

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2021-01-27
Citation *SODRAC 2003 Inc. v CBC*, 2021 CB 1
Members The Honourable Robert A. Blair, Q.C.
Mr. Claude Majeau
Mr. J. Nelson Landry

Application to Fix Royalty Rates for the Reproduction of Musical Works in the Repertoire of the Society for Reproduction Rights of Authors, Composers and Publishers in Canada Inc. and SODRAC 2003 Inc. by Canadian Broadcast Corporation

[Determination (2012-2018)]

Reasons for decision

I. INTRODUCTION

[1] CBC, the Canadian public broadcaster, makes different types of copies of musical works protected by copyright in the course of its activities. Such copies are either central to CBC's content production and sales operations or incidental to CBC's core broadcasting or program distribution operations.

[2] SODRAC 2003 Inc. and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada Inc. (collectively "SODRAC") asked the Copyright Board (the "Board") to set the royalties and terms and conditions authorizing CBC to use the works in its repertoire for the period from April 1, 2012 to March 31, 2018 (the "Period 2012-2018").

[3] The Board had set a similar licence for the period 2008-2012,¹ and as directed by the Supreme Court of Canada,² recently redetermined the part of that licence concerning "broadcast

¹ *Applications to fix royalties for a licence and its related terms and conditions (SODRAC v CBC/SRC)*, 2008-2012 (2 November 2012) Copyright Board. [2012 Decision]

² *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615. [CBC v SODRAC]

incidental copies” (“BICs”) made in the conventional and online television broadcasting context.³

[4] Specifically, the royalties cover BICs made for radio and television broadcasts (conventional and Internet), the sale of physical media, the sale of digital files, and distribution-incidental copies for the Period 2012-2018. The royalties also cover copies made for the synchronization of commissioned musical works, for a period that runs from January 1, 2018 until March 31, 2018 since the Parties have an agreement for the rest of the Period 2012-2018.

[5] The 2012-2018 determination is marked by a legal context that is different from the 2008-2012 period since, on November 7, 2012, provisions resulting from the *Copyright Modernization Act* came into force,⁴ creating new exceptions and modifying others. The Parties have debated their possible effect on royalties for the period starting on November 7, 2012.⁵

[6] For the reasons that follow, we fix the royalties as follows (averages are rounded):

- Television BICs: Conventional: \$260,000 (average)/year; Internet: \$10,400 (average)/year
- Radio BICs: Conventional: \$73,000 (average/year), Internet: \$6,000 (average/year)
- Synchronization of commissioned musical works: \$200 per work in a program, \$400 per work in a series (more than one program), adjusted for SODRAC’s share of the rights.
- Sale of physical media: For the years 2012-2014, for any sales not already paid, follow the first table. For the years 2015-2018, 2.39 per cent of amounts paid for sales. Any unpaid sales can follow the second table.

Per minute rate, per copy of program or product	Foreground music (including themes)	Background music (including transitions)
For the first 15 minutes	1.44¢	0.58¢
For the next 15 minutes	0.87¢	0.35¢
Thereafter	0.52¢	0.21¢

Per minute rate, per copy of program or product	Foreground music (including themes)	Background music (including transitions)
For the first 15 minutes	1.47¢	0.59¢
For the next 15 minutes	0.89¢	0.36¢

³ *Applications to fix royalties for a licence and its related terms and conditions (SODRAC v CBC/SRC)*, 2008-2012 (Redetermination) (26 June 2020) Copyright Board. [2020 Decision]

⁴ *Copyright Modernization Act*, S.C. 2012, c. 20.

⁵ For example, in its April 21, 2016, news release regarding its decision on the rates payable by commercial radio, the Board stated that these exceptions led to a general reduction of approximately 22 per cent in reproduction tariffs and that an additional reduction could apply in the future if users demonstrate that they respect certain conditions with regard to the types of reproduction that they carry out.

Thereafter	0.53¢	0.22¢
------------	-------	-------

- Sale of digital files:

Per minute rate, per copy of program or product	Foreground music (including themes)	Background music (including transitions)
For the first 15 minutes	1.44¢	0.58¢
For the next 15 minutes	0.87¢	0.35¢
Thereafter	0.52¢	0.21¢

- Distribution-incidental copies:
 $A \times B$, where
 (A) is 3 per cent of the revenues from the sale or licensing of programs, and
 (B) is the fraction of those revenues retained by CBC after paying a third-party its share.

II. WHAT ARE THE ROYALTIES FOR TELEVISION BROADCAST-INCIDENTAL COPIES?

A. BACKGROUND

[7] As explained in the Board’s *2020 Decision*, CBC makes different types of copies of musical works protected by copyright, including BICs. The latter are fundamentally copies for internal use, designed to facilitate the actual broadcasting process and to preserve the work in the broadcaster’s archives. Since the beginning of the 21st century, this process relies on digital technology and digital file-based workflows, which naturally involve making multiple copies.

[8] In terms of BICs made for conventional and Internet television, it is CBC’s position that the same approach to valuation should be used in both the 2008-2012 and 2012-2018 periods. CBC argued that SODRAC introduced no new material evidence that would show increased value for Television BICs in the 2012-2018 period.

[9] CBC further argued that the base price must be adjusted downwards to account for chain-of-title deficiencies in SODRAC’s repertoire and for modifications resulting from various copyright exceptions that came into force in November 2012.

[10] It is SODRAC’s position that the royalties for 2008-2012 it proposed as well as the underlying method for calculating them should apply to 2012-2018. Since it considered there were no technological changes compared to the previous licence period, the same licence terms should apply.

[11] SODRAC disagreed with the scope of adjustments requested by CBC. It claimed that CBC’s repertoire adjustments were grossly exaggerated. In terms of exceptions, SODRAC challenged the application of exceptions in many cases and the methodology underlying CBC’s assessment of price discounts due to the application of exceptions.

[12] On March 28, 2018, SODRAC filed with the Board a notice (“the March 28 notice”) that for the Period 2012-2018 an agreement had been reached between the Parties on several matters (i.e. synchronization of pre-existing works and commissioned works [up to Dec. 31, 2017, in the latter case] and interactive kiosks) (the “CBC-SODRAC Settlement”). In accordance with the *Copyright Act* (the “Act”)⁶ the Board was no longer seized of these matters, except for commissioned works from January 1, 2018 until March 31, 2018.

[13] The Board subsequently indicated in Notice [CB-CDA 2018-178] that the CBC-SODRAC Settlement may be useful in setting the royalties for Television BICs. The Parties were asked to file all agreements with the Board which are the object of the Parties’ March 28 notice. An agreement was filed with comments, but without admission and without prejudice to the Parties’ claims in this matter.

[14] SODRAC emphasized the fact that the CBC-SODRAC Settlement does not provide any rate for BICs.

[15] CBC agreed with the Board that this information could be relevant in establishing the royalties payable for Television BICs using the method set out in Dr. Reitman’s report. For reference, this method calculates the total price for all reproductions, deducts the synchronization fees and the difference represents the appropriate fees for BICs.

[16] In view of the without prejudice nature of the CBC-SODRAC Settlement with respect to BICs, we do not rely on it in this decision.

[17] It is noteworthy, however, that before their 2018 settlement, the Parties confirmed that they agreed to use SODRAC’s standard rates for synchronization of pre-existing music.⁷ The rate for commissioned musical works (e.g., theme music) was never fully settled.

B. DETERMINATION

[18] In its *2020 Decision* regarding the 2008-2012 period, the Board fixed the royalty rate for Television BICs by first determining the total royalties notionally owed to SODRAC with respect to all television-related reproductions for works used by CBC, and then allocating 25 per cent of this total for Television BICs made by CBC. This allocation was based on a sequential Nash bargaining model.

⁶ *Copyright Act*, R.S.C., 1985, c. C-42, s. 71.1. [the “Act”]

⁷ Exhibit SODRAC-42, *Statement of Case* (2012-2018) title E.2 « les taux standards de la SODRAC » at paras 2, 216, 230; Exhibit CBC-62, *Statement of Case* (2012-2018) at paras 172, 174, 177-183; M^e Lavallée (Cross) Transcripts, Vol 7 (Pub.) 901:19-23.

[19] The Nash model of the 2020 *Decision* works in this fashion. In the first stage, the Master Copy bargains with BICs and all synchronization copies other than the Master copy. Nash's usual result applies: 50 per cent of the royalties accrue to the Master Copy and 50 per cent of the royalties accrue to the other copies. In the second stage, BICs bargain with all synchronization copies other than the Master Copy. Once again, Nash's result applies: 50 per cent (of the 50 per cent of the original pie) accrues to BICs and remainder accrues to synchronization copies other than the Master copy. Accordingly, for the period 2008-2012, there was a relationship of 1:3 (being 25 per cent to 75 per cent) between the price for BICs and the price for all synchronization copies (including the Master Copy).

[20] This relationship should remain relatively stable for the period under consideration (2012-2018), unless significant changes in the market occurred that would affect the price of BICs differently than the price for the other synchronization copies. Accordingly, we use one-third of synchronization royalties as a proxy for determining the 2012-2018 royalties for Television BICs.

[21] However, we must consider whether this proxy, used for redetermining Television BICs for the 2008-2012 period, must be further adjusted to reflect a potential different technological environment as well as a different legal framework in terms of exempted copies and chain of title deficiencies. We therefore first consider whether there have been significant changes to the manner in which CBC uses BICs or synchronization copies. Indeed, unless changes to the technologies it uses for its program creation and broadcasts occurred in 2012-2018, there would be little justification for modifying our proxy. Second, we consider whether exceptions applicable to reproductions and chain-of-title deficiencies would affect the price of BICs differently than the price for synchronization copies.

i. Changes in CBC's Use of Technology

[22] With respect to the first potential change, Dr. Murphy explained that the "period since 2008 has largely been one of refinement and improvement of the CBC digital infrastructure described in [its] 2008-2012 Report, with additional reliability, additional capacity and flexibility, and stable or decreasing costs of deployment and operation (a period of continuing "evolution")."⁸ This leads SODRAC to conclude that: [TRANSLATION] "There hasn't been any major change in terms of digital copies technology since the 2008-2012 period."⁹

⁸ Exhibit SODRAC-48 at para 12.

⁹ Exhibit SODRAC-42 at para 25.

[23] CBC's *Statement of Case* concurs with this, noting that the "comments made in CBC's 2008-2012 Statement of Case carry forward to the 2012-2018 period"¹⁰ and stating "that the same approach to valuation should be used in both the 2008-2012 and 2012-2018 periods."¹¹

[24] We therefore conclude that the technology used is sufficiently similar between the two periods so as not to have a significant effect on the relationship between BICs and synchronization copies that emerged as a result of the *2020 Decision*.

ii. Effect of New Exceptions

[25] While the 1:3 relationship was observed in a period prior to the coming-into-force of certain exceptions under the Act – such as section 29.24 (back-up copies), section 30.71 (temporary reproductions), section 31.1 (network services) –, other exceptions such as section 29 (fair dealing) and subparagraph 32.1(1)(d)(copies required by the broadcasting regulatory framework) theoretically applied. It is appropriate to ask, then, whether the 1:3 relationship between the price for BICs and the price for all the other synchronization copies remains sound after November 7, 2012.

[26] In responding to this question, we address three issues, namely, whether the effect of the new exceptions may be calculated (i) by using the joint CBC Survey prepared by the Parties for the purposes of this arbitration; or (ii) by reference to the discount for new exceptions established by in a settlement reached following the Board's 2016 decision on commercial radio tariffs by the concerned parties;¹² or (iii) by using the synchronization standard rate as a proxy for the effect of exceptions (the Nash bargaining approach).

a. Can the effect of new exceptions be calculated from the joint CBC Survey?

[27] The Parties followed the approach used in *Commercial Radio, 2016* where the Board ruled that the presence of copyright exceptions may warrant a reduction in royalties. In order to determine the size of the reduction, the Board apportioned a relative value between different categories of copies and deducted the value of those categories that were exempt. In this case, to determine the value between the various categories of BICs, the Parties conducted a joint survey of CBC, by business unit, asking questions, in particular about the usefulness of each type of copy, the importance of each type of copy, and the sequence of the copies made. The survey was, broadly speaking, modelled on the survey conducted under the aegis of the proceeding in

¹⁰ Exhibit CBC-62 at para 5.

¹¹ Exhibit CBC-62 at para 11.

¹² *CSI, 2012-2013; Connect/SOPROQ, 2012-2017; Artisti, 2012-2014* (21 April 2016) Copyright Board. [*Commercial Radio, 2016*]

Commercial Radio, 2016. Appendix I to Exhibit SODRAC-59 contains all the data from the survey of CBC. The survey was conducted of 23 business units at CBC.

[28] CBC surveyed its media units on the usefulness of different types of BICs on a 1-5 scale and then homogenized the responses so there was a single response to each question.¹³ The usefulness scores were weighed by the number of copies made by CBC.

[29] For SODRAC, Drs. Boyer and Crémieux adopted a different methodology to allocate value to copies. Since there is just one data set (i.e. CBC), they believe that more complex measures should be used to find the value of copies. To this end, the following survey questions were used: The usefulness rating, the importance ranking, and the essential copies (copy-types that would be used if only a limited number of types could be used).

[30] There are frailties in the CBC Survey that make its data less favourable for use in this proceeding than was the case with a somewhat comparable type of survey utilized by the Board in *Commercial Radio, 2016*.

[31] First, the *Commercial Radio, 2016* decision contained data for 212 stations, of which only the data for 120 were found to be useable.¹⁴ In this matter, the Board never received disaggregated data for each of the 23 business units, allowing it to infer, to the extent that the commercial-radio decision is indicative, that the data from all business units may not be useable. Furthermore, the disaggregated data would be able to show whether there was any variation among the business units. If there is no variation, then this is not really a survey, it is just a report from CBC. To the extent that CBC counsel reviewed the answers before supplying them to SODRAC, this can also “contaminate” the variation normally present in a survey.

