.

¹⁹ *SOCAN - Tariff 22.A (Internet - Online Music Services), 1996-2006* (reasons) (October 18, 2007) at para 177 [SOCAN *Online Music Services (1996–2006)*].

²⁰ *SOCAN, NRCC, CMRRA/SODRAC Inc. - Tariff for Satellite Radio Services, 2005-2010* (reasons) (April

radio receivers on the basis that “no other group of users pay royalties on the hardware subscribers require to receive the service.”²¹

[32] Relatedly, in instances where the Board has set rates as a function of use of copyrighted subject-matter and used retail pricing²² or business-to-business pricing as a proxy²³, it adjusted the proxy, attempting to isolate the portion of the price attributable to the use and subject-matter at issue.

B. Analysis and Conclusion

[33] The payments made by Customers to Newmood are on account of multiple services provided to them:

- on-site copies of sound recordings from which they can play music in their establishments—which are routinely updated;
- the music already being licensed for performance in public when received by the Customer;
- a computer that is maintained on their behalf; and
- (potentially) services such as on-hold messaging, voice messaging, in-store background music, and in-store digital signage.²⁴

[34] The first three items are sold to the Customer as a single package, for a single price.

[35] Throughout its pleadings, CONNECT has attempted to characterize Totem's arrangement with Newmood's as being improper and a surprise to CONNECT. The primary consequence of this arrangement, according to CONNECT, is that Totem's revenues are not the appropriate rate base.

[36] For completeness, I note that the evidence does not support the claim that the nature of the Totem-Newmood relationship was purposefully withheld from CONNECT. In his Supplementary Witness Statement, Mr. Fréchette stated that AVLA (the collective society's name, prior to being renamed CONNECT), was aware of this arrangement when AVLA entered into a licensing agreement with PJJ – the predecessor to both Totem and Newmood. Mr. Fréchette described a telephone call that PJJ had with AVLA, as well as naming the people on this telephone call. According to his testimony, “the

8, 2009) [*Satellite Radio (2005–2010)*].

²¹ *Satellite Radio (2005–2010)*, *supra* note **Erreur ! Signet non défini.** at para 212.

²² *Access Copyright - Tariff for Elementary and Secondary Schools, 2005-2009* (reasons) (June 26, 2009) at paras 157–163; *CPCC - Tariff for Private Copying, 2010* (reasons) (November 2, 2010) at paras 77–96.

²³ *Tariff for the Retransmission of Distant Television Signals, 2014-2018*, CB-CDA 2019-056 at paras 428–451.

²⁴ CONNECT, Final Submissions (November 29, 2024) at para 56. [CONNECT, *Final Submissions*]

option of creating a separate entity to help streamline [the] process [of accounting for revenues attributable to music] was found to be acceptable to AVLA.”²⁵

[37] This evidence is not contradicted.

[38] Regardless, I do not have to conclude whether CONNECT knew or should have known about this arrangement in order to choose a rate base in this proceeding.

[39] I have already concluded that the relationship between Totem and Newmood is sufficiently close so that it cannot be assumed that transactions between them will be priced the same as if they were arms-length (para. **Erreur ! Source du renvoi introuvable.**, above).

[40] As the rate base was a live issue in this proceeding, I had put the following question to Totem, and permitted CONNECT to reply:

If the Board were to determine that the appropriate rate base is the price paid by end-users, but that revenues derived from ancillary services (such as renting, maintaining and replacing hardware and software) should not be part of the rate base, how should the Board determine the appropriate portion of the end-user price to attribute to those ancillary services?²⁶

[41] In response, Totem explained that the current rate for hardware ([Redacted text], was based largely on PJJ/Newmood’s historic rates for similar services. According to Totem, when—at first—PJJ only offered on hold messaging, PJJ supplied the end customer with a device. Embedded in the customer rates were the costs for the device rental, support and maintenance, which were evaluated between [Redacted text] and [Redacted text], depending on the type of device supplied to the customer.²⁷

[42] Totem submits that, based on current market rates, the [Redacted text] is a conservative estimate of the hardware costs. The computer supplied by Newmood is a Mac Mini computer. Totem points to third-party rental services for Mac Mini models comparable to those supplied by Newmood, where prices range from USD 29.99 to USD 59.99 ²⁸ (being approximately CAD 41.50 to CAD 83.00 at time of writing) per month.

²⁵ Totem, Motion to File a Supplementary Witness Statement, Schedule A: Supplementary Witness Statement – Bruno Fréchette (May 29, 2024) at paras 8-10.

²⁶ Order CB-CDA 2024-048, Part A (Questions to Totem) (June 26, 2024) Question 5 [Copyright Board, *Questions to Totem*].

²⁷ Totem, *Responses to Board Questions*, *supra* note **Erreur ! Signet non défini.** at pp 4–5.

²⁸ Totem, *Responses to Board Questions*, *supra* note **Erreur ! Signet non défini.** at p 4 (providing the example of macminivault.com).

[43] CONNECT explicitly declined to reply to Totem's response to this question.²⁹ Nevertheless, in its Final Submissions, CONNECT criticized Totem's proposed revenue allocation on the grounds that "[t]he on-site computers which contain the sound recordings are often used for more than one service, namely on hold messaging and/or digital signage."³⁰ CONNECT submits that

[t]he cost of supplying, maintaining, and upgrading the Totem/Newmood enterprise's computer systems cannot be attributable only to background music when those systems are shared between multiple service offerings.³¹

[44] While additional evidence may have permitted a more accurate allocation of revenues, I am satisfied that [Redacted text] for the rental of a computer akin to a Mac Mini, in addition to the provision of occasional services, approximates the price that Totem and Newmood would have reached had they been arms-length entities. It may even be a conservative approximation.

[45] Therefore, the [Redacted text] remitted to Totem by Newmood is an appropriate rate base.

IV. What is the most appropriate proxy for the use under consideration?

[46] The Board often sets royalty rates for uses of copyrighted subject-matter by considering the royalty rates that are paid for similar uses. Board jurisprudence often refers to these reference prices as benchmarks or proxies. Proxies can include Board tariffs, agreements between a user and a collective society, business-to-business prices,³² or retail prices.³³

[47] Totem submits that the best proxy for CONNECT's royalty rates for the reproduction of sound recordings is the royalty rate for the reproduction of musical works offered by other collective societies.³⁴

[48] The rights to reproduce musical works are managed by two collective societies in Canada: the Canadian Musical Reproduction Rights Agency ("CMRRA") and the Society of Composers, Authors and Music Publishers of Canada ("SOCAN"). While not a strict rule, broadly speaking, SOCAN generally manages reproduction rights of

²⁹ CONNECT, Reply to Totem's Responses to Board Questions (August 12, 2024) at para 6.

³⁰ CONNECT, *Final Submissions*, *supra* note **Erreur ! Signet non défini.** at para 56.

³¹ CONNECT, *Final Submissions*, *supra* note **Erreur ! Signet non défini.** at para 61.

³² *Tariff for the Retransmission of Distant Television Signals, 2014-2018*, CB-CDA 2019-056 at paras 428–451.

³³ *Access Copyright - Tariff for Elementary and Secondary Schools, 2010-2015* (reasons) (February 19, 2016) at paras 468, 479.

³⁴ Totem, *Responses to Board Questions*, *supra* note **Erreur ! Signet non défini.** at p 3.

French-language musical works, while the CMRRA generally administers reproduction rights of other musical works.

[49] CONNECT submits that its agreement with other background music suppliers is the most appropriate proxy.³⁵

[50] I conclude that the agreement between the CMRRA and Totem is the most appropriate proxy in this proceeding, based on my analysis below of the following considerations:

- the closeness of the target activity and the proposed proxies;
- the proposed proxies' relationships with other rates for background music;
- the proposed proxies' royalties rates in the context of Totem's finances;
- consideration of paragraph 66.501(a) of the *Copyright Act*,

A. The closeness of the target use and the proposed proxies

[51] The Board has previously stated that a proxy can be used if the uses covered by that proxy are sufficiently similar to the target use. If the uses are not sufficiently similar, the price may need to be adjusted. However, “[t]he more uncertain the adjustments necessary to determine a fair and equitable tariff are, the less the proxy is usable. If the adjustments are subject to a great deal of uncertainty, the proxy may not be usable at all.”³⁶

1. Analysis

[52] CONNECT's proposed proxy, the CONNECT Licence, is the closest to the use in question: it is for the same acts (reproduction for the purpose of a background music service) and the same subject-matter (sound recordings).

[53] There are two differences between the uses in the proxies proposed by Totem and the use at issue. First, they are in respect of musical works, not sound recordings. Second, the percentage of music that Totem uses that is in either CMMRA's or SOCAN's repertoire may differ from the percentage of music that is in CONNECT's repertoire.

[54] With respect to the proxies being for musical works, as opposed to sound recordings, Totem submits that the Board has consistently held that—for similar uses—

³⁵ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 5; CONNECT, *Responding Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 42.