[32] Second, both Parties consider some of the responses to be incorrect.¹⁵ They attempted to correct the data, an effort that renders the data at least questionable since they are no longer spontaneous. This can lead to two conclusions, neither of which is satisfactory. Either we accept the corrected data, which are “contaminated” by the correction process. Or we do not, in which case we are using data which the Parties tell us are incorrect.

[33] We are therefore reluctant to rely on the Survey evidence the Parties have put forward in order to measure the effect of the new exceptions on Television BICs royalties. This is particularly so when, as we shall explain, there is a preferable proxy, namely the synchronization standard rate.

¹³ Mr. Dupras, (Chief) Transcripts, Vol 12 (Pub.) p 1606; M^e Masse (Cross) Transcripts, Vol 12 (Pub.) at p 1688.

¹⁴ *Commercial Radio, 2016*, at paras 309-310.

¹⁵ Exhibit CBC-63 at para 34; Exhibit SODRAC-59 at para 50.

b. Can the discount for new exceptions for Commercial Radio be used?

[34] In Notice [CB-CDA 2018-178], the Board also asked the Parties for their views on whether the Settlement Agreement reached in the wake of *Commercial Radio, 2016* (submitted to the Board on September 15, 2017)¹⁶ could be used as a proxy for the value of exempted copies as a whole for Television, Internet Television, Radio, and Internet Radio BICs.

[35] SODRAC argued that the Commercial Radio Tariff Settlement was not representative of the market as it was negotiated in the shadow of the Board's decision and reflected other considerations that did not pertain only to copyright exceptions. SODRAC submitted that some BICs for radio do not exist for television and conversely.¹⁷

[36] For television and Internet broadcasting, CBC argued that the Commercial Radio Settlement has no relevance to valuing the exceptions applicable to CBC's Television or Internet BICs. The differences in the evidence and the applicable exceptions are simply too stark for the Commercial Radio Settlement to be a valid proxy.

[37] We agree. The Commercial Radio Tariff Settlement is probably not reliable in the television context as radio displays too many differences compared to television.

c. Can the synchronization standard rate be used to proxy the effect of new exceptions?

[38] There are three standard rates for synchronization:¹⁸

- Pre-existing works: \$300/30 seconds, to a maximum of \$1,200 per song.
- Pre-existing works used in variety shows: \$400 for less than 30 seconds, \$700 for 31-59 seconds, and \$1,000 per song for any usage over one minute.
- Commissioned works: \$200/episode, \$400/series.

[39] By "standard", we and the Parties mean that the rates are widely used in the relevant marketplace. The standard rate for the synchronization of pre-existing works has also been agreed upon by the Parties from April 1, 2012 to December 31, 2017.¹⁹ The rates for commissioned works were negotiated among the *Association québécoise de la production médiatique* (AQPM), the *Société professionnelle des auteurs et des compositeurs du Québec* (SPACQ), and SODRAC and were set out in a sector-wide agreement commonly designated as

¹⁶ This is a different settlement than the CBC-SODRAC Settlement referred to earlier in these reasons, which concerns synchronization copies.

¹⁷ SODRAC, Letter to the Board in response to Notice [CB-CDA 2018-178], Sept. 28, 2017 at p 11.

¹⁸ CBC, *Closing Arguments* (2012-2018) at paras 9-12.

¹⁹ SODRAC-42, *Statement of Case* (2012-2018) title E.2 « les taux standards de la SODRAC », at paras 2, 216, 230; CBC-62, *Statement of Case* (2012-2018) at paras 172, 174, 177-183; M^e Lavallée (Cross) Transcripts, Vol 7 (Pub.) 901:19-23.

the Tripartite Agreement.²⁰ We further explain under the section on the royalties for the synchronization of commissioned works why we rely on this rate.

[40] We agree with Dr. Reitman's assessment of negotiated prices: "The use of a negotiated agreement theoretically incorporates all the information available to the Parties about risk, costs, investments and returns to investments, and the relative role of music in the creation of value for [television] broadcasters".²¹ We accept that a standard synchronization price would also account for exceptions and repertoire adjustments. In this case, CBC stated it agreed with SODRAC's standard rates for pre-existing works, relied on the Tripartite Agreement for commissioned music, and made the chain-of-title deficiencies claim at the same time.

[41] It could be said that exceptions apply in some different measure to BICs and synchronization copies. They may be different types of copies; they may exist for different durations; they may be made in different absolute quantities. However, we do not think this presents an insurmountable problem for using a synchronization price (which has already been adjusted for exceptions) in our model to set the price of BICs, however. We say this for the following reasons.

[42] Synchronization copies include production-incidental copies (PICs), which have the same purpose as BICs: They are incidental copies necessary or helpful to achieve an intended outcome but are not part of the outcome itself. As the Board has previously explained, PICs are "made in the process of producing and distributing an audiovisual work, either before or after the Master Copy is made: It is a form of synchronization copy".²² The Parties and their experts have adopted the Board's definitions of synchronization copies and broadcast-incidental copies.²³ The evidence adduced shows that BICs and PICs are not clearly distinguishable.²⁴ Exceptions applying in the case of PICs may well apply in the case of BICs therefore.

[43] Another parallel can be drawn between synchronization copies and BICs. Synchronization copies include a "master copy". BICs include the "broadcast copy". No exceptions apply to

²⁰ *Société professionnelle des auteurs et des compositeurs du Québec (SPACQ), Association québécoise de la production médiatique (AQPM) et SODRAC – Entente Télévision Tripartite* (The Tripartite Agreement) whose rates are half as much, \$100 and \$200, respectively. As explained in the *2012 Decision* at paras 128-129, the rates in the Tripartite Agreement only pay the author, so they need to be doubled to account for the publisher as well.

²¹ Exhibit CBC-2, *Dr. Reitman Report* at para 128.

²² *2012 Decision* at para 12.

²³ Dr. Murphy: Transcripts, Vol 2 (Pub.) 183:17-184:14 (PICs), 195:1-5 (BICs); Exhibit CBC-1, *Statement of Case* (2012-2018) at para 8.

²⁴ See Dr. Murphy (Cross) Transcripts, Vol 2 (Pub.) 313:11-14; Dr. Murphy (Cross) Transcripts, Vol 2 (H. Conf.) 160:17-25; Dr. Murphy (Cross) Transcripts, Vol 3 (H. Conf.) 173:16-19; Dr. Murphy (Cross) Transcripts, Vol 2 (Pub.) 279:2-4. See also Dr. Murphy (Cross) Transcripts, Vol 2 (Pub.) 274:21-24. Drs. Boyer and Crémieux were also affected by this uncertainty: Drs. Boyer & Crémieux (Chief) Transcripts, Vol 3 (H. Conf.) 215:2-5 ("as Dr. Murphy explained there's some ambiguity as to exactly what PIC or BIC is going to be benefitted by the project."). See CBC, *Closing Submissions* (2008-2012) at para 52.

either of these types of copies. For any broadcast, there is exactly one Master Copy and exactly one broadcast copy. There is thus a valuation symmetry between synchronization copies and BICs. Each one consists of a large number of incidental copies that are subject to an exception and a single copy not subject to an exception. This adds weight to the premise that the shares associated with the (potentially) exempt copies are also similar and that there is a sufficient parallel between the exceptions applicable to BICs and those applicable to synchronization copies.

[44] In terms of PICs, SODRAC has expressly stated that the licence for synchronization includes PICs and therefore the price would have been adjusted for those exceptions that apply to PICs.²⁵ In terms of the synchronization master copy, the SODRAC licence permits unlimited copies. By implication, the Tripartite Agreement prices have also been adjusted for those exceptions which apply to PICs, which we consider to be similar to those exceptions which apply to BICs.

[45] Thus, while we recognize that the set of all synchronization copies may have characteristics somewhat different from those of BICs, we are satisfied on the basis of the record before us that it is appropriate to use the degree of exceptions embedded in a total amount payable for synchronization copies as a proxy for that degree applicable to BICs.

[46] Put in Nash bargaining terms, if we imagine that the bargain included a deduction of X per cent to the price of synchronization to account for new exceptions, using the 1:3 correspondence effectively applies this same deduction of X per cent to the price of BICs. In this regard, it is not necessary for us to determine the magnitude of X.

[47] Accordingly, we set the royalties for Television BICs as one-third of the total notional royalties payable for synchronization, without further adjustment, as the Board did in its *2020 Decision*.

iii. Calculating the Price of Television BICs

[48] We begin with the standard rates, as set out above. Applying these three rates to the set of internal productions actually synchronized by CBC gives the four figures which appear at the bottom of column K of Exhibit SODRAC-89. The next step is to compute the simple average of these four years and apply it to the remaining three years of the licence. Table 1 shows the notional²⁶ synchronization fees for the seven years of this licence.

²⁵ Exhibit CBC-79: SODRAC Interrogatory Answers Related to Production-incidental Copies.

²⁶ The fees are notional in the sense that, while we are no longer seized of synchronization of pre-existing works for the entire licence term, and of commissioned works up to Dec. 31, 2017, we can determine what those fees would

Table 1: Notional Synchronization Fees, by Year

2012	\$484,671.32
2013	\$291,234.56
2014	\$256,872.28
2015	\$469,784.51
2016	\$375,640.67
2017	\$375,640.67
2018	\$375,640.67

[49] The standard prices account only for internal productions. In order to account for external productions, it is important to take into account the share of internal productions.²⁷ Since these shares are typically stated in terms of CBC fiscal years,²⁸ they need to be converted to calendar years to make them compatible with the notional prices above. Table 2 shows the share of internal productions, by fiscal year and by calendar year.

Table 2: Share of Internal Productions

Fiscal Year	Internal Production Share	Calendar Year	Internal Production Share
2011-2012	58%	2012	56%
2012-2013	55%	2013	56%
2013-2014	56%	2014	49%
2014-2015	47%	2015	49%
2015-2016	50%	2016	44%
2016-2017	43%	2017	43%
2017-2018	43%	2018	43%

[50] It is then possible to gross up the amounts assuming that external productions are expected to use SODRAC music in the same quantity as internal ones. This assumption is also used by CBC's expert Dr. Reitman for the 2008-2012 period. We consider it to be a very reasonable assumption. Table 3 shows the process of grossing-up the synchronization prices.

Table 3: Synchronization Price, Unadjusted and Grossed-Up

Year	Synchronization Price	Internal Share	Grossed for External Production
2012	\$484,671.32	56%	\$873,084.44
2013	\$291,234.56	56%	\$522,309.26
2014	\$256,872.28	49%	\$520,594.00
2015	\$469,784.51	49%	\$960,040.29
2016	\$375,640.67	44%	\$848,182.97

have been based on the data and evidence in the record.

²⁷ Exhibit CBC-47.

²⁸ The CBC fiscal year begins on April 1. As such, the calendar year n is one-quarter of fiscal year $(n-1):n$ and three-quarters of fiscal year $n:(n+1)$.

2017	\$375,640.67	43%	\$870,278.03
2018	\$375,640.67	43%	\$870,278.03

[51] Following the Nash bargaining model adopted by the Board in its *2020 Decision*, we divide each of these annual figures by 3. Finally, we do not adjust this rate, since the market should price the legal framework correctly, including exceptions and chain-of-title deficiencies.

[52] Table 4 below sets out the final amounts payable for Television BICs, year-by-year, adjusting for the partial years at the beginning and the end of the licence period.

Table 4: Television BICs Royalties, by Year

Year	Full Synch Divided by 3	Partial Years	Television BICs Royalties
2012	\$291,028.15	0.75	\$218,271.11
2013	\$174,103.09	1	\$174,103.09
2014	\$173,531.33	1	\$173,531.33
2015	\$320,013.43	1	\$320,013.43
2016	\$282,727.66	1	\$282,727.66
2017	\$290,092.68	1	\$290,092.68
2018	\$290,092.68	0.25	\$72,523.17

iv. Conclusion

[53] But for the synchronization rate proxy, we would have relied on the survey. This proxy yields a “net” price, which means exceptions and other issues have been accounted for. We therefore do not need to ask ourselves which exception applies and if so, what is its effect on the price.

III. WHAT ARE THE ROYALTIES FOR THE SYNCHRONIZATION OF COMMISSIONED MUSICAL WORKS?

A. BACKGROUND

[54] The Parties are in agreement to use SODRAC’s “standard rates” for synchronization but disagree on what constitutes a “standard rate” for the synchronization of commissioned music for the period from January 1 to March 3, 2018.

[55] CBC claimed that the Tripartite Agreement provides a valid price benchmark for the synchronization of commissioned musical works.

[56] The Tripartite Agreement provides that commissioned music synchronized in a given television series is subject to a single \$100 payment per episode or \$200 per series, if a work is

used in multiple episodes.²⁹ These fees represent the author's share, which is 50 per cent of the total rights, the other 50 per cent belonging to the publisher. CBC has renounced its right to the publisher's share for commissioned works, and, as such, agrees to a doubling of the Tripartite Agreement rates.³⁰

[57] CBC argued that this is a standard rate it applies regardless of the number of minutes of synchronized music, and it should apply equally to CBC. This rate has been paid by all external producers in Quebec since 2009 and will have been paid until at least 2017.³¹

[58] CBC argued that the \$6.15 per minute rate is not a standard rate. It argues that the \$6.15 per minute rate is an artifact of the data problems that faced the Board in 2012, when the Board had access only to minutes of music and lacked any exhibit comparable to CBC-94 or SODRAC-89A to 89D.³² These data problems forced the Board to approximate the Tripartite Agreement \$200/\$400 rate using a per-minute rate. Additionally, at the time of the 2010 hearing, the Tripartite Agreement had just been signed, and its application in the industry was ill-understood. With better information now before the Board, it is now possible to apply the \$200 per episode, \$400 per series rate directly. To this effect, CBC filed Exhibit CBC-94.

[59] SODRAC contends that the \$6.15 per minute rate, which was originally set by the Board, is SODRAC's standard rate and that CBC conflates the applicable rate and the final amount owing once that rate is applied to the number of minutes synchronized by a user.

[60] In addition, SODRAC disagrees that the Tripartite Agreement is an appropriate benchmark for CBC's commissioned musical works because producers under the Tripartite Agreement do not produce news capsules. SODRAC argued that news capsules are not "episodes" of a "series". It referred to Mr. Martin's testimony that the \$200 fee was negotiated to account for the fact that the average number of episodes of a given show was 12 whereas news capsules exceed 365 per year.³³

²⁹ Exhibit SODRAC-86A at p 49, Clause 7(b). See also Exhibit SODRAC 42 at p 60, para 225.

³⁰ CBC *Closing Arguments (2012-2018)* at footnote 14.

³¹ M^e Lavallée (Cross) Transcripts, Vol 7 (Pub.) 942:2-8; CBC-90, Entente Tripartite 2009-2011 (signed 18 June 2009, as recited in the whereas clauses to CBC-92); Exhibit CBC-92, *Entente Tripartite 2015-2017* at pp 46-47 (Most recent agreement on file, renewing the Tripartite Agreement for 2 years from date of signature, which is 11 December 2015; the agreement will have renewed automatically after that time unless cancelled by one party).

³² Note: These exhibits identify productions that include commissioned music and whether its theme music (i.e. the music is used in multiple episodes).

³³ Mr. Martin (Cross) Transcripts, Vol 7 (Pub.) 946:10-947:10.

[61] SODRAC claimed that news productions require more music than other types of productions – i.e. dramas and documentaries – because they are aired more frequently. SODRAC implies that the Tripartite Agreement’s rate is an inappropriate standard.³⁴

B. DETERMINATION

[62] We begin with the question as to whether the Tripartite Agreement is an appropriate standard. During cross-examination, SODRAC conceded that external productions with 120 episodes (such as *District 31* produced by Aetios) existed.³⁵ Such series would be subject to the same \$200 fee for its commissioned music under the Tripartite Agreement, notwithstanding its number of episodes. This rebuts its initial argument that \$200 is notionally limited to 12 episodes. We note that the Board had also rejected this interpretation of a limit on the number of episodes in its *2012 Decision*, noting that the Tripartite Agreement allowed for more, “if only by providing that subsequent seasons of the same series do not trigger additional royalties unless new commissioned music is added”.³⁶ We believe this position is still valid.

[63] Furthermore, as CBC points out, M^e Lavallée, Director, Licences and legal affairs, SODRAC, also admitted that the \$6.15/minute rate that was set by the Board in its *2012 Decision* was not a standard rate: [TRANSLATION] “I would not necessarily characterize it as a standard rate.”³⁷ He further admitted that no one other than CBC has ever paid the \$6.15/minute rate.³⁸ This is not consistent with the notion of a standard rate.

[64] Regarding SODRAC’s claim that news productions require more music than other types of productions – i.e. dramas and documentaries – because they are aired more frequently, we fail to understand it. There is no correlation between the actual quantity of music synchronized and the number of broadcasts. To the extent that there is a relationship between musical works copied and the number of broadcasts, it pertains to BICs made, not synchronizations. It is possible that SODRAC’s argument confused BICs and synchronization.

[65] Regarding SODRAC statement that the \$6.15 per minute rate is just a variation of the standard rate, we disagree. When in 2012 the rate for commissioned music was set, the only evidence available on the amount of commissioned music synchronized by CBC was Exhibit SODRAC-121.G, which included a rough, unverified estimate by SODRAC of the total amounts of commissioned music used by CBC for 2006-2008.³⁹

³⁴ *Plan d’argumentation de la SODRAC* (2012-2018) at paras 178-183.

³⁵ Mr. Martin (Cross) Transcripts, Vol 7 (Pub.) 954:22-955:16.

³⁶ *2012 Decision* at para 129.

³⁷ M^e Lavallée (Cross) Transcripts, Vol 7 (Pub.) 918:1-21.

³⁸ M^e Lavallée (Cross) Transcripts, Vol 7 (Pub.) 918:22-25.

³⁹ Exhibit CBC-15 at footnote 79.

[66] The amount of music used in SODRAC-121.G is measured in seconds. The Board was willing to use the Tripartite Agreement as a benchmark but, in order to do so, accepted to convert to Tripartite Agreement blanket licence fixed fee into a per-minute rate to accommodate SODRAC-121.G, the only data available. At the time, it was assumed that, in practice, the amount of commissioned music per episode was five minutes, that the vast majority of commissioned music was in series, and that a series had 13 episodes ($\$400$ per series / 13 episodes = $\$30.77$ / 5 minutes = $\$6.15$ per minute x data = average annual synchronization royalty of $\$250,730$ for CBC's use of commissioned musical works in the SODRAC repertoire).⁴⁰

[67] Today, we know: (1) how many episodes or series typically use commissioned music, and (2) that the Tripartite Agreement rates apply regardless of the amount of music used.

[68] The origins of the $\$6.15$ per-minute price are as an approximation to the per-episode and per-series prices. SODRAC's contention that the per-minute price and the per-episode / per-series prices yield the same total royalties is not correct in this case. We must therefore choose between these two pricing structures. As time passes, CBC's usage of SODRAC repertoire changes, so the approximation becomes less precise. Since we prefer to match the prices CBC faces with those of the rest of the broadcasting industry (using the Tripartite Agreement), we need use those prices, not the approximation to them.⁴¹

[69] We conclude that the $\$6.15$ /minute rate is now obsolete. We conclude that the Tripartite Agreement (with its doubled rates as applied by CBC) is still a valid proxy and provides a standard rate for the synchronization of commissioned works, which should now be applied without further adaptations.

[70] For added clarity, we confirm that the royalty rate covers news capsules.

[71] For the (very-short) period of which we are seized, we prefer that the Parties calculate the royalties owing, rather than estimate the royalties based on past periods. The rates we approve are $\$200$, for any SODRAC repertoire work synchronized into a single episode, and $\$400$, if the same work is synchronized into multiple episodes of the same series. Of course, these fees apply only in respect of the reproduction rights owned by SODRAC.

⁴⁰ 2012 Decision at para 129.

⁴¹ Compare Exhibit CBC-94 (fixed rate) and Exhibit SODRAC-89.A to D (per minute rate). SODRAC admitted that it did not use the $\$200$ - $\$400$ rate in Exhibit SODRAC-89.A to D: Mr. Martin (Cross) Transcripts, Vol 7 (Pub.) 917:1-4.

IV. WHAT ARE THE ROYALTIES FOR INCIDENTAL COPIES MADE FOR CONVENTIONAL RADIO BROADCASTING?

A. INTRODUCTION

[72] In the *2012 Decision*, the Board set radio broadcast-incidental copies (BICs) as follows. It started with the payments made by CBC to SOCAN for the radio tariff and deducted 1.22 per cent thereof for the simulcasting rights. It then divided by 3.2, to keep the ratio between the value of reproduction and communication identical as between commercial radio and CBC radio, relying in part on the CMRRA-CBC Agreement of 2009.⁴² Finally, it multiplied the result by 34.5 per cent to reflect SODRAC's repertoire share for CBC radio.

[73] For the purpose of this matter only, CBC and SODRAC have agreed to set the base price for Radio BICs as a portion of the SOCAN royalties (\$144,406.60 per month), retaining the same portion as in the *2012 Decision*, namely, 31.25 per cent.^{43,44} They however disagreed on the repertoire adjustment that should apply and the effect of exceptions on the rate.

[74] Since the Parties agree on the base price, we use it here, without further comment. We address below the two areas of disagreement among the Parties: the repertoire adjustment that should apply to the base price and the effect of exceptions on the price.

B. REPERTOIRE ADJUSTMENT

i. Background

[75] The issue of repertoire adjustment has two components: a proposed adjustment for an alleged measurement "error" and an adjustment for alleged deficiencies in SODRAC's chain of title.

[76] Following SODRAC's filing of its Statement of Case, CBC sought clarifications on certain points. One of the issues related to the dates on which repertoire studies were conducted. As the evidence shows, SODRAC performs repertoire studies relating to CBC radio about two years later than the year to which the usage pertains. CBC pointed out that, since SODRAC updates its repertoire database on a continual basis, this means that some works that were not in SODRAC's repertoire at the time they were broadcast on the radio may have been counted as "in" SODRAC's repertoire for the purposes of the study. Table 5 shows the adjustment due to SODRAC allegedly using the incorrect year; the figures in Table 5 were provided by CBC.

⁴² *2012 Decision* at para 99.

⁴³ CBC, *Closing Arguments* at para 38.

⁴⁴ *Plan d'argumentation de la SODRAC (suite) : examen pour la période 2012-2018* at para 3.

Table 5: Corrections for Using Incorrect Year

Actual Year	SODRAC Repertoire Claim	Year used by SODRAC	Growth between the Two Years	Corrected Repertoire
2011	34.77%	2013	11%	30.94%
2012	32.74%	2014	10%	29.46%
2013	31.81%	2015	10%	28.62%
2014	32.49%	2016	9%	29.56%
2015	29.78%	2017	9%	27.09%
2016	-	-	-	29.13%
2017	-	-	-	29.13%
2018	-	-	-	29.13%

[77] CBC also claimed that SODRAC’s chain of title has broken in several places, such that it does not represent 34 out of the 60 works (or 57 per cent) it claims to represent.⁴⁵ It bases this claim on its analysis of the 60-work sample contained in Exhibits SODRAC-81 and SODRAC-82. These exhibits were filed for the purpose of determining the nature of SODRAC’s chain of title.

[78] SODRAC contended that there is no need to adjust the repertoire analyses for the difference in years, on the grounds that SODRAC’s repertoire share varies by less than one percentage point per year.⁴⁶ SODRAC explained that its repertoire increases primarily because of new works being added by existing rights holders.⁴⁷ Furthermore, it argued that CBC is well aware of this since it has had access to a full listing of SODRAC’s repertoire with quarterly updates.⁴⁸

[79] With respect to chain of title, SODRAC admitted that the chain of title is deficient for 17 works out of 60, or about 28 per cent.⁴⁹

ii. Determination

[80] In terms of the measure of repertoire growth, for the reasons provided further below, we do not make any adjustment for the differences in repertoire year and apply a uniform adjustment of 38 per cent for chain of title deficiencies.

⁴⁵ CBC originally made claims which contained adjustments for posthumous copyright reversion and works in the public domain. However, CBC abandoned its claim to these two justifications for reduction in its closing arguments.

⁴⁶ *Plan d’argumentation la SODRAC : examen pour la période 2012-2018* at para 130.

⁴⁷ Exhibit SODRAC-95 at para 188.

⁴⁸ Exhibit SODRAC-95 at para 186.

⁴⁹ Mr. Martin (Cross) Transcripts, Vol 7 (Pub.) 1000:11-20.

a. Repertoire Growth Measure

[81] Two remarks are in order. Since no repertoire calculations were done for 2016-2018, the Parties have agreed that the average figure for the preceding years may be used. Also, Table 2 is expressed in terms of calendar years, whereas the 2012-2018 licence is expressed in terms of CBC fiscal years. An adjustment for this difference is simple to implement and is done in Section D (What Value Do Exempt Copies Bear?) below. Yearly repertoire shares are detailed in Table 6.

Table 6: Final Repertoire Shares, by Year

Year	SODRAC repertoire claim	Chain of title	Final repertoire share
2012	32.74%	0.62	20.30%
2013	31.81%	0.62	19.72%
2014	32.49%	0.62	20.14%
2015	29.78%	0.62	18.46%
2016	32.32%	0.62	20.04%
2017	32.32%	0.62	20.04%
2018	32.32%	0.62	20.04%

[82] CBC noted that there is a discrepancy between the year SODRAC is using to measure its repertoire and the year it claims to be measuring. It led evidence of changes in SODRAC’s repertoire, year-over-year, and proposed a correction to the measure of repertoire put forward by SODRAC. CBC’s proposed characterization, however, is based on a miscategorization of the data used; accordingly, we reject it.

[83] While CBC’s arguments refer to the changes from year to year of SODRAC’s repertoire (an “absolute increase”), those are already counted if the new works are part of SODRAC’s repertoire for reproduction and SOCAN’s repertoire for communication. Each year, there are more works in SODRAC’s repertoire than the year before as authors and composers routinely assign their new, current and future works to SODRAC.

[84] However, the relevant changes to SODRAC’s repertoire are those that represent the proportion of SODRAC’s repertoire that is in SOCAN’s repertoire used by CBC (a “relative increase”); this fraction is necessarily between 0 and 1 and relatively stable over time. An absolute increase in repertoire would not necessarily lead to a relative increase in repertoire. CBC has presented no evidence of any relative increase in repertoire, year-over-year, such that an adjustment to SODRAC’s figures would be justified.

b. Chain of Title Deficiencies

[85] SODRAC’s counsel have indicated in a letter dated July 19, 2017 to CBC’s counsel that the sample of 60 works used to assess chain of title was [TRANSLATION] “sufficient for the

purpose of this matter.”⁵⁰ While SODRAC objected to CBC relying on this letter during the hearing,⁵¹ the basis for the objection was not explained and the representativeness of the repertoire sample is not questioned by SODRAC in any of its written submissions, including its closing arguments.

[86] We consider that the 60-work sample was properly agreed upon by the Parties as sufficiently representative. As such, we rely on it to establish the appropriate adjustment for chain of title deficiencies.

[87] SODRAC admitted that 17 of 60 works had title deficiencies. These admissions concern the following works: Exhibits CBC-81.04; 81.15; 81.18; 81.23; 82.04; 82.06; 82.08; 82.09; 82.17; 82.20; 82.21; 82.22; 82.23; 82.24; 82.26; 82.27; 82.28.⁵² This leaves 17 works on which CBC and SODRAC disagree.

[88] Our title validity analysis for each of these 17 works that CBC claims carry a title deficiency concludes that 7 works have a deficiency, 2 of which have a partial deficiency. Counting each of these partial deficiencies as “half”, a total of 23 out of 60 works have a title deficiency. We therefore apply a 38 per cent deduction. Our detailed analysis follows:

1. CBC-81.7

[89] CBC states the following: Ariane Brunet assigned the entirety of her copyright to three publishers (apparently in equal parts) as per Exhibit CBC-81.7, executed on August 13, 2013. Ms. Brunet joined SODRAC *after* the assignment, at which point she no longer owned any copyright which she could provide to SODRAC. Instead, the copyright was entirely co-owned by the three publishers. Only two of these publishers have joined SODRAC, each bringing 1/3 of the copyright with them (as per Exhibit SODRAC-109.23). CBC argues that the chain of title is defective since SODRAC does not own the entire copyright.