³⁶ *Re: Sound and SOCAN – Stingray Pay Audio and Ancillary Services Tariff (2007–2016)*, 2021 CB 5 at para 45, citing with approval *Access Copyright – Tariffs for Post-Secondary Educational Institutions, 2011–2017* (reasons) (December 6, 2019) at para 187 [*Pay Audio Tariff*].

the value of rights in sound recordings should be the same as the value of the rights in the musical works embodied in those sound recordings.³⁷

[55] I agree that the Board has a longstanding approach whereby no adjustments are required to account for the difference in subject-matter (musical work versus sound recording) when considering proxies. First used in *NRCC - Tariff 1.A (Commercial Radio)*, 1998-2002,³⁸ it was reiterated in more recent decisions such as *Re:Sound - Tariff 8 (Non-Interactive and Semi-Interactive Webcasts)*, 2009-2012,³⁹ and in *Re:Sound and SOCAN – Stingray Pay Audio and Ancillary Services Tariff (2007–2016)*.⁴⁰

[56] There are no reasons in this proceeding for me to depart from this approach. Therefore, I agree with Totem that, were either the CMRRA licence or SOCAN licence to be used as a proxy, no adjustment would be required to account for the difference in subject-matter.

[57] With respect to a possible difference in repertoire-use, Totem acknowledges that an adjustment may be necessary.⁴¹

[58] I consider the issue of repertoire-use below, and conclude that such adjustments can be reasonably estimated (see paras. **Erreur ! Source du renvoi introuvable.**– **Erreur ! Source du renvoi introuvable.** and **Erreur ! Source du renvoi introuvable.**– **Erreur ! Source du renvoi introuvable.**).

[59] Therefore, while the uses in the CMRRA and SOCAN licences are not as close to the target uses as those in the CONNECT Licence, the adjustments to account for these differences are not so uncertain so as to make these proxies unusable.

2. Conclusion

[60] I conclude that this consideration favours using the CONNECT Licence as a proxy, even if the CMRRA and SOCAN licences could be useable proxies.

³⁷ Totem, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 25 Totem, *Responses to Board Questions*, *supra* note **Erreur ! Signet non défini.** at p 3.

³⁸ *NRCC - Tariff 1.A (Commercial Radio)*, 1998-2002 (reasons) (August 13, 1999).

³⁹ *Re:Sound - Tariff 8 (Non-Interactive and Semi-Interactive Webcasts)*, 2009-2012 (reasons) (May 16, 2014) at para 151 (“the Board has decided in the past, and we have already decided in this instance, that the right to communicate a sound recording of a musical work is worth the same as the right to communicate that musical work”) [*Re:Sound Tariff 8*].

⁴⁰ *Pay Audio Tariff*, *supra* note **Erreur ! Signet non défini.** at para 280.

⁴¹ Totem, *Responses to Board Questions*, *supra* note **Erreur ! Signet non défini.** at p 3.

B. The proposed proxies' relationships with other rates for background music

[61] Next, I compare the royalty rates in the proposed proxies' with other royalty rates paid by Totem to collective societies in respect of its background music services.

[62] Totem submits that one of the main indicators that the rates in the CONNECT Licence are unfair is that these rates are between [Redacted text] to [Redacted text] times higher than the rates Totem pays to other collectives, and that they are almost equal to the total amount that Totem pays for all other music-related rights combined.⁴²

1. CONNECT's Licence can be compared with other instruments

[63] As a preliminary matter, CONNECT submits that "the rates payable to CONNECT should not be determined by what Totem may pay to other collectives for other rights."⁴³ It argues that "Totem needs to make reproductions of sound recordings for the successful operation of its business."⁴⁴

[64] However, this claim can be made by any of the other collective societies from which Totem obtains a licence: Totem needs to be able to make reproductions of musical works, and to authorize Customers to perform musical works and sound recordings in public.

[65] I am of the view that—in this respect—the CONNECT licence is not so different from the other licences in terms of its importance to Totem. As such, it is useful to compare the rates in the proxies proposed by Totem and CONNECT to the other rates charged to Totem by the other collectives.

2. Royalty rates applicable to Totem

[66] Totem filed a list of all other legal instruments (either tariffs or direct licencing agreements) pursuant to which it makes royalty payments to other collectives, copies of any such direct licencing agreements, and the amounts it pays under each. These amounts were not in dispute by the Parties.

[67] These instruments (either tariff or direct licence agreement), and the royalty rates applicable to Totem are set out in **Erreur ! Source du renvoi introuvable.**, below. To assist with comparison, the royalty rates—however set in the actual instrument—are also shown as percentage of revenue, and as a dollar amount per customer, per month.

⁴² Totem, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 17.

⁴³ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** para 71.

⁴⁴ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 71.

For reference, I have also included Totem's and CONNECT's requested rates, but these are not used for the comparison of the proposed proxies.

Table 1 : Royalty rates for Totem

Collective (instrument)	Rights	Rate in Instrument applicable to Totem	As % of revenue (Calculated)	As \$ per customer, per month (Calculated)
SOCAN (Tariff 16) ⁴⁵	Public performance of musical works	\$5/Customer/quarter	[Redacted text]	\$1.67
Re:Sound (Tariff 3.A) ⁴⁶	Public performance of sound recordings	\$2.15/Customer/quarter	[Redacted text]	\$0.72
CMRRA (licence) *Proxy proposed by Totem	Reproduction of musical works	[Redacted text]	[Redacted text]	[Redacted text]
SOCAN (licence) *Proxy proposed by Totem	Reproduction of musical works	[Redacted text]	[Redacted text]	[Redacted text]
SOPROQ (licence)	Reproduction of sound recordings	[Redacted text]	[Redacted text]	[Redacted text]
CONNECT (licence) *Proxy proposed by CONNECT	Reproduction of sound recordings	[Redacted text] [Redacted text]	[Redacted text] [Redacted text]	[Redacted text] [Redacted text]

⁴⁵ SOCAN - Various Tariffs, 2006-2013, Tariff No. 16 (2010-2011) (approved tariff) (June 30, 2012), C Gaz I, Supplement Vol. 146, No. 26. (The tariff's royalty rate is the greater of 7.5% of revenues and \$5.00/premise/quarter).

⁴⁶ Re:Sound Tariff 3.A – Background Music Suppliers (2014-2018) 2020 CB 015-T (October 10, 2020), C Gaz I, Supplement Vol. 154, No. 41. (The tariff's royalty rate is the greater of 3.2% of revenues and \$2.15/premise/quarter) [Re:Sound Tariff 3.A].

CONNECT's requested rate	Reproduction of sound recordings	[Redacted text] [Redacted text]	[Redacted text] [Redacted text]	[Redacted text] [Redacted text]
Totem's requested rate	Reproduction of sound recordings	[Redacted text]	[Redacted text]	[Redacted text]

3. Royalty rates applicable to Totem, normalized for repertoire-use

[68] However, because each collective's repertoire can be different, each of these instruments may have a different implicit repertoire-use adjustment.⁴⁷

[69] It is more useful to compare what these royalty rates would be if Totem's repertoire-use for each legal instrument were 100% (that is, if the rates were based on the premise that all music used by Totem were in the repertoire of each collective).⁴⁸ As such, I remove the implicit repertoire-use adjustment in each of the instruments, adjusting both the royalty rates and any minimum fees, accordingly. This calculation is based on the following:

- for the reproduction of sound recordings for CONNECT and SOPROQ, I use the repertoire-use figures provided by CONNECT⁴⁹ ([Redacted text] for CONNECT, and [Redacted text] for SOPROQ);
- for the reproduction of musical works for the CMRRA and SOCAN, given that these collectives also have historically had an English-language / French-language split, I estimate that Totem's repertoire-use is sufficiently similar to those for CONNECT and SOPROQ⁵⁰, respectively, so as not to require an adjustment for this estimate;
- for the public performance of musical works for SOCAN, I use a recent tariff with comparable use, *Re:Sound and SOCAN – Stingray Pay Audio and Ancillary Services Tariff (2007–2016)*, where the repertoire-use (95.8%) of SOCAN's repertoire was based on an agreement;⁵¹ and
- for the public performance of sound recordings for Re:Sound, I compare the royalty rates in the Re:Sound and SOCAN tariffs for background music:

⁴⁸ The Expert Report does something similar when it compares the rates from other countries to the sum of the rates paid to both CONNECT and SOPROQ (which together will amount to approximately 100% of repertoire-use). See Dobner Report, *infra* note **Erreur ! Signet non défini.** at p 7.

⁴⁹ CONNECT, *Statement of Case* at paras 54–55.

⁵⁰ CONNECT, Case Record, Witness Statement of Janet Turner (April 24, 2024) at para 22 (“[I]f a supplier only wanted to provide Québécois or Francophone music, it might choose to bypass CONNECT and license the desired repertoire only from SOPROQ, which specializes in those genres.”) [Turner Witness Statement].

⁵¹ *Pay Audio Tariff*, *supra* note **Erreur ! Signet non défini.**

*Re:Sound Tariff 3.A – Background Music Suppliers (2014-2018)*⁵² and *SOCAN - Tariff 16 (Background Music Suppliers), 2007-2009*.⁵³ This results in an implied repertoire-use of 43%.

[70] Normalized in this way, these estimates can be directly compared with the rates in the proxies proposed by CONNECT and Totem. Again, I include Totem's and CONNECT's requested rates for reference—but do not use them to evaluate the Parties' proposed proxies.