[90] SODRAC took notice of Exhibit CBC-83, which entry (6C-7) for the works *Mes mots* and *C'est toi* in Exhibit CBC-81.7 indicated the absence of deficiencies.

[91] SODRAC referred to Exhibit SODRAC-109.23.

[92] We conclude that SODRAC owns 100 per cent of the rights: Contrary to CBC’s claim, Ms. Brunet joined SODRAC on October 15, 2010 (Exhibit CBC-81-7, [TRANSLATION] *Affiliation Statement Agreement to the Articles and Bylaws of SODRAC 2003 Inc.*). On that date, she

⁵⁰ See para 23, CBC, *Closing Submissions* (2012-2018) referring to Exhibit CBC-108 at p 8: Letter from Robic to M^e Marek Nitoslawski dated July 19, 2017.

⁵¹ Transcripts, Vol 7 (Pub.) 993:1-996:17.

⁵² Exhibit SODRAC-124 at works 81.23 and 82.08; Mr. Martin (Cross) Transcripts, Vol 7 (Pub.) 998:19-1000:20.

assigned her reproduction rights on existing or future works. SODRAC was therefore the sole right holder when Ms. Brunet “transferred” her rights to the three publishers on August 13, 2013.

2. CBC-81.09

[93] CBC states the following: SODRAC claims to own the rights of Émilie Archambault in the song *Banc*. However, in 2010, she assigned her rights to Entourage Productions (which is not a SODRAC member) (Exhibit CBC-81.09). Her assignment to SODRAC was made in 2011, at which point she no longer held copyright (Exhibit CBC-81.09). SODRAC claims that the assignment to Entourage was somehow “under reserve” of a future assignment Ms. Archambault might make to SODRAC (Exhibit SODRAC-124). First, SODRAC has provided no authority that such a future conditional assignment of copyright is possible. Second, clause 5.[2] of Exhibit CBC-81.09, the clause on which SODRAC relies, clearly refers only to past assignments, not future ones. Even if SODRAC is correct in law, this contract does not have that effect. CBC concluded that the chain of title is incomplete.

[94] SODRAC argued that the author reserved her right to assign her copyright to SODRAC under clause 5.2 of the assignment agreement.

[95] We conclude that SODRAC owns 0 per cent of the rights.

[96] Clause 5.2 is under section 5 [TRANSLATION] “Precedence of agreements already concluded with copyright collective societies.”

[97] Clauses 5.2 and 5.3 refer to a past assignment [TRANSLATION] “will have assigned/has assigned her rights [...] to SODRAC.” This is in contrast with SODRAC’s own standard recommended reservation clause (<https://sodrac.ca/en/vos-redevances-et-notre-commission-2/>) which also provides for future assignments to SODRAC:

Notwithstanding anything to the contrary, any right assigned or granted to (Name of the Contractor) hereunder is subject to agreements already concluded by (Your name or appellation) or which may be with the collecting societies the right of public performance or reproduction (including SOCAN, SODRAC and their affiliates throughout the world). Therefore, (Name of the contractor) cannot, under any circumstances, modify or diminish the right of (Your name or appellation) to its share of the amount collected by the said management company. Also, (Name of the contractor) must remind any subsequent user of this subjection. [Emphasis added]

[98] Clause 5.3 provides that where the rights have been assigned to SODRAC, the author will guarantee payment to the publisher of its 50 per cent share to which it is entitled under the agreement.

[99] Clause 5.4 provides that any right assigned to SODRAC that reverts to the author is assigned to the publisher under the agreement.

[100] Clause 8.1.1 provides that, subject to s. 5, the author represents and warrants that the rights have not been assigned away.

[101] Based on the foregoing, the agreement does not reserve the author's right to assign copyright to SODRAC, which she has already assigned to the publisher Entourage Productions. This is more likely a standard clause that may apply where copyright has been assigned *prior* to the transfer to the publishers. In such a case the agreement only conveys an interest in the SODRAC royalties, if any.

3. CBC-81.10

[102] CBC states the following: Messrs. Mukash and Iserhoff, the authors of a 13-track music album, have apparently assigned the rights thereto to "Ceremony" prior to joining SODRAC (as per SODRAC's submissions on this work in SODRAC-124). Ceremony is not a SODRAC member. Ceremony then provided an exclusive licence to Benoit Gagné Productions (Exhibit CBC-81.10, third « attendu que » clause and clause 2.1). Benoit Gagné Productions then purported to assign the rights to SODRAC (Exhibit CBC-81.10). However, Benoit Gagné Productions did not own copyright and could not assign it to SODRAC, since Benoit Gagné Productions was a mere licensee. SODRAC has admitted that it must operate via assignment and can only operate via licensing if there is a by-law approving such activity (Exhibit SODRAC-124, submissions concerning the about sixty songs listed in Exhibit 81.23). No such by-law has been proven here. CBC concluded that the chain of title is incomplete.

[103] SODRAC provided Exhibit SODRAC-109.26, which confirms the authors joined SODRAC in 2012.

[104] We conclude that SODRAC owns 100 per cent of the rights.

[105] CBC erroneously assumes that the authors have assigned their rights to Ceremony. The latter's status and form are unknown. Ceremony is clearly the authors' *alter ego*. Ceremony is represented by no other than the authors themselves. There is no document proving an assignment from the authors to Ceremony. At best, Ceremony is an undeclared partnership, which under section 2252 *Civil Code of Quebec*⁵³ does not have its own patrimony. Accordingly,

⁵³ *With respect to third persons, each partner remains the owner of the property he contributes to the undeclared partnership.*

Property that was undivided before the contributions of the partners were combined or that is undivided by agreement of the partners, or any property acquired using undivided sums during the term of the contract of partnership, is undivided property as between the partners.

the rights cannot be transferred to Ceramony. When the authors joined SODRAC (Exhibit SODRAC-109.26), they conveyed the entire rights (whether undivided or not) to SODRAC.

4. CBC-81.19

[106] CBC indicated the following: They were provided with many contracts involving Alain Patenaude. Given SODRAC's reference to Valérie Combe, this chain of title is intended to refer to the work *Duo pour un blues* (Exhibit CBC-81.19 at p 18).

[107] The assignment on which SODRAC relied was signed in 2013 with a three-year duration (clause 2.1). The rights assigned have thus expired since 2016 and SODRAC has not provided any new assignment for the post-2016 period. CBC argued that the chain of title is incomplete.

[108] SODRAC claimed that a "without prejudice" clause in this contract means that SODRAC somehow can claim to own a greater interest in the copyright than its own assignee. This is simply bad law. SODRAC's assignee owned a three-year copyright, and this is the best that could be provided to SODRAC.

[109] SODRAC stated that it represents only one of the authors via a reciprocity agreement with SACEM (Exhibits SODRAC-124 and SODRAC-109.43).

[110] We conclude that SODRAC holds 50 per cent of the rights for 100 per cent of the Licence term as rights of co-author Valérie Combe were transferred to SACEM in August 2011.

[111] Evidence of transfer from Ms. Combe (a France resident) to the publisher Incaba is dubious given discrepancies of signatures on Exhibits CBC-81.19 and SODRAC-109.43. The transfer document from Ms. Combe to SACEM is to be preferred. SACEM membership triggers SODRAC representation from the date of membership through the SACEM-SODRAC reciprocity agreement.

5. CBC-81.22

[112] CBC indicated the following: SODRAC relies on a contract that is clearly a mandate/agency relationship, not an assignment, from the author to the publisher (Exhibit CBC-81.22, clause 4.1). At best, the publisher was constituted an exclusive licensee. Again, SODRAC cannot operate via licensing and requires an assignment. There is no assignment of copyright, so the chain of title is incomplete.

[113] We conclude SODRAC holds 100 per cent of the rights.

[114] Exhibit CBC-81.22 corresponds to responses to interrogatories 6C-22 (see Exhibit CBC-81). In Exhibit CBC-83, the contract CBC-81.22 was described by CBC as appearing to confer

valid title to SODRAC. As such, SODRAC was not on notice to provide any explanation or additional documents in relation to Exhibit CBC-81.22.

[115] Furthermore, SODRAC argued *in general* that the publishing agreement is not relevant when the authors are also SODRAC members. (*Plan d'argumentation de la SODRAC* (2012-2018) at para 143) In this case, the works *Tant pis*, *Ça y est, tu pars*, *Feu de paille*, *Marie*, *Les retailles du plancher*, *Ce soir*, *Les yeux fermés*, *T'es qui toé?*, and *Plus rien à faire* subject to the publisher agreement are represented by SODRAC through the authors' membership. Public information suggests that Simon Guénard, Simon Lachance, Martin Plante, Alexandre Zacharie and Éric Blanchard are SODRAC members (<https://sodrac.ca/en/directories-music-works/>).

[116] Because of the inconsistency in CBC's arguments and the public information available, we presume that the rights holders are duly represented by SODRAC.

6. CBC-81.27

[117] CBC argued the following: SODRAC claims to represent Productions Christian Clermont, a publisher. However, there was no assignment from the author of the works to the publisher, so the chain of title was incomplete. SODRAC has produced a "confirmatory assignment" (Exhibit SODRAC-109.31A). This is evidently a document created after-the-fact in the hopes that it will retroactively correct the gap in SODRAC's chain of title.

[118] The Federal Court and Federal Court of Appeal have ruled that retroactive assignment of copyright is not possible (*Harmony Consulting v GA Foss Transport*, 2012 FCA 226 at para 61; *Milliken & Co v Interface Flooring Systems (Canada) Inc.*, [1998] FCJ 135 at paras 44-46 (TD), affirmed without comment on this point [2000] FCJ 129 (CA); *JL de Ball Canada v 421254 Ontario Ltd.*, [1999] FCJ 1977 at paras 15-20 (TD)). CBC reiterated that the chain of title remains incomplete.

[119] SODRAC indicated that Christian Clermont Inc is Mr. Christian Clermont's *alter ego*. Furthermore, the assignment of July 2015 was confirmed as per Exhibit SODRAC-109.31A, executed July 20, 2017.

[120] We conclude that SODRAC holds 0 per cent in the work.

[121] *J.L. de Ball Canada Inc. v 421254 Ontario Ltd.*, 1999 CanLII 9222 (FC), <http://canlii.ca/t/1j1m0>, at paras 23-24 provides that:

The jurisprudence on so-called "*nunc pro tunc*" documents establishes that they have their stated effect only if they are merely recording an event that occurred or should have occurred.

[122] Since the Act requires an assignment to be in writing and since there is no such writing to evidence the assignment of July 2015, Exhibit SODRAC-109.31A cannot validate the assignment retroactively (“*nunc pro tunc*”).

[123] While Mr. Christian Clermont appears to be a SODRAC member (from a search in: <https://sodrac.ca/en/directories-music-members/>), we have no evidence to suggest he was a SODRAC member during the licence period.

7. CBC-81.30

[124] CBC argued the following: SODRAC claims to represent Marc Déry. However, the contracts provided clearly demonstrate that Mr. Déry’s copyrights have been assigned to Éditorial Avenue. CBC referred to Exhibit 81.28. Accordingly, the chain of title is incomplete.

[125] We conclude that SODRAC holds 100 per cent of the rights in the impugned work *Changer d’air*.

[126] Exhibit CBC-81.28 concerns the author Philippe Garceau yet CBC’s *Closing Submissions, Appendix B: SODRAC’s chain of title* raises deficiencies with respect to Marc Déry, identified as CBC-81.30.

[127] Furthermore, there is a discrepancy between CBC’s *Closing Submissions* and its *Appendix B: SODRAC’s chain of title*: The former does not identify CBC-81.30 as displaying an invalid chain of title; the latter identifies CBC-81.28 as problematic but refers to problems with CBC-81.30.

[128] We note that Exhibits CBC-81.28 and CBC-81.30 correspond to responses to interrogatories 6C-28 and 6C-30, which were identified as having valid chains of title under Exhibit CBC-83. As a result, SODRAC was not afforded the opportunity to provide any explanation or additional documents in relation to works CBC-81.28 and CBC-81.30.

[129] Furthermore, SODRAC argued in general that the publishing agreement is not relevant when the authors are also SODRAC members (*Plan d’argumentation de la SODRAC* (2012-2018) at para 143.) In this case, the works subject to the publisher agreement are represented by SODRAC through the author’s membership. Public information suggests that Marc Déry is a SODRAC member (<https://sodrac.ca/en/directories-music-works/>).

[130] Because of the inconsistency in CBC’s arguments and the public information available, we presume that the right holder is duly represented by SODRAC.

[131] We also conclude that SODRAC holds 100 per cent of the rights of Virginie Bilodeau, as per Exhibit CBC-81.30.

[132] Finally, we conclude that SODRAC holds 100 per cent of the rights of *Éditorial Avenue*, including those assigned by Marc Déry in 2014, as per Exhibit SODRAC-109.6, [TRANSLATION] *Affiliation Statement Agreement to the Articles and Bylaws of SODRAC 2003 Inc.*, signed March 12, 2004, and covering “all rights published” by *Éditorial Avenue*.

[133] Based on the foregoing, we do not identify Exhibit CBC-81.30 as deficient.

8. CBC-82.01

[134] CBC claimed the following: SODRAC relies on a chain of title allegedly tracing back to the succession of Lionel Daunais. However, there is no documentary or other proof that Mr. Daunais’ copyrights passed to the succession on his death. The writing requirement applies to wills as well as *inter vivos* transfers (*Wing v Velthuisen*, 2000 CanLII 16609 at para 45 (FC)). As a result the chain of title is incomplete.

[135] SODRAC provided Exhibit SODRAC-109.45: SODRAC Membership Declaration of succession Lionel Daunais.

[136] We conclude that SODRAC holds 100 per cent of the work *Le petit chien de laine*.