Table 2: Estimated repertoire-use unadjusted royalty rates for Totem

Collective (Instrument)	Rights	Calculated rates paid by Totem for actual repertoire-use (from Table 1)		Estimated rates for 100% repertoire-use (calculated)	
		As % of revenue	As \$ per customer, per month	As % of revenue	As \$ per customer, per month
SOCAN (Tariff 16)	Public performance of musical works	[Redacted text]	\$1.67	[Redacted text]	\$1.74
Re:Sound (Tariff 3)	Public performance of sound recordings	[Redacted text]	\$0.72	[Redacted text]	\$1.67
CMRRA (licence) *Proxy proposed by Totem	Reproduction of musical works	[Redacted text]	[Redacted text]	[Redacted text]	[Redacted text]
SOCAN (licence) *Proxy proposed by Totem	Reproduction of musical works	[Redacted text]	[Redacted text]	[Redacted text]	[Redacted text]

⁵² *Re:Sound Tariff 3.A – Background Music Suppliers (2014-2018)* 2020 CB 015-T, C Gaz I, Supplement, Vol. 154, No. 41.

⁵³ *SOCAN - Tariff 16 (Background Music Suppliers), 2007-2009* (approved tariff) (June 20, 2009), C Gaz I, Supplement Vol. 143, No. 25.

SOPROQ (licence)	Reproduction of sound recordings	[Redacted text]	[Redacted text]	[Redacted text]	[Redacted text]
CONNECT (licence) *Proxy proposed by CONNECT	Reproduction of sound recordings	[Redacted text] [Redacted text]	[Redacted text] [Redacted text]	[Redacted text] [Redacted text]	[Redacted text] [Redacted text]
CONNECT's requested rate	Reproduction of sound recordings	[Redacted text] [Redacted text]	[Redacted text] [Redacted text]	[Redacted text] [Redacted text]	[Redacted text] [Redacted text]
Totem's requested rate	Reproduction of sound recordings	[Redacted text]	[Redacted text]	[Redacted text]	[Redacted text]

[71] The main rate in the CONNECT Licence is significantly higher than all the other rates except for those of SOPROQ. And the advertising rate in the CONNECT Licence is [Redacted text] the rate of SOPROQ.

4. Royalty rates for main and ancillary uses

[72] In *SOCAN - Tariff 16 (Background Music Suppliers), 2007-2009*,⁵⁴ the Board surveyed its jurisprudence at that time, and observed that it has set royalty rates for acts that were “not as central” to a user’s activities. For example, in the case of commercial radio, the royalty rate for making reproductions was lower than the royalty rate for its public performance. In the case of ringtones, the reproduction “was worth more than the transmission [to the customer by way of download].”⁵⁵

[73] Based on this, the Board concluded that, in the case of a background music service (where the customer downloads copies to local storage), the transmission of music to a customer should attract a lower royalty rate than the authorization to perform that music.⁵⁶

[74] The Board has applied this approach in cases where a reproduction was made in a preparatory act made to permit a desired outcome—though the terminology used in

⁵⁴ *SOCAN - Tariff 16 (Background Music Suppliers), 2007-2009* (reasons) (June 19, 2006) [*SOCAN Tariff 16*].

⁵⁵ *SOCAN Tariff 16*, *supra* note **Erreur ! Signet non défini.** at paras 57–58.

⁵⁶ *SOCAN Tariff 16*, *supra* note **Erreur ! Signet non défini.** at para 62.

decisions varies (e.g., “ancillary”, “incidental”). For example, for commercial radio stations⁵⁷ as well as non-commercial radio stations,⁵⁸ the royalty rate for the reproduction of musical works is lower than the rate for the communication to the public by telecommunication.

[75] Totem submits that the reproductions it makes are “incidental” to the desired outcome: the public performance of music. This makes the fact that the royalty rates in the CONNECT Licence are higher than those in licences or tariffs for the performance in public all the more notable.⁵⁹

[76] CONNECT submits that, in this proceeding, the reproduction right is not “ancillary” to the public performance right:

The ability to make reproductions of CONNECT’s repertoire is fundamental to Totem’s operations. In fact, Totem appears to use *only* the reproduction right, not the performance right. Totem’s business model relies on its ability to make unlimited copies of CONNECT’s repertoire for digital programs supplied to customers.⁶⁰

[77] CONNECT argues that the reproductions are not ancillary to Totem because Totem is not directly carrying out the performances in public; and because Totem could decide to not provide the Customers with pre-licensed music, as this is merely “a benefit that suppliers provide to customers, but not essential to the operation of the suppliers’ businesses.”⁶¹

[78] Based on the following, I find that, based on the evidence in this proceeding, the reproduction of music is ancillary to the performance of the music, including its authorization.

[79] First, it is not the case that Totem only uses the reproduction right. It authorizes the public performance of sound recordings. This is a use of the public performance right and it cannot do so without the authorization of the owner of copyright.

⁵⁷ SOCAN Tariff 2.A – Commercial Television Stations (2014-2024), 2024 CB 8-T-1 (November 23, 2024), C Gaz I, Supplement, Vol. 158, No. 47 (1.9% of revenues); Commercial Radio Reproduction Tariff (2024-2026), 2023 CB 3-T (July 8, 2023), C Gaz I, Supplement, vol 157, No. 27 (The highest payable rate is 1.65% of revenues).

⁵⁸ Non-Commercial Radio Reproduction Tariff (CMRRA: 2003-2010, CSI: 2011-2017), 2022 CB 12-T (September 3, 2022) C Gaz I, Supplement, Vol. 156, No. 36 (The royalties are \$50 per year for reproductions for radio-broadcasting); SOCAN Tariff 1.B – Radio – Non-Commercial Radio other than the Canadian Broadcasting Corporation (2018-2021), 2020 CB 005-T (August 8, 2020), C Gaz I, Supplement, Vol. 154, No. 32 (The royalties are 1.9 per cent of the station’s gross operating costs).

⁵⁹ Totem, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 19; Totem, *Final Submissions* (November 29, 2024) at para 40 [Totem, *Final Submissions*].

⁶⁰ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 72.

⁶¹ CONNECT, *Responding Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 37.

[80] Second, I do not accept the characterization that providing the public performance licences to Customers is a “mere convenience.”⁶² The revenues obtained by Totem relate to the total value the Customers obtain from its service. Some of that value is attributable to the ability to perform in public the musical works and sound recordings of musical works in their establishments. Some of that value is also attributable to the convenience and/or efficiencies derived from having reproductions of sound recordings directly on a computer on its premises, as opposed to streaming them over the internet.⁶³

[81] Given the evidence, the licensing of the public performance on behalf of customers appears to be a fundamental aspect of Totem’s business: there are no Customers that obtain Totem’s hard drive that do not also obtain a licence to perform that music.⁶⁴

[82] Moreover, even where preparatory actions become an “essential” part of a business process⁶⁵, this does not mean that these cannot be ancillary in relation to the main use. For example, in *CBC v. SODRAC*, the Board held that the making of broadcast-incidental copies of musical works—even though essential to CBC’s broadcasting activities—nevertheless was ancillary to their broadcasting.⁶⁶

[83] Given the Board’s jurisprudence and the facts in this proceeding, I conclude that the making of reproductions by Totem is ancillary to the performance of music by the Customers.⁶⁷ The making of reproductions is a preparatory step that enables the main activity desired by the Customers: to be able to play music on their premises.

[84] As such, an appropriate rate for reproductions in this case would tend to be lower than that for the performance in public (or the authorization of that performance). I therefore agree with Totem that the fact that the royalty rates in the CONNECT Licence are the highest among those Totem pays is exacerbated by the reproductions being ancillary to the eventual performance in public.

5. Conclusion

[85] I conclude that comparing the Parties’ proposed proxies against the other applicable legal instruments weighs in favour of using the CMRRA licence as a proxy.

⁶² CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 73.

⁶³ Fréchette Witness Statement, *supra* note **Erreur ! Signet non défini.** at para 11.

⁶⁴ Totem, Case Record, Exhibit BF-02 “Copy of a Model Newmood Customer Agreement”.

⁶⁵ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 17.

⁶⁶ *SODRAC 2003 Inc. v CBC*, 2020 CB 001 at para 61.

⁶⁷ It would remain ancillary even if the reproduction and authorization activities were done by different people. However, issues of comparing rates for different rate bases would arise.

[86] The rates in the CONNECT Licence are the highest of these, and significantly higher than all other rates—save for that in the SOPROQ licence.

[87] Given how high these rates are, and having concluded that the reproductions are ancillary in this proceeding, this consideration weighs strongly against the use of the CONNECT Licence as a proxy.

[88] If I am wrong that such reproductions should be characterized as ancillary in this proceeding, then they should nevertheless be priced similarly to the other rights, not significantly higher. In such a case, I would still conclude that this consideration weighs against the use of the CONNECT Licence as a proxy.

C. The proposed proxies in the context of Totem's finances

[89] Next, I consider the proposed proxies in the context of Totem's finances.

[90] CONNECT argues that the CONNECT Licence provides Totem with a “good return on investment.” It relies on the expert opinion report of Mr. Dobner (“the Report”) to support the proposition that—as a joint enterprise—Totem and Newmood's joint profits are higher than for publicly traded companies “in the same industry”.⁶⁸ The Report states that the average for such companies is approximately 6.8%, while Totem and Newmood's joint Earnings Before Interest and Taxes over the last 7 years are approximately [Redacted text].⁶⁹

1. Ability to pay is not indicative of a good proxy

[91] Totem replies to CONNECT's submissions that

the issue is not whether Totem can pay CONNECT's rates and stay in business. The Copyright Board does not approve rates based on whether they are the maximum amount a user can pay and still keep the doors open.⁷⁰

[92] I agree. While the inability to pay a particular royalty rate might indicate that the rate is unfair, the mere ability of a user to pay a particular rate it is not indicative of its fairness—or the appropriateness of a proxy containing that rate.

2. What if Totem paid the same royalties for all rights?

[93] Moreover, Totem's profits are a function of, among other things, all the royalties it pays—not only those it pays to CONNECT. This can be seen by considering the

⁶⁸ Michael Dobner, *Expert Opinion Report* (October 23, 2004) at p 14 [Dobner Report].

⁶⁹ CONNECT, *Final Submissions*, *supra* note **Erreur ! Signet non défini.** at para 93.

⁷⁰ Totem, Response to CONNECT's Statement of Case (May 15, 2024) at para 24 [Totem, *Response to Statement of Case*].

situation if Totem were to pay the rates in the CONNECT Licence for all of the four uses of copyrighted subject-matter (being the reproduction and performance in public of musical works, and reproduction and performance in public of sound recordings of musical works) for 100% of its uses.

[94] In such a situation, Totem would be paying between [Redacted text] to [Redacted text] in copyright royalties per Customer.⁷¹ This would be greater than Totem's revenues per Customer ([Redacted text]), and potentially even greater than Totem's and Newmood's combined revenues per Customer ([Redacted text])

[95] For comparison, the analogous figure would be [Redacted text] were the royalty rate in the SOCAN Licence used for all rights, and [Redacted text] if the rate in the CMRRA Licence were used.

3. Conclusion

[96] I conclude that this consideration weighs against the use of the CONNECT Licence as a proxy.

D. Consideration of paragraph 66.501(a) of the Copyright Act

[97] Paragraph 66.501(a) of the *Copyright Act* requires the Board, when fixing royalty rates (and any related terms and conditions), to consider, "what would have been agreed upon between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm's length and free of external constraints."⁷²

[98] I conclude that consideration of paragraph 66.501(a) weighs in favour of using the CMRRA licence or SOCAN licence as a proxy.

1. Paragraph 66.501(a) is a consideration, not a condition or test

[99] CONNECT's position is that its licences "satisfy" this criterion.⁷³ It submits that the "widespread acceptance" of its licences with other background music suppliers shows that these prices are "fair market value." Since these are "fair market value," they meet the conditions in paragraph 66.501(a).

[100] In effect, CONNECT treats the consideration of paragraph 66.501(a) as a kind of test that determines whether a proxy can or cannot be used by the Board. This can be

⁷¹ This is what Totem would pay if it paid [Redacted text] - [Redacted text] (see **Erreur ! Source du renvoi introuvable.**) for each right.

⁷² *Copyright Act*, RCS, 1965, c. C-42, s. 66.501(a).

⁷³ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 24.

seen, for example, in CONNECT's argument about the meaning to be given to paragraph 66.501(a):

For the willing buyer/willing seller criterion to have any substance, it cannot be read to exclude a collective's existing market agreements from consideration as proxies simply because collectives represent larger repertoires than individual rightsholders. To do so would be to assume that any agreement a collective enters into with a willing licensee is *prima facie* unfair, despite the fact that both users and collectives benefit from the efficiencies of collective copyright administration.⁷⁴

[101] However, CONNECT's proposed approach to interpreting this provision is inconsistent with paragraph 66.501(a) and the chapeau in section 66.501.

[102] Paragraph 66.501(a) is only one consideration among many. Section 66.501, in its entirety, reads:

66.501 The Board shall fix royalty and levy rates and any related terms and conditions under this Act that are fair and equitable, in consideration of

(a) what would have been agreed upon between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm's length and free of external constraints;

(b) the public interest;

(c) any regulation made under subsection 66.91(1); and

(d) any other criterion that the Board considers appropriate.

[103] Being only one consideration among many potential others, including "any other criterion that the Board considers appropriate,"⁷⁵ I do not interpret the consideration in paragraph 66.501(a) as rising to the level of a condition or test that must be met in order for a price to be fair. Relatedly, it is not necessary for an agreement to be made under the market conditions described in paragraph 66.501(a) for the Board to be able to consider that agreement as a proxy, or to conclude that the rate in a proxy can be used to establish a fair and equitable tariff.

[104] Instead, the Board must turn its mind to what kind of rates would be arrived at in the type of competitive market described in paragraph 66.501(a). But it remains only one among all other relevant considerations that the Board must weigh in its decision.

⁷⁴ CONNECT, *Reply to Final Submissions*, *supra* note **Erreur ! Signet non défini.** at para 8.

⁷⁵ *Copyright Act*, RCS, 1965, c. C-42, s. 66.501(d).

2. Paragraph 66.501(a) requires consideration of a transaction in a particular set of circumstances

[105] CONNECT's position that its licences satisfy the s. 66.501(a) criterion is based on the following premise: that the consideration of paragraph 66.501(a) "is essentially a question of fair market value"⁷⁶ and that this can be "calculated with reference to what other businesses acting in the same or similar markets have paid for the same use."⁷⁷

[106] Totem disagrees, and submits that the relevant consideration is

not whether any willing seller would accept the rates that Totem is offering, but whether there is a willing seller and a willing buyer in a competitive market for those rates. In a competitive market, a seller would likely accept any price above cost rather than lose the business to a competitor, and importantly, would factor in relevant market constraints and market shifts into pricing. That is the nature of supply and demand in a competitive market.⁷⁸

[107] I agree with Totem. In my view, adopting CONNECT's approach would ignore the characteristics listed in paragraph 66.501(a), and turn the consideration from what would have been reached in a hypothetical competitive market, to one of what has been reached in a market with unspecified competitive characteristics.

[108] I therefore conclude that paragraph 66.501(a) cannot be considered merely by "reference to what other businesses acting in the same or similar markets have paid for the same use."⁷⁹

3. The Expert Opinion Report

[109] In this proceeding, CONNECT filed an expert opinion report, prepared by Michael Dobner.

[110] For the following reasons, I give the Report little weight, and conclude that it does not assist in my consideration of paragraph 66.501(a):

- the Report goes beyond what was permitted in Ruling 2024-049;
- the Report does not meaningfully consider a competitive market, either in its market-based approach or profit-based approach;
- most of the rates used in the Report in its market-based approach are from international sources;
- the profit allocation approach generates a very broad range of potential prices;

⁷⁶ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 18.

⁷⁷ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 21.

⁷⁸ Totem, *Response to Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 19 [emphasis mine].

⁷⁹ Dobner Report, *supra* note **Erreur ! Signet non défini.**, section 2.1 at p 9 (Market Based Approach).

- any royalty rate that allows the user to earn a reasonable profit putatively satisfies the 66.501(a) criterion; and
- the profit-allocation approach appears to compare typical IP expenditures (as a function of profit) for all IP to only royalties payable to CONNECT and SOPROQ.

a. CONNECT was permitted to file an expert report with specific parameters

[111] Early in this proceeding, in assessing the proportionality of possible procedural approaches to derive the value of the matter before the Board, I put it to the Parties that “the value of the matter before the Board is relatively modest.” They agreed.⁸⁰

[112] Furthermore, I had rejected CONNECT’s proposed approach where the proportionality of the procedural steps should be assessed as against the possible consequences on future negotiations between CONNECT and users not in this proceeding.⁸¹

[113] One consequence of this was that parties had to seek leave to file expert evidence.⁸²

[114] In its Motion of May 29, 2024, CONNECT asked leave to file

an expert report that addresses the statutory criteria to be taken into consideration by the Board when setting “fair and equitable” rates under section 66.501 of the *Copyright Act* (the “section 66.501 criteria”). In particular, the report would address whether the rates charged by CONNECT can be reasonably considered to be within the range of what would have been agreed upon “between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm’s length and free of external constraints” under paragraph 66.501(a) of the *Act* (the “willing buyer/willing seller criterion.”)⁸³

[115] I granted CONNECT leave to file expert evidence in relation to the Board’s consideration of paragraph 66.501(a),⁸⁴ with limitations: the assistance of an expert would only be appropriate in relation to the identification of a method suitable for quantifying a range of prices that would have all the characteristics enumerated in paragraph 66.501(a).⁸⁵ Furthermore, my Ruling explicitly stated that the Board does not require an expert:

- “to understand how to apply the evidence to the considerations in 66.501 of the

⁸⁰ Order of the Board, CB-CDA 2024-016 (February 23, 2024) at para 15 [*Order 2024-16*].

⁸¹ *Order 2024-16, supra* **Erreur ! Signet non défini.** at paras 16–21.

⁸² *Order 2024-16, supra* **Erreur ! Signet non défini.** at paras 22–24.

⁸³ CONNECT, “Motion for Leave to File Expert Evidence” (May 29, 2024) at para 4 [CONNECT, *Expert Witness Motion*].

⁸⁴ Ruling of the Board CB-CDA 2024-049 (June 26, 2024) at para 1 [*Ruling 2024-049*].

⁸⁵ *Ruling 2024-049, supra* note **Erreur ! Signet non défini.** at para 33.