[137] We rely on Exhibit SODRAC-109.45. In our opinion, CBC misinterprets *Wing v Velthuisen*, 2000 CanLII 16609 at para 45, which merely provides that a copyright *can* be transferred in a will, not that it *must* be.

[138] The law of the Province where the author died domiciled will determine the beneficiaries, whether the author dies with or without a will (D. Vaver, *Copyright Law*, Irwin Law, 2000 at p 116. See also *Wing v Velthuisen*, 2000 CanLII 16609 at para 47 [although it is a common law case]. See also subsection 14.2(2) of the Act).

[139] In Quebec, unless otherwise provided by testamentary provisions, a succession devolves under the operation of the law (section 653 *Civil Code of Quebec*; B. Lefebvre, *Droit d’auteur, droit matrimonial et droit successoral*, in ALAI Canada (ed.), *Un cocktail de droit d’auteur*, Montréal, Éditions Thémis, 2007, at pp 213-245).

9. CBC-82.02

[140] CBC claimed the following: SODRAC apparently relies on a chain of title that traces from the author Roland Lebrun to his succession, and from there to Ms. Gemma Lebrun, to her succession, and finally to SODRAC itself. The only document provided for this chain of title is an assignment from the succession of Gemma Lebrun to SODRAC (Exhibit SODRAC-109.46). None of the previous steps have been proven by written assignments, which is necessary given that Exhibit CBC-82.02 contains statements that the copyright is owned by the succession of Roland Lebrun, not the succession of Gemma Lebrun. The chain of title is therefore incomplete.

[141] SODRAC stated that it represents the succession of Gemma Lebrun as per SODRAC-109.46

[142] We conclude that SODRAC holds 0 per cent of the work: There is no evidence that the succession of Gemma Lebrun holds the rights in Mr. Lebrun's work *L'adieu du soldat*. The link between the succession of Roland Lebrun and the succession of Gemma Lebrun is missing.

10. CBC-82.03

[143] CBC argued the following: The only document initially provided to CBC was an assignment from Mr. Filion to *Éditions La Claire* (Exhibit CBC-82.03). No subsequent assignment from *Éditions La Claire* to SODRAC was provided. SODRAC has provided additional documentation as SODRAC-109.32, but none of these documents are an assignment from *Éditions La Claire*, which has been the owner of this work, *La parente*, since 1957 according to Exhibit CBC-82.03. Therefore, the chain of title remains incomplete.

[144] SODRAC stated that it holds the rights of Jacques Labrecque (doing business as *Éditions La Claire Fontaine*) and Jean-Paul Filion as per Exhibit SODRAC-109.32.

[145] We conclude that SODRAC holds 100 per cent of the work as per Exhibits SODRAC-109.32 and CBC-82.03.

[146] There is no reason to believe *Éditions La Claire* was a separate legal entity as it is standard practice to mention it when it is the case. In fact, the reference to *Éditions La Claire* is crossed out on the assignment document CBC-82.03, where the assignment is from Filion to *Les Éditions Jacques Labrecque*. Both Filion and *Les Éditions Jacques Labrecque* are SODRAC members as per Exhibit SODRAC-109.32.

11. CBC-82.06

[147] CBC argued the following: SODRAC has provided a great many contracts for the work *Nous, on est dans le vent*, but there is no contract relevant to Warner Chappell Music France, which SODRAC claims is an owner of this work (see copyright bulletin provided as Exhibit CBC-82.06). The chain of title is incomplete.

[148] SODRAC provided Exhibit SODRAC-109.3A-E, which are SACEM membership agreements and a legal publication on a corporation's change of name from Vogue Intl to Cabot International SA.

[149] We conclude that SODRAC holds 100 per cent of the work.

[150] As per Exhibit SODRAC-109.03, SODRAC represents the work through its reciprocity agreement with SACEM. A search on the SACEM database shows that it represents the rights in the work. Warnell Chappell Music France is associated to Cabot International SA.

12. CBC-82.07

[151] SODRAC claims to represent Ben Kaye, yet no assignment from Mr. Kaye to SODRAC has been provided. The chain of title is therefore incomplete.

[152] SODRAC provided SODRAC-109.4A.

[153] We conclude that SODRAC owns 100 per cent of the rights.

[154] SODRAC 109-4A states that Halben Publishing Reg'd holds the rights in the work/composition *Ton amour a changé ma vie*. Ben Kaye (one of the authors) is a principal of Halben Publishing Reg'd. All three authors signed off the assignment. This would meet the writing requirement for an assignment in subsection 13(4) of the Act.⁵⁴

13. CBC-82.11

[155] CBC claimed the following: Prior to joining SODRAC in 1998, Mr. Stéphane Venne had assigned all of his rights to another company, XII, in 1982 (Exhibit SODRAC-109.7B). He thus had no rights left to give to SODRAC.

[156] Therefore, SODRAC needs to prove a chain of title tracing from Mr. Venne to XII to Musicobec to SODRAC.

[157] SODRAC has provided an assignment from XII to Musicobec (Exhibit SODRAC-109.7B). However, the list of songs covered by this assignment is in an appendix to the contract and the appendix has not been provided. There is no reason to believe that the work at issue here, *C'est le début d'un temps nouveau*, is included in that assignment. The chain of title is incomplete.

[158] SODRAC's submissions on this work mention emails and verbal assurances of ownership. These are not sufficient to prove chain of title. The chain of title is incomplete.

[159] SODRAC stated that it is still looking for the writing attesting to a transfer from XII to Musicobec of the work.

⁵⁴ See *Turgeon c Michaud*, 2003 CanLII 4735 (QC CA), <<http://canlii.ca/t/6kfr>> at para 71: [TRANSLATION] Moreover, it appears to me unreasonable to invalidate a written assignment only because it does not use an express formulation whereas the document shows the intent of the parties to implement such an assignment. In my opinion, for an assignment to be valid, it suffices that it be in writing and executed by the right holder and that it clearly shows that the true intent of the latter was to assign that right.

[160] In our view, SODRAC owns 0 per cent of the rights: No evidence is available to show transfer of the work from Musicobec to SODRAC.

14. CBC-82.15

[161] CBC claimed the following: SODRAC has admitted that it does not represent Almo Music of Canada as per SODRAC's submissions on work 82.15, *La voix que j'ai*, in Exhibit SODRAC-124.

[162] SODRAC claims to represent the share of this copyright held by Almo. Given the admission by SODRAC's lawyers that Almo is in fact not a SODRAC member, the chain of title is incomplete.

[163] SODRAC has contacted Universal in relation to the publishing agreement for Jean Gravel, Gerry Boulet and Gilbert Langevin.

[164] We conclude that SODRAC holds 50 per cent of the rights.

[165] While SODRAC's website mentions it represents Almo in relation to the work *La voix que j'ai* (by Offenbach, 1977), *Les Éditions Offenbach enr.* confirmed in a letter dated March 17, 2005 to SODRAC that Universal Music collects rights therein on behalf of Almo (Exhibit CBC-82.15).

[166] Universal confirmed that they administer Almo Music rights (email to SODRAC, March 31, 2005, Exhibit CBC-82.15).

[167] Universal Music is a SODRAC member (Exhibit SODRAC-109.35).

[168] However, SODRAC has not provided evidence that Universal is the assignee of Almo Music's 50 per cent share in the work (as per the 1976 Participation Agreement between Almo Music and *Les Éditions Offenbach enr.*: Exhibit CBC-82.15).

15. CBC-82.16

[169] SODRAC's submissions on this work, *Petit matin*, in Exhibit SODRAC-124 are contradictory. In Exhibit SODRAC-124, SODRAC takes the position that the rights in question are held by Mr. Lelièvre's succession. Yet none of the contracts provided involve the succession or would prove that the succession owns the copyright. Instead, they are from *Éditions Basse Ville* and Monique Lelièvre-Vaillancourt, neither of whom has provided assignments from the succession.

[170] If the succession does own copyright, no assignment to SODRAC has been provided. If the succession does not own copyright, then SODRAC has not proven who is the proper assignor. Either way, the chain of title is incomplete.

[171] SODRAC referred to Exhibit SODRAC-109.11.

[172] We conclude that SODRAC holds 100 per cent of the rights.

[173] The author Sylvain Lelièvre is presumed to be the right holder.

[174] He joined and assigned his rights (present and future) to SODRAC on Nov. 25, 1986 (Exhibit SODRAC-109.11).

[175] Mr. Lelièvre passed away in April 2002. SODRAC is the right holder until 2027 under section 14 of the Act.

16. CBC-82.17

[176] CBC claimed the following: Luc Plamondon joined SODRAC, but subsequently received a re-assignment of his rights back from SODRAC (see contract dated 30 June 1999 in Exhibit SODRAC-109). In return, he granted SODRAC a licence. As admitted by SODRAC, it can only operate via licensing if there is a by-law approving such activity (Exhibit SODRAC-124, submissions concerning work 81.23, *Si fragile*). No such by-law has been proven here. The chain of title is incomplete.

[177] SODRAC referred to Exhibit SODRAC-109.36

[178] We conclude that SODRAC holds 100 per cent of the rights in the work *Si fragile*.

[179] Luc Plamondon joined SODRAC 2003 Inc. in September 2003 (see [TRANSLATION] *Affiliation Statement Agreement to the Articles and Bylaws of SODRAC 2003 Inc.* and letter from Mr. Plamondon to SODRAC 2003 Inc. dated Oct. 7, 2004 as per Exhibit SODRAC-109.36).

17. CBC-82.25

[180] CBC declared the following: Nicole Bélanger assigned all of her rights to a company called Solodarmo in 1992 (Exhibit CBC-82.25). Solodarmo then assigned the rights to a company called *L'Industrie Musicale* in 1993. Ms. Belanger did not join SODRAC until 1997, at which point she had no rights left to give to SODRAC. SODRAC does not represent *L'Industrie Musicale*.

[181] Clause 7 of Exhibit CBC-82.25 is not relevant. It constitutes a promise to pay royalties by Solodarmo. This doesn't have any effect on ownership of the work. The chain of title is incomplete.

[182] SODRAC relied on clause 7 of Exhibit CBC-82.25 to argue that SODRAC “will continue to collect synchronization and reproduction rights”. SODRAC considers that section 7 reserved the author’s right to assign her rights to SODRAC. SODRAC further argues whatever the share of the author in the work, she is represented by SODRAC.

[183] We conclude that SODRAC holds 0 per cent of the rights.

[184] With respect to the work *La rue principale (Les Colocs)*, Nicole Bélanger assigned “100% of all her rights” to Solodarmo in 1992 (clause 3, *Contrat d’édition musicale between Solodarmo et André Fortin / Nicole Bélanger*, Exhibit CBC-82.25).

[185] Clause 7 cannot be read as reserving Ms. Bélanger the right to assign the copyright in the work to SODRAC. Clause 7 provides that the publisher will [TRANSLATION] “retrocede to the Author-Composer 52.5% of all revenues from the commercial exploitation of the work, it being expressly provided that [...] SODRAC will collect the synchronization and reproduction rights [...]”.

[186] Because what is to be “retroceded” are monies (vs. rights), this implies that as far as SODRAC is concerned, Solodarmo is the copyright holder, who will receive the royalties, which are then notionally “retroceded” to the authors. The fact that Solodarmo did not join SODRAC cannot modify the interpretation of clause 7.

[187] This interpretation of clause 7 is confirmed by clause 17: [TRANSLATION] “In case of bankruptcy, winding down, asset liquidation or simple collapse, the assignment herewith shall be automatically cancelled and the author-composer will regain all her rights.” [Emphasis added]

[188] This is confirmed when looking at a subsequent agreement under which Solodarmo assigns 50 per cent of its rights in the work to *L’Industrie Musicale*. Without a full assignment under the previous agreement, Solodarmo could have only assigned 47.5 per cent of the rights in the work as it stood prior to signing the 1992 agreement.

C. EXCEPTIONS

i. Background

[189] On November 7, 2012, certain provisions of the *Copyright Modernization Act* came into force, including the enactment of section 29.24, which provided an exception for backup copies, and section 30.71, which provided an exception for reproductions forming an essential part of a technological process, and the amendment of section 30.9, amending a limited exception for ephemeral reproductions made by broadcasters.

[190] CBC claimed that it meets the conditions that allow it to benefit from a certain number of copyright exceptions, which in turn ought to discount the base price. Indeed, in the past,

applicable exceptions led to a reduction in reproduction tariffs in existence prior to the coming into force of new exceptions. SODRAC and CBC disagreed on which copies would be subject to an exception.

[191] We examined the Parties' arguments and determined that each type of Radio BIC can fall into one of three categories:

- Exempt;
- Exempt if CBC meets certain conditions, which it did not during the 2012-2018 period; and
- Non-exempt.

[192] After having identified the copies that are exempt, we consider the methodologies put forward by the Parties that would allocate a value to an exempt category of copy. Such value would constitute the extent of the base price discount.

ii. Which Copies⁵⁵ are Exempt?

a. RAM Copies

[193] Random Access Memory (RAM) Copies raise two legal issues. The first relates to the procedural fairness issue raised by SODRAC who objects to the admissibility of RAM Copies. The second issue is whether a RAM Copy is a substantial copy, since only the latter is protected by copyright.

Procedural fairness

[194] SODRAC objects to the admissibility of RAM Copies for the following reasons: CBC cannot rely on copyright exceptions that were not identified in the Parties' *Statement of Issues*. Admitting RAM copies would be contrary to procedural fairness because SODRAC did not have the opportunity to carry out interrogatories on RAM Copies and adequately prepare its case as RAM Copies were not identified at the beginning of the arbitration process. More particularly, RAM Copies were not identified in the Questionnaire to CBC on the various types, amounts and usefulness of broadcast-incident copies (BICs) it makes. While CBC subsequently had the opportunity to address some discrepancies in its responses to interrogatories, it did not reference RAM Copies. Furthermore, CBC and its economics expert unilaterally added RAM Copies *ex post* and set the utility factor identified without consulting with CBC's technical personnel. SODRAC argues that allowing this new evidence after the interrogatories' phase deprives SODRAC from the ability to adjust its initial expert evidence, which relied on the information

⁵⁵ A consolidated list of definitions of each type of copies is provided in Exhibit CBC-122.

provided by CBC during interrogatories. SODRAC claimed that it was not materially possible to make these adjustments so close to the hearing date and it would be prejudicial to reopen the file after the record was perfected.