- Act, either from a legal or from an economic perspective”;⁸⁶ nor
- to opine on whether or not the agreements between CONNECT and other background music suppliers meet the criteria described in s. 66.501(a).⁸⁷

[116] As such, CONNECT was permitted to file an expert report, limited to providing the range of prices referred to in para 4 of its Application for Leave, and explaining how the range was obtained.⁸⁸

[117] Mr. Dobner signed the *Acknowledgement of Expert Witness Form*⁸⁹ and included his qualifications in the Report⁹⁰. As is Board practice, there was no separate qualification process.

b. Summary of the Report

[118] According to the Report, Mr. Dobner was tasked to provide an opinion on

whether the rates charged by CONNECT to Totem [Redacted text] for the reproduction of sound recordings for use in a background music service, can reasonably be considered to be within the range of what would have been agreed upon “between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm’s length and free of external constraints.”⁹¹

[119] In the report, Mr. Dobner expresses the following opinions:

- determining the price in a competitive market is practically impossible;
- the concept of “Fair Market Value” (FMV) is sufficiently similar so that it can be used instead;
- a market-based approach to FMV using international data suggests an average of CAD [Redacted text] per month;
- Totem’s and Newmood’s joint profits are sufficiently high to demonstrate that the CONNECT Licence is a good return on investment;
- a profit-allocation approach to FMV suggests a rate of 25% to 33% of profit or more;
- CONNECT’s agreements are sufficiently close to these figures that they could be considered as being FMV; and
- CONNECT’s change in repertoire should not result in a change in royalties.

[120] For the purposes of the Report, Mr. Dobner had been instructed by CONNECT to treat Totem and Newmood as a single enterprise.⁹²

⁸⁶ *Ruling 2024-049, supra* note **Erreur ! Signet non défini.** at para 31.

⁸⁷ *Ruling 2024-049, supra* note **Erreur ! Signet non défini.** at para 31.

⁸⁸ *Ruling 2024-049, supra* note **Erreur ! Signet non défini.** at paras 32–34 [emphasis mine].

⁸⁹ Based on Practice Notice PN 2019-002 - *Practice Notice on Acknowledgement of Expert Witnesses*.

⁹⁰ *Copyright Board Rules of Practice and Procedure*, SOR/2023-24, Rule 48.

⁹¹ Dobner Report, *supra* note **Erreur ! Signet non défini.**, Section 1.1 at p 4.

⁹² Dobner Report, *supra* note **Erreur ! Signet non défini.**, Section 1.1 at p 4.

c. The Report goes beyond what was permitted in Ruling 2024-049

[121] By using the premise that FMV is “akin” to paragraph 66.501(a), the report, in effect, departs from the parameters set out by the Board in Ruling CB-CDA 2024-049.

[122] There appears to be no meaningful difference in scope when comparing the Report to the scope of the report that was initially proposed by CONNECT, despite the fact the motion was only granted in part, with significant restrictions on its scope.

[123] Rather than putting forward a method for finding a range of prices that are contemplated in paragraph 66.501(a), and despite the Ruling’s explicit directions that the Board does not need an expert witness “to opine on whether or not the agreements between CONNECT and other background music suppliers meet the criteria described in s. 66.501(a),” this is stated as one of the main purposes of the report.⁹³

[124] This is the first reason that I give the Report little weight. The remaining reasons are substantive.

d. The Report does not meaningfully attempt to determine a price in a competitive market

[125] Mr. Dobner states that simulating the outcome of a competitive market in the case of IP “is practically impossible.” Mr. Dobner refers to the fact that, on the cost side, there will be various costs associated with creating copyrightable subject-matter or with obtaining particular copyrights, and costs associated with monetizing the copyright in various markets.

[126] Therefore, instead of attempting to determine a range of prices that may arise in a competitive market, Mr. Dobner opines that paragraph 66.501(a) “is akin to the fair market value definition used by valuation practitioners, and accepted by Canadian courts, the Canada Revenue Agency, and quasi-judicial bodies in Canada.” Mr. Dobner goes on to state that the FMV methodology assumes a competitive market,⁹⁴ and explains that in economics, this means “having many sellers and buyers.”⁹⁵

[127] Even if I were to accept this as a workable definition for the purpose of the Report, the Report does not confirm that the prices referred to were observed in markets with “many sellers and buyers.”

[128] This is not an assumption about a market that can be made trivially. On the contrary, copyright licensing by collectives typically has many features contrary to a

⁹³ Dobner Report, *supra* note **Erreur ! Signet non défini.**, Section 1.4 at p 5.

⁹⁴ Dobner Report, *supra* note **Erreur ! Signet non défini.** at pp 8–9 and FN 23.

⁹⁵ Dobner Report, *supra* note **Erreur ! Signet non défini.**, Section 2.1 at p 8.

competitive market: there may be very few sellers; licenses granted cannot be resold; and licences are typically not sold on an open market.

[129] Instead, the little description there is of the sellers suggest that they act in markets where there may only be one, or that they have significant market power:

[W]e relied on royalty data from the IFPI. IFPI provided data on the royalty rates charged by the 11 largest MLCs globally, which includes CONNECT. This data was used by us to review the rates charged by MLCs. [...]here is typically only one MLC in each country that licenses reproduction rights in sound recordings[.]⁹⁶

[130] Similarly, in the “Profit Allocation Approach,” there is no mention of whether the sellers of the intellectual property were transacting in a market with “many sellers and buyers.” Furthermore, in a competitive market, no one, buyer or seller, can influence the price. As such, Totem’s profit⁹⁷ is not meaningful. The fact that Totem earns a positive profit does not mean that all inputs are priced competitively.

[131] While I accept that there may be difficulties in trying to determine a range of prices that may arise in a competitive market, I am of the view that ignoring the elements of s. 66.501(a) is not a valid way of giving effect to that provision. As such, I conclude that FMV, as presented in the Report, is not a substitute for the consideration required under that provision. If a FMV analysis requires a competitive market, then the Report does not support the conclusion that observed prices are FMV. If FMV does not require a competitive market, but can assume it, then FMV cannot be said to be “akin to” paragraph 66.501(a).

e. The Report relies on prices from other countries

[132] The figures Mr. Dobner obtains rely primarily on prices from other countries.

[133] The Board’s jurisprudence cautions against the use of prices and similar data from international markets. For example, as the Board observed in 2014, “since we know nothing of the market environment within which these other [international] rates exist, they cannot serve as proxies.”⁹⁸

⁹⁶ Dobner Report, *supra* note **Erreur ! Signet non défini.**, Section 2.1 at p 9.

⁹⁷ As this term is used in the Dobner Report.

⁹⁸ *Re: Sound Tariff 8*, *supra* note **Erreur ! Signet non défini.** at para 126; See also *CPCC - Tariff for Private Copying, 2012-2014* (reasons) (August 30, 2013) (“The Board will continue its practice of viewing foreign rates with caution. This example demonstrates why. We do not know how these rates were set. We know that only four are higher than the current Canadian rate. We also know that the rates vary by a factor of as much as 34 to 1. We do not know whether prices at the lower end were influenced by market or other (political) considerations that do not exist in Canada [...] It would be imprudent to take those prices into account in setting the levy without knowing considerably more about them.”)

[134] Potential issues include:

- the difficulty in comparing the implied repertoire-use in those rates;
- the lack of clarity about whether the licences—which were not filed with the Board—include communication to the public by telecommunication for the purpose of transmitting the sound recording to the Customer’s own computer;⁹⁹
- the potential differences in legislative or regulatory frameworks, such as compulsory or statutory licensing; and
- the potential differences in jurisprudence, including on the relative value between the performance in public and the reproduction.

[135] If the Board should be cautious about relying on foreign rates to act as proxies, then it should also be cautious about foreign rates for the purposes of considering s. 66.501(a).

[136] Without additional evidence about how similar or different other jurisdictions are to Canada, the observed prices do not assist with my consideration of what a price for these uses could be in a competitive market in Canada.

[137] This issue is present in both the “Market Based Approach” and “Profit Allocation Approach” section of the Report.

f. The Profit Allocation Approach section does not support the conclusion that CONNECT’s rates are FMV

[138] In the Profit Allocation Approach section, Mr. Dobner

- estimates an allocation of Totem’s and Newmood’s revenues and costs, in order to determine Totem’s and Newmood’s joint earnings before interest and taxes (“EBIT”), one measure of “profit” frequently used in accounting statements;
- estimates that the royalties charged by CONNECT translate to an average (over the last 7 years) of approximately [Redacted text] of Totem’s and Newmood’s joint EBIT; and
- estimates that the royalties charged by CONNECT and SOPROQ (to cover all reproductions of sound recordings) translate to an average (over the last 7 years) of approximately [Redacted text] of Totem’s and Newmood’s joint EBIT.

[139] Mr. Dobner states that there is a “rule of thumb that is commonly used by valuation practitioners, which suggests that royalties usually range between 25% and 33% of EBIT,” but that “the royalties commonly charged for music rights are substantially higher than the common range for licensing intellectual property” and “that

⁹⁹ Dobner Report, *supra* note **Erreur ! Signet non défini.**, Section 3.2 at p 10 (“Background music streaming licences allow for up to 4 hours of programming to be cached onsite”)

royalties for licensing in the entertainment and media are the highest of any other industry.”¹⁰⁰

[140] In addition to the limitations I have noted above relating to the prices not being from competitive markets, and the fact that they are from international markets, I make the following observations on this part of the Report.

[141] First, the Report compares the entirety of a business’s typical IP costs (as a function of EBIT) with only the licensing costs for CONNECT and SOPROQ. Such a comparison ignores the other royalties (also being IP costs) paid by Totem.

[142] Second, and relatedly, such a comparison can—at best—show whether the total of IP royalties payable by Totem are within some typical range. It does not show whether any component of those royalties is FMV.

[143] Third, the percentage of EBIT a user will pay for IP will be very dependent on the characteristics of the market in which it sells its good or services to end users. Thus, it is difficult to meaningfully compare percentage of EBIT paid for IP among users that sell their goods and services in different markets: the typical profit margins in one market can vary significantly from those in another market.

[144] Fourth, [Redacted text] of EBIT is very high—being even higher than what the Report put forward as the “usual range” of 25%–33%.¹⁰¹

g. Conclusion on the Report

[145] Given the above described features of the Report, I conclude that it is not helpful in my consideration of paragraph 66.501(a).

E. The Proposed Proxies’ prices compared to price in s. 66.501(a)

[146] In this proceeding, I can consider paragraph 66.501(a) in the following way: with all other things being equal, preferring a proxy whose price is closer to the hypothetical price described in paragraph 66.501(a).

[147] In practice, most proxies will tend to differ in other aspects than price—as is the case here. As such, whether a price is closer to the hypothetical price in s. 66.501(a) must be weighed along with all other relevant considerations.

[148] This approach has the benefit of:

- ensuring that paragraph 66.501(a) remains as only one of the considerations that the Board must consider—and does not become a strict test;

¹⁰⁰ Dobner Report, *supra* note **Erreur ! Signet non défini.** at p 14.

¹⁰¹ Dobner Report, *supra* note **Erreur ! Signet non défini.** at p 14.

- avoiding interpreting this provision in a manner that would ignore the elements listed therein; and
- avoiding the challenges of attempting to numerically simulate a price, or range of prices, in a competitive market.

a. A lower price tends to be closer to the price to be considered in s. 66.501(a)

[149] Sellers will maximize profit by setting a price which balances the tendency of higher prices to increase the average revenue per unit sold and the tendency of higher prices to decrease the number of units sold. Where there is only one seller, this balancing price will tend to be higher than in a market with many sellers. As the number of sellers increases, this balancing price decreases, trending towards the perfectly competitive price.¹⁰²

[150] Furthermore, if there are two markets selling very similar goods, one of which has a lower price, the one with the lower price is more likely to be the more competitive market.

[151] While the CONNECT Licence, the CMRRA licence, and SOCAN licence are not in respect of the same subject-matter, they are otherwise sufficiently similar for meaningful comparison (Part **Erreur ! Source du renvoi introuvable.**, above).

[152] However, the royalties payable by Totem under the CMRRA licence and SOCAN licence are substantially lower than those payable under the CONNECT agreement. In this case, the transactions for the right to reproduce musical works occur closer to a competitive price than the transactions for the right to reproduce sound recordings.

[153] As such, I conclude that the rates in the CMRRA and SOCAN licences are closer to the rates contemplated in paragraph 66.501(a) of the *Act* than the rates in the CONNECT Licence, and this weighs in favour of using them as a proxy.

[154] For completeness, I address two related arguments raised by CONNECT.

b. Reasonable return on investment for CONNECT

[155] CONNECT submits that accepting Totem's rates would deprive CONNECT of a "reasonable return on investment."¹⁰³ Moreover, CONNECT states that the outcome of a competitive market is an equilibrium price that provides a seller with a reasonable return

¹⁰² This is also described in the Dobner Report, *supra* note **Erreur ! Signet non défini.**, Section 2.1 at p 8.

¹⁰³ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 41.

on its investment.¹⁰⁴ Thus, such a price would not be one arrived at in a competitive market.

[156] However, CONNECT did not file any evidence by which the claim relating to return on investment could be meaningfully evaluated. The difficulty of this is partially captured in the Report, which details the numerous potential costs associated with the creation and monetization of copyrighted subject-matter.¹⁰⁵ Similarly, a single work or sound recording can generate revenues from numerous jurisdictions around the world, for many years, and for many different uses.

[157] Of these, only those costs and revenues attributable to Canada should be taken into account, and—even then—limited to those attributable to the uses under consideration.

[158] Without a way of considering these—even very approximately—CONNECT's claims regarding its return on investment cannot be meaningfully assessed.

c. Reasonable return on investment for Totem

[159] I have already considered CONNECT's argument regarding Totem's profits (paras. **Erreur ! Source du renvoi introuvable.**–**Erreur ! Source du renvoi introuvable.**, above).

[160] However, because CONNECT points to Totem's profit as support for the proposition that the prices in the CONNECT Licence are such that they would have been agreed to in a competitive market¹⁰⁶, I address Totem's profits in relation to paragraph 66.501(a) here for completeness.

[161] Paragraph 66.501(a) requires the Board to consider “a competitive market.” This must refer to some particular, well-defined market. In the context of this provision, I interpret it to refer to a market for the copyrighted subject-matter. In my view this paragraph is not concerned with the characteristics of markets, the transactions for which the Board is not fixing a price, such as the market in which Totem sells its services.

[162] In other words, in order to consider paragraph 66.501(a), the hypothetical situation described does not have to be limited to that in which the buyer is acting as a seller in another, competitive, market.

¹⁰⁴ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 20.

¹⁰⁵ Dobner Report, *supra* note **Erreur ! Signet non défini.** at p 9 (“That requires identifying all the activities that went into developing and maintaining the IP and monetizing them at the price levels on the date of valuation”).

¹⁰⁶ CONNECT, *Final Submissions*, *supra* note **Erreur ! Signet non défini.** at para 96.

[163] As such, this paragraph does not have the additional criteria of the buyer acting as a seller in a competitive secondary market, and therefore Totem's profits are not directly relevant to the consideration of this paragraph.

F. Acceptance of CONNECT's proposed proxy in the industry

[164] CONNECT points to the fact that all background music suppliers with which it deals—save Totem—have accepted the rates and terms and conditions in the CONNECT Licence. CONNECT cites the Board's decision in *Access Copyright - Tariffs for Post-Secondary Educational Institutions, 2011-2017*¹⁰⁷ (Access) for the proposition that a licence with sufficient take-up is a good proxy.¹⁰⁸

[165] I distinguish the situation here from that in *Access*: in the latter case, educational institutions had several realistic alternatives to the Access licence, including retail, direct agreements with publishers, and bundled offers through intermediaries.¹⁰⁹

[166] CONNECT submits that background music suppliers have two options as alternatives to dealing with it. The first is to deal directly with their member labels.¹¹⁰ Apparently, this has occurred on occasions, but there are no details about how frequently this occurs, how many services have done so, nor at what price.¹¹¹

[167] The second option CONNECT offers is to deal only with SOPROQ. There is no evidence that any background music service has done so, and the fact that SOPROQ specializes in Quebecois or Francophone music¹¹², this would entail a significant change in Totem's business as apparently [Redacted text] of reproductions are of sound recordings from CONNECT's repertoire.¹¹³ As such, I do not consider this second option to be realistic.

[168] In this case, Totem could potentially use a limited repertoire and deal directly with rights owners.¹¹⁴ While there is evidence that this has occurred on occasion, it is unclear how frequently this occurs, and how feasible this would actually be.

[169] This limited set of options does not present to background music suppliers the same degree of choice as that available to educational institutions in the *Access* case. A high degree of take-up is less meaningful in this proceeding, as there is a very limited

¹⁰⁷ *Access Copyright - Tariffs for Post-Secondary Educational Institutions, 2011-2017*, CB-CDA 2019-082 [Access].

¹⁰⁸ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 5.

¹⁰⁹ *Access*, *supra* **Erreur ! Signet non défini.** at paras 70–71.

¹¹⁰ CONNECT, *Final Submissions*, *supra* note **Erreur ! Signet non défini.**, at para 74.

¹¹¹ Turner Witness Statement, *supra* note **Erreur ! Signet non défini.** at paras 22 and 60. At least one background music supplier has done so, but there may be more than one.

¹¹² Turner Witness Statement, *supra* note **Erreur ! Signet non défini.** at para 22.

¹¹³ CONNECT, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at para 77.

¹¹⁴ Turner Witness Statement, *supra* note **Erreur ! Signet non défini.** at para 22.

set of options available to potential users and there is no evidence as to how reasonable these options are (e.g., their rates).

[170] If I am wrong that educational institutions in the *Access* case actually had meaningfully more options than those present here, then I do not follow that decision. I am of the view that without sufficient realistic options, the measure of take-up is not meaningful.

[171] This conclusion does not weigh in favour of, or against, the use of the CONNECT Licence as a proxy.

G. Conclusion on proxy

[172] In deciding which is the proxy that should be used in this proceeding, I considered the following:

- The closeness of the target activity and the Parties' proposed proxies. I concluded that this consideration weighs in favours the use of the CONNECT Licence, as it is the closest.
- The proposed proxies' relationships with other rates for background music. I concluded that this consideration weighs in favours the use of the CMRRA licence, as it is most consistent with the other instruments..
- The royalty rates in the proposed proxies in the context of Totem's finances. I concluded that this consideration weighs against the use of the CONNECT Licence. If it were the royalty rate used in relation to all of the Totem's use of copyright for background music activities, the total amount payable would be greater than all of Totem's revenues, and potentially even greater than Totem's and Newmood's revenues combined.
- Paragraph 66.501(a) of the *Copyright Act*. I concluded that this consideration weighs in favour of the CMRRA and SOCAN licences, as these are likely closer to a competitive market price than those in the CONNECT licence.