[195] In response to SODRAC's objection, CBC argued the following:⁵⁶ RAM Copies were omitted from the surveys through inadvertence. CBC's technical personnel simply did not think of them, because they are copies that are made automatically and without human intervention. When CBC received SODRAC's *Statement of Case*, CBC's in-house counsel noticed that Dr. Murphy seemed to be systematically distinguishing permanent copies from what appeared to be RAM Copies.⁵⁷ CBC's counsel then reviewed the Board's 2016 Commercial Radio decision and noticed that it made reference to RAM Copies. CBC's counsel made inquiries of CBC technical personnel, discovered that CBC makes RAM Copies throughout its production and broadcasting processes, and so these copies were included in CBC's *Statement of Case*. CBC claimed it was a good-faith oversight and there was no prejudice. CBC offered to provide additional information about RAM Copies, and this offer was refused. CBC argued that Dr. Murphy showed himself eminently capable of discussing RAM Copies. First, he provided a live demonstration of this during the hearing, by filling out his tables of copy characteristics in real time for both TV RAM and Radio RAM Copies. Second, his reply report advances a number of explanations as to why he believes RAM Copies are not substantial parts of copyrighted works, and thus should not reduce SODRAC's royalties. There is no prejudice to SODRAC. Dr. Murphy had no difficulty working with RAM Copies. If there was any prejudice, it would be self-inflicted, since SODRAC refused CBC's offer of additional information.

[196] We consider that it would be unfair to CBC to deny its right to an exception for procedural reasons when it acted in good faith. SODRAC's objection is in effect directed towards CBC's arguments rather than the evidence allegedly filed improperly. Furthermore, the fact that SODRAC was aware of the existence of RAM Copies and was the first to raise it at the Statement of Case stage through its expert⁵⁸ is significant. SODRAC cannot claim surprise in this respect. In any event, it would also be unfair to deny CBC the right to make submissions on RAM value even if it was denied the right to rely on its own evidence in terms of usefulness. Finally, there is an argument to be made that the existence of RAM Copies in computer systems is such a notorious fact that the Board can take judicial notice thereof.

Is a RAM Copy a substantial copy?

[197] SODRAC argued that RAM Copies do not involve substantial copying. As such, they are not copies that benefit from an exception, which means that no discount for RAMs should apply.

⁵⁶ CBC, *Submission on SODRAC Procedural Objections (2012-2018 Arbitration)* at paras 12-16.

⁵⁷ Exhibit SODRAC-48 (Dr. Murphy Report) at paras 20, 97, 215, 246, 301.

⁵⁸ Exhibit SODRAC-48 (Dr. Murphy Report) at paras 20, 97, 215, 246, 301.

[198] In its 2009 Satellite Radio Decision⁵⁹ the Board had to determine whether the 4 to 6-second buffer – which stores in the temporary memory of the satellite radio user’s receiver a “rolling” four seconds of the signal received from the satellite or repeater which provides time diversity – is a reproduction of a substantial part of a work. To so conclude, it had to find that: (1) buffers are in effect a copy of the protected work; (2) the copying is substantial; and (3) the resulting copy is in a material form.

[199] The Board ruled that these specific temporary copies (rolling buffer) meet parts 1 and 3 of the test above but fail part 2:

[97] Thus, the question is reduced to whether the 4 to 6 second buffer is a substantial part of an entire work. The rolling 4 to 6 seconds of a musical work is not an aggregate of an entire work. At no time does a subscriber possess a series of 4 to 6 second clips which when taken together would constitute a substantial part of the work. It matters not that overtime the totality of all works transmitted are reproduced. We are dealing with a rolling buffer and at no time can we line up all of the fragmented copies amounting to one complete copy of a musical work. At no point in time can one extract from the RAM of the receiver more than 4 to 6 seconds of a song (or more accurately of a signal). More importantly, at no time is there a choice as to what goes in there or when it comes out.⁶⁰

[200] In *Commercial Radio, 2016*, while the Canadian Association of Broadcasters raised the issue, the Board did not discuss the substantial-part aspect of “streaming copies”, i.e. temporary buffering copies made in the course of streaming radio station content to computers, mobile devices and other digital terminals. It held that streaming copies meet the requirements of section 30.71 of the Act.⁶¹

[201] The most relevant authority on how to determine substantial copying in a regulatory context (vs. infringement) is *Canadian Copyright Licensing Agency (Access Copyright) v Canada, 2018 FCA 58*, essentially stating that the Board is permitted a significant margin of appreciation in determining the method by which the tariff should be set, including a quantitative analysis for the purpose of determining substantiality.⁶² The same would likely apply in the arbitration context where – for valuation purposes, in a technological context – it may be impractical or unfeasible to carry out a qualitative analysis. Indeed, surveying each RAM Copy within any given computer to determine qualitative substantiality is most likely impossible.

⁵⁹ *SOCAN, NRCC, CMRRA/SODRAC Inc. – Tariff for Satellite Radio Services, 2005-2010* (8 April 2009), Copyright Board at para 85.

⁶⁰ Affirmed in *Sirius Canada Inc. v CMRRA/SODRAC Inc.*, 2010 FCA 348 at para 52. However, the Court held that: “In my view, the Board’s conclusion that the buffered content was not a copy of an entire work or a copy of a substantial part of a work was reasonably open to it on the record and was not based on an error of law. CSI’s application cannot succeed on this ground.” (at para 52)

⁶¹ At para 192.

⁶² At paras 126-129.

[202] Whether there is substantial copying (or not) is not relevant where the copy does not or should not bear a value, however. As we explain under the relevant subsection on value, we do not assign any value to RAM Copies.

b. Backup Copies

Background

[203] Backup Copies, in relation to a radio program, are copies made by or for CBC to be used in the operation of CBC's radio services in the event that another copy is lost, damaged, or otherwise rendered unusable.

[204] CBC relies on section 29.24 of the Act, which provides the following:

Backup copies

29.24 (1) It is not an infringement of copyright in a work or other subject-matter for a person who owns — or has a licence to use — a copy of the work or subject-matter (in this section referred to as the “source copy”) to reproduce the source copy if

(a) the person does so solely for backup purposes in case the source copy is lost, damaged or otherwise rendered unusable;

(b) the source copy is not an infringing copy;

(c) the person, in order to make the reproduction, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented; and

(d) the person does not give any of the reproductions away.

Backup copy becomes source copy

(2) If the source copy is lost, damaged or otherwise rendered unusable, one of the reproductions made under subsection (1) becomes the source copy.

Destruction

(3) The person shall immediately destroy all reproductions made under subsection (1) after the person ceases to own, or to have a licence to use, the source copy.

[205] CBC claimed that its backup copies fulfill all the requirements of section 29.24 of the Act:

- CBC owns or has a licence to use the source copy. Neither is the source copy infringing.

- CBC makes Backup Copies solely for backup purposes.⁶³ CBC further submits that while Dr. Murphy insinuated that Backup Copies were used for other purposes, this is incorrect. CBC's backup copies are stored on the LTO StorageTek and cannot be used for broadcasting or production. To the extent that CBC wants to make use of these copies, it would have to generate new copies, which would fall into a different category of copy.⁶⁴
- There are no technological protection measures on content received by CBC, so the creation of backup copies cannot fall afoul of 29.24(1)(c).⁶⁵
- CBC does not give away either the source or backup copy.⁶⁶
- As the Board noted in *Commercial Radio, 2016*, Canada's collective copyright management regime means that in practice these copies will be covered by a licence in perpetuity, so 29.24(3) is no barrier to applying this exception.⁶⁷

[206] In terms of conventional radio backup copies, SODRAC does not contest that these copies meet the conditions in subsection 29.24(1) of the Act. However, it argued that subsection 29.24(3) of the Act is a precondition to the application of the backup exception and that CBC does not have in place a system to enable it to comply with the condition, particularly, automatic deletion protocols for backups.⁶⁸ SODRAC argued that section 29.24 of the Act must be considered in its entirety.

[207] CBC argued that the only requirements to qualify for the exception are those set out in subsection 29.24(1) of the Act. The text of subsection 29.24(3) of the Act is not written as if it creates some kind of pre-condition to qualify for the backup copies exception; instead, a plain reading shows that it imposes a duty on the user to destroy backup copies when certain circumstances occur. Until those circumstances have occurred though, the duty is not triggered. Nothing in subsection 29.24(3) of the Act imposes an obligation on users to create an automated deletion system in order to benefit from the backup copies exception. Finally, imposing an automated deletion protocol requirement would undermine Parliament's legislative policy. The backup copy exception applies to all users, commercial and non-commercial, individuals as well as enterprises. It would be difficult, if not impossible, for individuals who make backup copies at home to implement an automated deletion protocol based on licence expiration.

Determination

[208] The Board has distinguished in *Commercial Radio, 2016* (at para 181) exceptions that comprise automatic deletion (such as section 30.71 of the Act) from others (such as subsection

⁶³ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub) 1567:2-10; Vol 11 (Conf.) 202:8-17 (backup copies for television and radio have the same characteristics).

⁶⁴ Mr. Dupras (Chief) Transcripts, Vol 11 (Conf.) 200:21-201:5; Vol 11 (Pub) 1570:5-20.

⁶⁵ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub) 1570:21-1571:7.

⁶⁶ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub) 1570:15-20.

⁶⁷ *Commercial Radio, 2016*, at para 171.

⁶⁸ Exhibit SODRAC-96 (Dr. Murphy Reply Report) at paras 37-39.

29.24(3) of the Act) that require a positive act by a person to destroy a copy when a specific event occurs. We believe that this distinction is valid. Accordingly, SODRAC's argument that a deletion protocol must be in place before one can benefit from the exception must be dismissed for the same reasons. CBC meets the conditions in subsection 29.24(1) of the Act⁶⁹ and, as such, can claim the benefit of the exception for the duration of the licence.

c. CRTC Regulatory Logging Copies

Background

[209] CBC is required under the Canadian Radio-television and Telecommunications Commission (CRTC) regulatory framework to maintain logs, which requires CBC to keep copies of all broadcasting for 28 days. CBC may benefit from paragraph 32.1(1)(d) of the Act, which exempts copies made to comply with the broadcasting regulatory frameworks if they are destroyed once the prescribed retention period expires (i.e. 28th day).

[210] However, CBC keeps TV logging copies for 65 days to one year and radio logging copies for one month. As a result, CBC admits it cannot benefit from the exemption. CBC argues, however, that deletion protocols for CRTC copies can be easily modified. It asks that the Board value these copies and declare that once CBC alters its deletion protocols, it may subtract the value of these copies from *future* BIC royalty payments.⁷⁰

[211] SODRAC argued that they were never included in the BIC's licence fee as the exception was in existence and known to the Parties and the Board when the first licence was set by the Board.⁷¹ Therefore, they should not be deducted. It also argues that the exception is not a new one adopted in 2012 and therefore not within the scope of arbitration.⁷² Finally, SODRAC suggests that for radio logging copies in particular, the exception cannot apply because this issue was not raised in previous Commercial Radio tariff decisions.

[212] CBC argued that SODRAC is mistaken. First, it is clear from both the Board's *2012 Decision* and the Supreme Court's judgment that CRTC mandated copies of all kinds were included in the Television BICs at issue for the 2008-2012 period.⁷³ Second, witnesses and SODRAC's own technical expert classified CRTC logging Copies as BICs at the 2008-2012

⁶⁹ Exhibit SODRAC-48 (Dr. Murphy Report) at p 95.

⁷⁰ CBC, *Closing Submissions* (2012-2018) at para 120.

⁷¹ SODRAC, *Statement of Case* (2012-2018) at para 147(d); *Plan d'argumentation de la SODRAC* (2012-2018) at paras 54-59.

⁷² *Plan d'argumentation de la SODRAC* (2012-2018) at paras 54-59. See Q1 on reasons why this latter argument should be dismissed.

⁷³ *2012 Decision* at para 54 (closing captioning copies); Exhibit CBC-3, *CBC v SODRAC*, 2015 SCC 57 at paras 11 (majority: closed captioning copies), 126, 129 (dissent: closed captioning copies), 137 (dissent: CRTC logging copies), and 167 (dissent: all CRTC-required copies).

period.⁷⁴ Third, SODRAC acknowledged in its Supreme Court factum that BICs had been defined as including CRTC logging copies.⁷⁵

Determination

[213] We agree with CBC. It is clear that BICs include CRTC Logging Copies. Moreover, CBC is entitled to claim an exception, whether it precedes or not the 2012 *Copyright Modernization Act* or whether it was addressed in prior radio tariff proceedings. Whether the claim is successful is a different issue.

[214] In terms of satisfying the copy-destruction condition, it is impossible for CBC to comply with the destruction of copies retroactively. We therefore do not consider this exception for the 2012-2018 period.

d. Archive Copies

Background

[215] CBC argued it is mandated to maintain archives of its programming under the *Broadcasting Act* (S.C. 1991, c. 11). Since copies are made to comply with this statute, CBC claims that they are exempt under paragraph 32.1(1)(d) of the *Copyright Act* (exception for copies made under statutory obligations). SODRAC argued that there are no statutory obligations to make archive copies.

[216] Alternatively, CBC claimed that such copies are permitted under the Act's fair dealing provision.

Determination

[217] Paragraph 3(1)(l) of the *Broadcasting Act* provides that:

(l) the Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains

Paragraph 46(1) of the *Broadcasting Act* reads as follows:

46 (1) The Corporation is established for the purpose of providing the programming contemplated by paragraphs 3(1)(l) and (m), in accordance with the conditions of any

⁷⁴ Exhibit SODRAC-6A, Dr. Murphy, *Report on Contemporary Broadcasting Technology* at paras 50-51; Exhibit CBC-60E, Transcripts of Mr. Bell's Testimony before the Copyright Board, Vol 11, 15 June 2010 at 2026:21-2027:12.