[173] Given this, I conclude that the CMRRA licence is the most appropriate proxy in this proceeding.

V. Should the proxy be adjusted for repertoire-use?

[174] There are two potential adjustments to the CMRRA licence I consider to account for repertoire-use. I conclude that no adjustments for repertoire-use are necessary.

A. Possible adjustments on account of differences between Totem's use of CONNECT's and CMRRA's respective repertoires

[175] The first adjustment I consider is to adjust for possible differences between the amount of music that Totem uses that is in CONNECT's and CMRRA's repertoires.

[176] I am of the that view that no adjustment to the CMRRA agreement, used as a proxy, is necessary. Both CONNECT's and CMRRA's repertoire consist primarily of English-language music, and I estimate that Totem's use of these collectives' repertoire will be sufficiently similar so as not to require an adjustment. This is particularly so, given that I use the proxy to decide between the rates put forward by the parties (see paras. **Erreur ! Source du renvoi introuvable.**–**Erreur ! Source du renvoi introuvable.**), and not as a final figure.

B. Possible adjustments on account of changes to CONNECT's repertoire

[177] The second possible repertoire adjustment is based on Totem's submission that consideration should be taken of the fact that 10 labels had, in June 2023, left CONNECT's repertoire.

[178] I am of the view that no adjustment is required for this either. The evidence presented by CONNECT supports the conclusion that Totem's repertoire-use has not meaningfully changed as a result of any changes in CONNECT's repertoire.

VI. Should there be a higher rate for advertising?

[179] The CONNECT Licence includes a higher royalty rate (both as a percentage of revenue, and minimum fees) when background music is combined with in-store advertising. Instead of a rate of [Redacted text] of revenues, with a minimum fee of [Redacted text] per Customer, the rates for programs with in-store advertising is [Redacted text] of revenues, with a minimum fee of [Redacted text] per Customer.

[180] In the CONNECT Licence, in-store advertising is defined as

promotional messages included in Licensee products or services that are produced specifically by or for Licensee's Commercial Subscribers promoting the Commercial Subscriber's business or services.¹¹⁵

[181] This means that a background music supplier would pay a [Redacted text] higher royalty rate on its revenues from customers that have advertisements interspersed with the background music. This would be so whether or not the background music supplier charged higher rates to those customers.

[182] CONNECT's arguments for having a separate—higher—royalty rate can be grouped into the following two categories: financial justification, and as a “shield” against improper revenue allocation.

¹¹⁵ *Agreed Statement of Facts*, *supra* note **Erreur ! Signet non défini.**, Exhibit C: 2022 Standard MSS HD Compression Licence.

[183] Totem submits that whatever value, if any, is derived from in-store advertising will necessarily be reflected in greater revenues, which will in turn increase payments made to CONNECT.¹¹⁶ Furthermore, The mere fact of inserting ads into background music does not result in a distinct or “new use” deserving a distinct royalty rate.

A. Financial justification: higher profit should result in a higher royalty rate

[184] CONNECT put forward the following premise: when background music suppliers are permitted to intersperse the background music with in-store advertising, the business customers will have higher profit margins.¹¹⁷ This enables the background music supplier to offer programs that include instore advertising at a higher price.¹¹⁸ This, in turn “produces a higher profit margin to the user.”¹¹⁹ Finally,

[t]o ensure that CONNECT was fairly sharing in the profits, it was necessary both to ensure that the incremental revenue from in-store advertising was captured in the rate base and to increase the percentage rate to ensure that CONNECT was getting a greater share of that more profitable revenue.¹²⁰

[185] CONNECT refers to four websites with promotional material for background music suppliers. These references aim to support the proposition that “[m]any suppliers use the ability to provide in-store promotional messaging as a benefit to entice business customers to subscribe to their service.”¹²¹

[186] I identify two main deficiencies of this argument:

1. there is insufficient evidence of the effect of music on in-store advertising; and
2. there is insufficient justification to allocate any benefits to the reproduction right.

[187] I consider each of these in turn.

1. Insufficient evidence of the effect of music on in-store advertising

[188] I find that there is insufficient evidence in this proceeding as to whether music amplifies the effect of advertising on Customers’ profits.

[189] A necessary premise in CONNECT’s theory is that in-store advertising generates higher profits for Customers’ establishments in the presence of music. While plausible,

¹¹⁶ Totem, *Final Submissions*, supra note **Erreur ! Signet non défini.** at para 4.

¹¹⁷ CONNECT, response to Order CB-CDA 2024-048 (July 22, 2024) at para 7.

¹¹⁸ *Ibid* at para 10.

¹¹⁹ *Ibid* at para 5.

¹²⁰ *Ibid* at para 4.

¹²¹ *Ibid* at para 8.

there is insufficient evidence in this proceeding to determine whether and the extent to which this is the case, and whether it justifies a 33% increase in rates.

[190] The websites referred to by CONNECT appear to ascribe many of the benefits of “in-store audio ads” to the advertisements themselves: that they are audio as opposed to written, how they are crafted, how seamlessly they are interspersed with the background music, etc.¹²²

[191] The closest the references come to supporting CONNECT’s theory is a quote from a background music CEO who makes the claim that “background music has the potential to lift sales by 10%.”¹²³ Even this article, which appears to be a self-promotion, speaks to revenues, not profits.

2. Insufficient justification to allocate benefit to reproduction right

[192] Even if in-store music did have the effects claimed by CONNECT (*i.e.*, Customers saw higher profits when it used music with in-store advertising, and this resulted in Customers paying more to background music suppliers) it has not sufficiently justified what share—if any— of that increased profit should accrue to the reproduction right. This is not a situation where, for example, an added feature results in more use of the copyrighted subject-matter.

[193] If a background music supplier does earn additional revenues by offering advertising, these revenues do not appear related to the making of reproductions on the Customer’s hard drives.

B. Shield against improper revenue allocation

[194] As a distinct argument, CONNECT submits that a higher rate for advertising is required to counteract the effect of an improperly set rate base. A single percentage rate, applied only to Totem, will not generate higher royalties if Newmood has additional revenues because of inclusion of in-store advertising.¹²⁴ As such, CONNECT argues, this “improper” rate base has the effect of “capping” the royalties collected by CONNECT—regardless of the revenues generated by Totem/Newmood.

¹²² “Harnessing the Power of In-Store Audio ads Messaging for Enhanced Customer Engagement and Sales”, online : Jukeboxy <<https://www.jukeboxy.com/blog/enhancing-sales-and-engagement-with-in-store-audio-messaging/>>.

¹²³ Lynn Petrak, “EXCLUSIVE: How In-Store Music Increases Grocery Sale” (April 12, 2023), online: *Progressive Grocer* <<https://progressivegrocer.com/exclusive-how-store-music-increases-grocery-sales>> .

¹²⁴ CONNECT, *Reply to Final Submissions*, supra note **Erreur ! Signet non défini.** at paras 49–53.

[195] Setting such a higher royalty rate would be an unusual way of compensating for an inappropriate rate-base. If the rate base is inappropriately set, it should be corrected not compensated for by setting a separate, higher, rate.

[196] In this proceeding, I have the opportunity to determine and set the appropriate rate base— it will not have been unilaterally determined by Totem. Therefore, while this concern could be present in the context of a negotiation, it is not one present here.

C. Conclusion

[197] I do not fix a separate, higher, rate for the use of background music when in-store advertising is present.

VII. Should there be a minimum fee?

A. Position of the Parties

[198] CONNECT submits that a minimum fee is necessary, given how Totem and Newmood have structured their business.

[199] CONNECT states that, because the licence Totem previously had with CONNECT included a minimum fee, “it has largely managed to avoid the negative effects of Totem’s conduct.”¹²⁵ CONNECT adds that not having a minimum fee would be “inconsistent with Board precedent and would leave no floor value for the right.”

[200] Totem argues against a minimum fee, and refers to Board jurisprudence where the Board has stated that the Copyright Board has previously held that a “greater of” structure burdens users “with an unfair share of risks” and unduly advantages the collective society.¹²⁶

B. Analysis

[201] With one exception (the *Satellite Radio Tariffs*¹²⁷), the Board has not set minimum fees in the context of single users.¹²⁸

¹²⁵ CONNECT, *Responding Statement of Case*, supra note **Erreur ! Signet non défini.** at para 29.

¹²⁶ Totem, *Response to Statement of Case*, supra note **Erreur ! Signet non défini.** at para 25 (referring to *Re:Sound Tariff 8*, supra **Erreur ! Signet non défini.** at paras 98–99).

¹²⁷ See *Re:Sound Tariff 4 – Satellite Radio Services (2019-2021)* 2024 CB 10-T (December 7, 2024), C Gaz I, Supplement, Vol. 158, No. 49; SOCAN, *Re:Sound - Tariff for Satellite Radio Services, 2010-2018* (approved tariff) (June 3, 2017), C Gaz I, Supplement, Vol. 151, No. 22.

¹²⁸ *Tariff 1.C – Radio – Canadian Broadcasting Corporation (SOCAN: 2015-2018; Re:Sound: 2012-2019)*, 2020 CB 016-T (November 14, 2020), C Gaz I, Supplement, Vol. 154, No. 46; SOCAN – *Various Tariffs, 2007-2017 — Tariff No. 2.D (2013-2014)* (approved tariffs) (May 6, 2017), C Gaz I, Supplement, Vol. 151, No. 18; SOCAN - *Tariff 2.E (CTV Television Network Ltd.)*, September 1, 1993-December 31, 1998

[202] The proxy I am starting from, the CMRRA licence, does have a minimum fee, which depends on the number of customers. If the licensee has fewer than [Redacted text] customers, there is a minimum fee of [Redacted text] per quarter. Otherwise, there is a minimum fee of [Redacted text] per quarter. The quantum of this fee appears that it is one aiming to cover the administrative costs of issuing and managing the licence.

[203] Unlike a tariff that can apply to more than one user, this proceeding relates directly to only one. This is not a case where a minimum fee may be necessary to account for a variety of users, or for the future, and unknown, behaviour of a user. Nor is it the case that Totem offers free or discounted trials or similar offers that may reduce its revenues, despite the same use of music.

[204] Moreover, Totem's revenues per customer are not only known, but they remain exactly the same throughout the period for which they seek that the Board set a royalty rate. At the time of this decision, the entirety of the licence, ending June 30, 2025, is in the past.¹²⁹

[205] Fixing a minimum quantum of royalties per customer would result in fixing a rate that will never apply to Totem. As such, there is no need for me to fix such a rate, or to consider what the appropriate amount would be.

VIII. What should the terms of the licence be?

[206] In its Final Submissions, CONNECT raised a new issue: whether or not Totem was permitted to operate in the manner it does pursuant to the CONNECT Licence.

A. Who is permitted to make reproductions?

[207] CONNECT contends that Totem does not, itself, operate a background music service, and therefore does not "qualify" for the CONNECT Licence. CONNECT states that it "does not condone, and has never authorized, the sublicensing of its repertoire by a licensee to another entity, related or otherwise."¹³⁰ It claims that

(approved tariff) (December 21, 1996), C Gaz I, Supplement, Vol. 130, No. 51; *SOCAN Tariff 22.E – Internet - Canadian Broadcasting Corporation (2014-2018)* 2024 CB 9-T (December 7, 2024), C Gaz I, Supplement, Vol. 158, No. 49; Copyright Board, *Applications to fix royalties for a licence and its related terms and conditions (SODRAC v. CBC/SRC and SODRAC v. Astral)* (licence for Astral) (2 November 2012, revised 31 March 2014); *Application to fix royalties for a licence and its related terms and conditions (SODRAC v. CBC, 2012-2018 [Determination])*, 2021 CB 1.

¹²⁹ *SOCAN - Tariffs 22.D.1 – Internet - Online Audiovisual Services & 22.D.2 – Internet User-Generated Content, 2007-2013* (reasons) (July 18, 2014) at para 64.

¹³⁰ CONNECT, *Final Submissions*, *supra* note **Erreur ! Signet non défini.** at para 38.

Totem makes copies of sound recordings and supplies them to a related company, Création Newmood Inc. (“Newmood”). Newmood, in turn, reproduces those copies onto hard drives that it supplies to business customers for use as background music.¹³¹

[208] The evidence does not support this assertion. The evidence is that Totem makes the reproductions onto a hard drive owned by Newmood, or causes them to be made by means of remote updates onto hard drives located at Customer’s premises.¹³²

B. Relationship with Customers

[209] For greater certainty, and without making a finding on whether this is permitted under the CONNECT Licence or not, it is appropriate to permit Totem to have a third-party, such as Newmood, to

- deliver the hard-drives to the Customer,
- collect payment from the Customer, and
- take any other action that may otherwise be required of Totem (e.g. when dealing with Customers) on Totem’s behalf, and I do so.

IX. Public interest considerations

[210] Totem submits that there are relevant “market constraints” that should be seen by the Board as issues of public interest. It states that

hospitality and retail industries, which make up the bulk of Totem’s customer base, suffered considerably as a result of COVID. These industries have not fully recuperated from the effects of the pandemic. Totem’s customers in the hospitality industry have been set back even further by the effects of inflation and high interest rates, rising wage demands and labour shortages, and increased competition from meal delivery options.¹³³

[211] By contrast, CONNECT submits that it is in the public interest to maintain consistency and predictability in the existing licensing scheme. It argues that there is nothing special about Totem’s situation, and that setting a rate lower than that in the CONNECT Licence would

- result in Totem gaining an unfair competitive advantage over other background music providers; and
- disrupt a functioning market and set a negative precedent.¹³⁴

¹³¹ CONNECT, *Final Submissions*, *supra* note **Erreur ! Signet non défini.** at para 30.

¹³² Totem, *Responses to Board Questions*, *supra* note **Erreur ! Signet non défini.**, Question 2.

¹³³ Totem, *Statement of Case*, *supra* note **Erreur ! Signet non défini.** at paras 30–31.

¹³⁴ CONNECT, *Final Submissions*, *supra* note **Erreur ! Signet non défini.** at paras 102–104.

A. CONNECT's initial motion

[212] CONNECT's submissions on this issue are closely related to a Motion it made early in this proceeding.

[213] CONNECT's initial response to the Application was to file a Motion to dismiss the Application.¹³⁵ CONNECT argued that, either the Board lacked the jurisdiction to hear the Application, or, in the alternative, that the Board should exercise its discretion under subsection 71(4) not to grant the Application without a consideration of the merits.¹³⁶

[214] CONNECT argued that the use of subsection 71 was inappropriate because this was "not a bespoke licensing negotiation between a collective and a user." In the presence of an established licensing regime for background music services, the Board should not intervene.¹³⁷

[215] The Board held an oral hearing into this motion on October 19, 2023, and denied the motion to dismiss, in writing, on November 15, 2023.¹³⁸ It held that the requirements of subsection 71(1) were met in this case¹³⁹ and that there was sufficient notice provided by Totem.¹⁴⁰ Furthermore, it held that this was not an appropriate situation to refuse to hear the case, and that the fact that there is an "established and functioning" marketplace does not mean that the royalties in that marketplace are "fair and equitable."¹⁴¹

B. Analysis and Conclusion

[216] The Board has considered the public interest in its proceedings long before it was explicitly required to do so by statute.¹⁴² Consideration of the public interest can infuse all considerations the Board makes. As such, it is not the case that the "public interest" has to be considered as a distinct criterion in every proceeding.¹⁴³

¹³⁵ CONNECT, letter to the Board (June 30, 2023) (indicating that CONNECT intends to bring a motion).

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ Ruling of the Board CB-CDA 2023-057 (November 15, 2023).

¹³⁹ *Ibid* at para 32.

¹⁴⁰ *Ibid* at para 43.

¹⁴¹ *Ibid* at para 58.

¹⁴² See e.g., *Access*, *supra* note 107 at para 182 (explaining why the Board may put questions to parties and seek out evidence); *Re:Sound - Tariff 3 (Background Music), 2010-2015*, CB-CDA 2017-091 (reasons) (September 1, 2017) at paras 34-35 (explaining why an agreement in the marketplace is not determinative.)

¹⁴³ See e.g., *SOCAN Tariff 9 – Sports Events (2018-2023)*, 2021 CB 9 ("Paragraph 66.501(b) of the Act provides that the Board will also consider public interest in determining whether a proposed tariff is fair and equitable. The record raises no other public interest concerns not already addressed in this proceeding.")

[217] With respect to the financial issues raised by Totem, I have already taken them into account—where relevant—in my consideration of all the other issues. I need not consider them again under a separate heading or as a distinct consideration.

[218] With respect to CONNECT's arguments on public interest, I am of the view that its approach would—for all practical purposes—render an application under subsection 71(1) unavailable to any user where more than a few operate the same type of business.

[219] Unless users organize to make an application jointly under subsection 71(1), there can always be a “first” user not to accept the rates, terms or conditions of a licence being offered by a collective society. That user's application may very well result in that user being subject to rates, terms or conditions that differ from those to which other similar users have agreed.

[220] As such, an application under subsection 71(1) always has the possibility of affecting future negotiations between the collective and other, similar users. It may also result in a user paying rates—at least for some period—that are different from those paid by users that have entered into an agreement with the collective society.

[221] I therefore conclude that the arguments raised by CONNECT under the concept of public interest do not weigh in favour of using the royalty rates, terms and conditions in the CONNECT Licence.

X. Conclusion and decision

[222] I have concluded that the appropriate proxy to use in this proceeding is the CMRRA licence. I have also concluded that the proxy does not require any adjustment to account for differences in repertoire-use.

[223] The Parties proposed the following royalty rates: [Redacted text] by Totem, and [Redacted text] by CONNECT (due to the binding nature of the proposed minimum fees).

[224] As between these—given my conclusions on the proxy, and possible adjustments—I conclude that the rate proposed by Totem is more supported by the evidence in this proceeding.

[225] I have also determined not to fix a separate rate for music with advertising, and not to fix a minimum royalty.

[226] I therefore fix the royalty rate for Totem's use of sound recordings in CONNECT's repertoire at [Redacted text] of Totem's revenues.

[227] Totem is permitted to use a third party, such as Newmood, to deal with Customers, as I describe in these reasons.

[228] Other terms and conditions in the licence offered by CONNECT to Totem were not included as part of the application under subsection 71(1), and I do not fix them here.