⁷⁵ Exhibit CBC-110, SODRAC's Supreme Court Factum.

licence or licences issued to it by the Commission and subject to any applicable regulations of the Commission, and for that purpose the Corporation may

- (a) establish, equip, maintain and operate broadcasting undertakings;*
- (b) make operating agreements with licensees for the broadcasting of programs;*
- (c) originate programs, secure programs from within or outside Canada by purchase, exchange or otherwise and make arrangements necessary for their transmission;*
- (d) make contracts with any person, within or outside Canada, in connection with the production or presentation of programs originated or secured by the Corporation;*
- (e) make contracts with any person, within or outside Canada, for performances in connection with the programs of the Corporation;*
- (f) with the approval of the Governor in Council, make contracts with any person for the provision by the Corporation of consulting or engineering services outside Canada;*
- (g) with the approval of the Governor in Council, distribute or market outside Canada programming services originated by the Corporation;*
- (h) with the approval of the Minister, act as agent for or on behalf of any person in providing programming to any part of Canada not served by any other licensee;*
- (i) collect news relating to current events in any part of the world and establish and subscribe to news agencies;*
- (j) publish, distribute and preserve, whether for a consideration or otherwise, such audio-visual material, papers, periodicals and other literary matter as may seem conducive to the attainment of the objects of the Corporation;*
- (...)*

[218] CBC interprets paragraph 46(1)(j) as the source of its obligation to archive some of its content. CBC submits that the list of objectives set out in section 46 is indeed introduced with the word “may” in English and “*peut*” in French. However, a purposive interpretation of the statute shows that while some of the enumerated purposes under section 46 are indeed optional, others are not. For example, paragraphs 46(1)(a) and 46(1)(c) are clearly mandatory, since if CBC did not carry out these objectives, it would be incapable of operating as a public broadcaster. CBC claims that this is an example of a “may” in service of a “must”.

[219] Section 11 of the *Interpretation Act*⁷⁶ provides that: “The expression ‘shall’ is to be construed as imperative and the expression ‘may’ as permissive.” Authorities explain that this provision only sets a presumption that may be rebutted depending on the context, objective and subject-matter of a provision.⁷⁷

[220] Nonetheless, the context, objective and subject-matter of the provision do not support rebutting the presumption. First, CBC has indicated that only programs with significant heritage or historical value are archived.⁷⁸ It is unclear how preserving such programs fit within the CBC’s objects, namely to provide “a wide range of programming that informs, enlightens and entertains”.⁷⁹ Arguably, the mandate can be achieved without archiving content.

[221] Moreover, the power to preserve audio-visual material is clearly discretionary as per the provision itself: “[...] preserve [...] such audio-visual material, papers, periodicals and other literary matter *as may seem* conducive to the attainment of the objects of the Corporation” / “[...] conserver [...] les documents audiovisuels, journaux, périodiques et autres publications *qu’elle juge de nature à favoriser la réalisation de sa mission*” [Emphasis added]. This language does not support an obligation to archive content.

[222] Furthermore, even if it were imperative, the fact that the provision only applies to “audio-visual material” does not support an overarching obligation to preserve programs,⁸⁰ which would include audio-only programming as well. It is difficult to understand why only audio-visual material is worth preserving when audio-only documentaries can have patrimonial value (e.g., the audio-only interview of an important head of State).

[223] Finally, because the objects of the CBC concern chiefly audio and audiovisual programming (radio and TV),⁸¹ and because the power to preserve content under paragraph 46(1)(j) of the *Broadcasting Act* aims at a mix of audio-visual and print material (“*papers, periodicals and other literary matter*”), whereas the latter are not within CBC’s core mandate, one can correctly interpret the power to preserve as only applicable to news content created under the powers vested by paragraph 46(1)(i), i.e. the power to create a news agency. Indeed, only a news agency will create both print and audio-visual material. CBC has no other power to create print material.

⁷⁶ R.S., c. I-23, s. 28.

⁷⁷ P.-A. Côté, *Interprétation des lois*, Thémis, 4^{ème} édition at paras 895ff.

⁷⁸ Exhibits CBC-5 at p 3, and CBC-88 (Interrogatory Q89), Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1576:10-1577:8, 1577:14-23.

⁷⁹ Paragraph 3(1)(l) of the *Broadcasting Act*.

⁸⁰ Under section 2 of the *Broadcasting Act*, “programs” means: “sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text”.

⁸¹ Section 2 and subsection 3(1) of the *Broadcasting Act*.

[224] We conclude that Archive Copies are not mandatory and, as a result, that they do not meet the conditions to benefit from the exception. We however conclude that they are exempt under the fair dealing provisions in the Act.

[225] CBC explained that: Archive Copies of television broadcasts are made in order to preserve culturally-important programming for posterity. The decision to archive a program is made by CBC's archivists and media librarians, who select programs with significant heritage or historical value. The purpose of CBC's archive is to preserve Canada's media and broadcasting heritage, and to permit access to this heritage by future generations. Archives are made available to the public online via various websites, like Curio.ca, an online streaming platform for educators. Additionally, researchers can gain physical access to CBC's archives. CBC claimed that Archive Copies are therefore made for private study, research and education purposes.

[226] Applying the factors enunciated by the Supreme Court of Canada in *CCH Canadian Ltd. v Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13, CBC argued that, since the facts applied to the factors weigh in favour of fairness, this dealing is fair:

1. Purpose [goal]⁸² of the dealing: The decision to preserve a program in the archives is taken by archivists and librarians. Their purpose is a cultural and archival one, namely the preservation of Canada's media heritage. Any business or production use is secondary, since producers and businesspeople do not make the decision to create Archival Copies. At best, they work with the material that archivists have already chosen to preserve.
2. Character of the dealing: The volume of copying at issue is small. Archival copies are by far the smallest category of TV copy by volume. Radio Archive Copies are the second-smallest category after Live Performance Copies.
3. Amount of the dealing: This factor considers what portion of the work is involved in the dealing (as opposed to overall volume of copying). Use of an entire work can be fair, especially if the purpose of the dealing requires access to an entire copy of the work. Here, Archival Copies can only fulfill their function of preserving Canada's media heritage if they are entire copies of TV or radio programs. It would make no sense to preserve partial copies.
4. Alternatives to the dealing: There are no reasonable alternatives to the dealing. No outside organization will preserve CBC's programming for it. Nor is there a way to permanently preserve a broadcast except to record it as a copy.
5. Nature of the work: This factor considers whether the work is one whose dissemination should be encouraged by copyright law. Television and radio programs by their nature are intended for broadcast to the public.
6. Effect of the dealing on the work: Archival Copies do not have a negative impact on the work, because they do not compete with the original musical work. No one would choose to listen to an archived copy of a TV program rather than a musical track. Instead, Archive Copies have a positive impact on the work, since they allow it to be preserved

⁸² See *Commercial Radio*, 2016, at para 144.

and perhaps replayed at some time in the future. Since new synchronization payments are made when a work is repurposed, rights holders benefit substantially from the use of Archive Copies in new productions like *Tout le monde en parlait* or *Les enfants de la télé*.

[227] Furthermore, CBC stated that the fact that archival material might be used in a future production is not relevant to fair dealing. When CBC or third parties use archival material in a new production (such as *Les enfants de la télé*), this involves making a separate production copy and payment for a new synchronization licence. CBC referred to SODRAC's witness, M^e Martin Lavallée, who explained that when he worked as a producer and used CBC archival footage, CBC would always indicate to archive users that a new synchronization payment needed to be made. The archival copy remains in the archives and continues to serve an archival function.

[228] SODRAC disagreed that Archive Copies are made for research purposes. It claims that they are made for private and commercial purposes:

1. Archive Copies are made and used for CBC's internal production purposes. Their format is specific to CBC's internal processes;⁸³
2. Archive Copies are not designed to be made public and are only accessible "by permission";⁸⁴
3. M^e Christophe Masse, CBC Senior Legal Counsel, confirmed that CBC monetizes these copies;⁸⁵ and
4. CBC does not have the objects of a library (archives) and Archive Copies are a valuable source of revenue.⁸⁶

[229] We adopt CBC's arguments, which we find convincing and consider that Archive Copies are exempt under fair dealing. SODRAC insisted on the fact that Archive Copies are monetized when used for production purposes. Yet, the latter use triggers a payment to SODRAC and, at that stage, the copy ceases to be an Archival Copy.

e. Ingest Copies

[230] Ingest Copies means, in relation to a track or program, a copy made from a music delivery service (MDS) server or from another source and used as the source of other copies that are made in the operation of CBC radio service.

⁸³ Exhibit SODRAC-103 A & B.

⁸⁴ Exhibit SODRAC-103 D & E; Mr. Dupras Transcripts, Vol 11 (Pub.) 1578:4-14.

⁸⁵ Exhibit SODRAC-146, Transcripts, Vol 12 (Conf.) 245:2-10.

⁸⁶ Exhibit SODRAC-16: Business case AC214, Executive summary, 1st paragraph.

[231] CBC claimed that Ingest Copies are exempted under section 30.9 of the Act, as it was the case in *Commercial Radio, 2016*, to the extent that CBC meets the destruction and record keeping conditions set out under the “ephemeral copies” provision.

[232] CBC admitted that it does not yet keep any section 30.9 of the Act records, but like the objectors in *Commercial Radio, 2016*, will begin complying with the recording-keeping requirements once a modified blanket licence is issued. Similarly, CBC currently retains Radio Ingest Copies indefinitely, but will implement a 30-day deletion protocol in order to comply with the durational requirement.

[233] SODRAC argued that since retroactive compliance will not be possible, the matter is moot.

[234] We agree with SODRAC. The Board is only seized of the 2012-2018 period. As such, any discount is theoretical only and we do not consider this exception any further.

f. Live Performance Copies

Background

[235] Live Performance Copies means a copy of a live performance of one or more musical works that occurs either at a CBC studio or at a remote location.

[236] CBC submitted the same factual framework and legal arguments for Ingest Copies apply to Live Performance Copies, which may be exempted under section 30.9 of the Act. CBC cites *Commercial Radio, 2016* where the Board concluded that Radio Live Performance Copies are potentially subject to section 30.9 of the Act.⁸⁷

[237] SODRAC argued that since retroactive compliance will not be possible, the matter is moot. It also argued that the Board has in the past⁸⁸ determined that these copies fall under section 30.8 of the Act, which provides that the exception does not apply where a licence is available from a collective society to make reproductions of the work.

Determination

[238] We accept SODRAC’s submission. Section 30.9 of the Act only applies to works embodied in sound recordings. A live performance of a work ceases to be a live performance when it is embodied in a sound recording. Fixation and reproduction of live performances of a

⁸⁷ *Commercial Radio, 2016*, at para 214.

⁸⁸ *Application to fix royalties for a licence and its related terms and conditions for 2012-2016 (SODRAC v CBC/SRC) – Interim Licence, 2012-2016* (16 January 2013) Copyright Board at paras 20-21.

work are governed by section 30.8 of the Act. This exception does not apply where a licence is available, as it is the case.

g. Music Evaluation Copies

Background

[239] Music Evaluation Copies means in relation to a track, copies made for the purpose of evaluating the track, including the musical work(s) that it contains, to determine whether to add the track to the CBC library or programming rotation.

[240] In *Commercial Radio, 2016*, the Board concluded that Radio Evaluation Copies are protected by fair dealing.⁸⁹ CBC argued that the same conclusion applies here since CBC makes the same use of these copies as its commercial competitors.⁹⁰

[241] SODRAC claimed that distinctions must be made with *Commercial Radio, 2016* since CBC has indicated it retains Music Evaluation Copies indefinitely.⁹¹

Determination

[242] In *CCH Canadian Ltd. v Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13, the Supreme Court addressed the issue of copy destruction when assessing fair dealings:

55 In assessing the character of a dealing, courts must examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing. If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness. It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair. [Emphasis added]

[243] Arguably, the same music track may be evaluated more than once, at different times. It would be counterproductive to destroy the same Music Evaluation Copy several times. There is no evidence that it is the industry's practice to delete Music Evaluation Copies systematically. This combined with the fact that such copies remain within CBC (and not distributed to third parties) tends toward fair dealing. Accordingly, we conclude that Music Evaluation Copies are exempted.

⁸⁹ Paras 167-168.

⁹⁰ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1595:6-13.

⁹¹ Exhibit SODRAC-10A at p 12, Q10.

h. Active Log Copies

[244] Active Log Copies are created when programs are broadcast because CBC records all of its outgoing radio signals. These copies are used for rebroadcasting programs at a later date, as well as feeding into other workflows, like the creation of Internet Radio programming or creating CRTC logging copies.⁹²

[245] CBC argued that such copies comply with the technical requirements for section 30.9 of the Act, and also the duration requirement since they are retained for only seven days. CBC admitted that it does not yet comply with the record-keeping requirement but will begin keeping the required records once a modified blanket licence issues.

[246] SODRAC argued that therefore any exemption would apply only for the future.

[247] We accept SODRAC's submission. The Board is only seized of the 2012-2018 period. As such, any discount is theoretical only and we do not consider this exception any further.

i. Voice-Tracking Copies

[248] Voice-Tracking Copies mean, in relation to a track, a copy made to facilitate the making of voice track recordings.

[249] CBC cited Dr. Murphy who testified that a Voice-Tracking Copy does not involve making a new copy of music.⁹³ CBC claimed that, if it is true, it would mean that SODRAC is not entitled to royalties for this category.

[250] CBC argued that in any event, to the extent these copies include music, they fall under section 30.9 of the Act but that while it complies with the technical requirements for this section, it does not yet comply with the record-keeping and time-retention requirements. It will however comply with all requirements once a modified blanket licence is issued.

[251] SODRAC argued that therefore any exemption would apply only for the future.

[252] We accept SODRAC's submission. The Board is only seized of the 2012-2018 period. As such, any discount is theoretical only and we do not consider this exception any further.

⁹² Exhibit CBC-7, *Narrative Description of CBC's Conventional Radio Broadcasting Technology and Use of Copies* (v 1.2) at p 5; Exhibit CBC-85, CBC's Response to 2012-2017 Interrogatory Q193 (TV Copies Questionnaire) at p 10.

⁹³ Dr. Murphy (Cross) Transcripts, Vol 13 (H. Conf.) 1027:4-10.

j. Broadcasting Copies

[253] Radio Broadcasting Copies are the copies of music which are transferred to CBC’s broadcast servers in order to generate its radio signal. They are deleted from those servers after being used to broadcast.⁹⁴

[254] CBC argued that these copies should be covered by the modified blanket licence. They comply with the technical requirements for section 30.9 of the Act and generally comply with the duration requirement, since they remain in existence for one month (although a subset remains in existence longer). CBC will begin keeping the required records once a modified blank licence is issued and will implement a 30-day deletion protocol in order to comply with the durational requirement.

[255] SODRAC argued that therefore any exemption would apply only for the future.

[256] We accept SODRAC’s submission. The Board is only seized of the 2012-2018 period. As such, any discount is theoretical only and we do not consider this exception any further.

D. WHAT VALUE DO EXEMPT COPIES BEAR?

i. Introduction

[257] Table 7 summarizes the results of our preceding analysis regarding exempt copies:

Table 7: Results of Our Exceptions Analysis

Copy	Exempt
ActiveLog	No
Archive	Yes
Backup	Yes
CRTC Regulatory	No
Ingest	No
Live Performance	No
Main Automation System	No
Music Evaluation	Yes
RAM	Yes
Virtual Music Library	No
Voice Tracking	No

[258] The Parties disagreed as to how to calculate the value of those exempt copies.

⁹⁴ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1586:19-1587:2.

[259] In addition, as mentioned above, we ignore those exceptions to which CBC would be entitled if it were to comply with conditions in the Act, even though CBC has asked us to compute the value of the other exceptions on a “go-forward” basis. We do this for two reasons.

[260] First, we adopt the point the Board made in *Commercial Radio, 2016*: Broadcasters are only entitled to certain exceptions if they comply with the terms. This approach has strong symmetry with the approach we recommend adopting above in terms of repertoire for SODRAC. SODRAC has a positive onus to demonstrate a chain of title in its repertoire; CBC has a positive onus to demonstrate it is complying with the conditions of the exceptions it is claiming.

[261] Second, we cannot assume that negotiations will fail in the future. Maybe CBC will stop using SODRAC’s repertoire on the radio. Maybe CBC will negotiate an agreement with SODRAC for Radio BICs and leave the Board out of it. Either way, there is no continuation of rights as there can be for a tariff renewal.⁹⁵

[262] The calculation of the royalties owing by CBC to SODRAC for Radio BICs, taking into account the considerations in the reasons offered below, proceeds in two steps. In Table 8, the calculations proceed using information that does not differ by year and does not depend on the methodology chosen to allocate value to exempt copies. In Table 9, the amounts owing by CBC to SODRAC are calculated, year by year, taking into account the repertoire calculations by SODRAC and our chain of title adjustment,⁹⁶ the method to calculate the value of exempt copies⁹⁷ that we adopt, and the fact that there are two partial years in the licence.⁹⁸

Table 8: Preliminary Calculations

Item	Amount
Monthly Royalty CBC to SOCAN	\$144,406.60
Annual Royalty CBC to SOCAN	\$1,732,879.20
Net of Simulcast @1.22%	\$1,711,738.07
Apply Ratio of 1:3.2	\$534,918.15
Apply Chain of Title @62%	\$331,649.25

Table 9: Final Calculations

Year	Base Royalty	Repertoire	Exceptions	Partial Years	Royalties
2012	\$331,649.25	32.74%	78.94%	0.75	\$64,285.95

⁹⁵ S. 73.2 of the Act.

⁹⁶ The chain of title is addressed in Table 8; there is no need to deal with this aspect of the calculation once again.

⁹⁷ In addition, there is a smaller adjustment for exceptions in 2012, since not all the exceptions were in force on April 1, 2012.

⁹⁸ The CBC royalties to SOCAN are monthly. The annual royalties are 12 times this amount. In 2012, the licence applies only from April 1 to December 31 (three-fourths of the year). Similarly, in 2018, the licence applies only from January 1 to March 31 (one-fourth of the year).

2013	\$331,649.25	31.81%	68.42%	1	\$72,181.48
2014	\$331,649.25	32.49%	68.42%	1	\$73,724.49
2015	\$331,649.25	29.78%	68.42%	1	\$67,575.11
2016	\$331,649.25	31.71%	68.42%	1	\$71,954.56
2017	\$331,649.25	31.71%	68.42%	1	\$71,954.56
2018	\$331,649.25	31.71%	68.42%	0.25	\$17,988.64
	Total				\$439,664.80

ii. Background

[263] As stated above, the Parties conducted a joint survey of CBC, by business unit, asking questions about the usefulness of each type of copy, the importance of each type of copy, and the sequence of the copies made, among others. The survey was, broadly speaking, modelled on the survey conducted under the aegis of the proceeding in *Commercial Radio, 2016*. Appendix I to Exhibit SODRAC-59 contains all the data from the survey of CBC. The survey was conducted of 23 business units at CBC and then homogenized so there was a single response to each question.⁹⁹

a. CBC's Method

[264] CBC followed the method used by the Board in *Commercial Radio, 2016*. In that decision, the Board used the data for usefulness and weighted them by the number of stations making that type of copy. The resulting figures were then normed¹⁰⁰ to turn them into percentages. CBC's expert, Dr. Reitman, made one small change to this method. Since there is only one survey respondent, CBC, he substituted the number of copies made of each type for the number of stations making that type of copy.¹⁰¹ Table 10 gives the results we compute using CBC's method.¹⁰²

Table 10: Valuation of the Types of Copies: CBC Method

Copy	Usefulness	Unweighted
ActiveLog	3	7.89%
Archive	5	13.16%
Backup	5	13.16%
Broadcasting	5	13.16%

⁹⁹ Mr. Dupras, (Chief) Transcripts, Vol 12 (Pub.) 1606:1-10; M^c Masse (Cross) Transcripts, Vol 12 (Pub.) 1686:1-1688:17.

¹⁰⁰ In mathematics, *norming* a set of numbers consists of dividing a set of numbers by their sum. To turn these normed figures into a percentage, it suffices to multiply by 100.

¹⁰¹ Although Dr. Reitman also produced calculations without weighting, we focus on his weighted calculations here.

¹⁰² Table 5 includes a line for RAM Copies, as CBC did. This is, however, without mathematical consequence. Our approach is to exclude RAM Copies both from the numerator and the denominator of the norming process, which yields the same percentages as in Table 5.

CRTC	2	5.26%
Ingest	5	13.16%
Live Performance	4	10.53%
Music Evaluation	2	5.26%
RAM	0	0.00%
Virtual Music Library	5	13.16%
Voice-Tracking	2	5.26%

[265] Two remarks are in order. First, in accordance with our reasons below, we set the usefulness of RAM to 0. This is mathematically equivalent to saying that a RAM Copy has no monetary value.

[266] Second, CBC presented both weighted and unweighted calculations in the report of its expert. The latter, Dr. Reitman, stated that it was not clear “if the respondent(s) were answering about the usefulness of each copy of each type, or of all the copies made of each type.”¹⁰³ While Dr. Reitman concluded it was the former, based on his conversation with CBC counsel, this is not determinative; it is difficult to know what was in the mind of respondents.

[267] In addition, while Dr. Reitman claimed that “weighting by the number of copies is akin to the combination of usage and usefulness information used in the 2016 commercial radio decision,” we do not concur. The two types of weighting have similar effects only if the two surveys were similar in that they looked at a large number of stations making independent choices. Because the choice to make a type of BIC is likely made at the time of investing in digital infrastructure, the two types of weighting convey different types of information. In our view, the more appropriate measure to adopt from CBC’s method is the unweighted one.

b. SODRAC’s Method

[268] SODRAC decided to use all the preference data for its valuation calculation. Table 11 shows the data set used by SODRAC. In that table, the letter Q denotes the question number from the survey. In question 5, respondents were asked to identify which copies they would make, if they used only 2 copy types, only 3 copy types, or only 4 copy types.

Table 11: Data used by SODRAC

Copy	Q2	Q3	Q5a	Q5b	Q5c
	Importance	Usefulness	Only 2	Only 3	Only 4
ActiveLog	7	3	0	0	0
Archive	4	5	0	0	0.25
Backup	2	5	0	0.33	0.25
Ingest	3	5	0.5	0.33	0.25

¹⁰³ Exhibit CBC-63 at para 32.

Broadcasting Copy	1	5	0.5	0.33	0.25
Music Evaluation	9	2	0	0	0
Radio Live Performance	6	4	0	0	0
Virtual Music Library	5	5	0	0	0
Voice Tracking	8	2	0	0	0

[269] SODRAC’s method had three steps. First, it combined the Q5 responses (which it did in two different ways). Next, it combined the merged Q5 responses with those of Q2 and Q3 (which it did in three different ways). Finally, it normed the results, producing three versions of the valuation in percentage terms. Table 12 shows the valuations, denoted as Option A, Option B, and Option C.¹⁰⁴

Table 12: Valuation of the Copies: SODRAC’s method

Copy	Option A	Option B	Option C
ActiveLog	5.1%	5.8%	5.1%
Archive	13.9%	13.7%	11.4%
Backup	16.8%	15.9%	16.3%
CRTC Regulatory	2.4%	3.1%	2.4%
Ingest	19.8%	18.1%	21.3%
Main Automation System	21.0%	19.0%	22.5%
Music Evaluation	3.0%	3.5%	3.0%
Radio Live Performance	6.5%	7.5%	6.5%
Virtual Music Library	8.0%	9.3%	8.0%
Voice Tracking	3.6%	4.0%	3.6%

[270] It is noteworthy that SODRAC’s method does *not* weight by the number of copies. However, this method produces a similar result to that using CBC’s method, since it places a higher weight on those copies which CBC would use, if it had fewer copy-types at its disposal. We note that these copy-types are among the most used copy types at present.

iii. Determination

[271] The two models put forward by the Parties suffer equally from the deficiencies coming from the data they use. The mixture of subjective and objective data in CBC’s method does not give a materially different response from that coming from SODRAC’s method, which uses subjective data alone. The value of exceptions using CBC’s method is a little larger than the value using SODRAC’s Option C, and a little smaller than the value using SODRAC’s Options A and B.

¹⁰⁴ Table 8 contains a line for CRTC copies, despite the fact that SODRAC did not consider these copies at all. In our view, these copies are made and need to be considered; therefore, they attract value. They are not exempt, as per our analysis above.

[272] The analysis in the preceding paragraph offers little to recommend one method over another. The SODRAC method, however, is in our opinion somewhat arbitrary in the way in which it combines the information from Q2, Q3, and Q5. This is easily seen from the fact that SODRAC presents two ways to combine the information in the subparts of Q5 and then three ways to combine the information in Q2, Q3, and Q5, without stating that any of the three options is preferred. Mathematically speaking, there is an infinite number of ways to combine information coming from different variables. The fact that all the various combinations presented by SODRAC give approximately the same answer indicates that there is little benefit to combining the variables.

[273] While CBC's method is not identical to the one used by the Board in *Commercial Radio, 2016*, it is as close as one could get, given the data in this file. In the circumstances, we adopt CBC's method, as expounded above. We also observe that we rely on the survey approach because of the lack of a better alternative, such as a proxy that was available in the Television BICs issue.

[274] Finally, regarding RAM Copies, we decide not to attribute any value to them for the following reasons.

[275] Not all exceptions decrease liability or value. In some cases, exceptions merely clarify that a use or activity does not bear economic value. As the Board indicated in *Commercial Radio, 2016*:

[179] The Government of Canada, in one of its explanatory documents for the CMA, stated that: "The bill clarifies that the making of temporary, technical and incidental reproductions of copyrighted material as part of a technological process is allowed." While we are mindful of the limited reliability and weight of such statement, we believe it is a useful guidepost to the kind of activities the provision sought to capture.

[276] Indeed, it appears artificial to attempt to establish a RAM "market", pre-existing s 30.71 of the Act. First, we have no evidence that a specific value was allotted to the right to make RAM copies in pre-2012 licence agreements. Second, only three licences stipulating that the licence to make reproductions includes RAM were adduced.¹⁰⁵ Third, in itself, such contractual language is not evidence that a higher fee was negotiated in exchange of the right to make RAM Copies. Instead, one can explain the reference to RAM in the licence for greater legal certainty and peace of mind of the licensee. It is inappropriate to discount the licence fee as a result of the exception if no specific value (or evidence thereof) was allocated to RAM Copies in the first place.

¹⁰⁵ Exhibits SODRAC 31, SODRAC 32-A, and SODRAC 32-B. See CBC, *Closing Submissions* (2012-2018) at para 66.

[277] Furthermore, we consider that it would be inappropriate that the making of RAM Copies receive any specific value. RAM Copies are fleeting, “mirror” copies of durable BICs. Since RAM Copies would not exist but for those BICs, which are already accounted for under the licence (or the corresponding discount as per the relevant user’s rights or exception), allocating them value would amount to double counting, and create another layer of discounts based solely on the technology used to deliver or broadcast content to end users.¹⁰⁶

V. WHAT ARE THE ROYALTIES FOR INTERNET BROADCAST-INCIDENTAL COPIES (RADIO AND TELEVISION)?

A. BACKGROUND

[278] As part of the survey discussed in Radio BICs, for example, SODRAC asked questions about the copies made for broadcasting radio and television programs over the Internet.¹⁰⁷ For some of the questions, CBC gave a single response for Internet Radio and Internet Television. For other questions, CBC gave separate responses for each type of Internet programs.

[279] CBC and SODRAC used different methodologies to calculate the value of BICs using the survey data. Each one used the same methodology for Internet streaming as for conventional broadcasting. Broadly speaking, SODRAC used more of the questions than CBC did.

[280] The choice of which questions to use also dictated a methodological choice: Whether to calculate the value of exceptions for Internet television and Internet Radio separately or together. The questions used by SODRAC did not have separate answers for these two services, so SODRAC calculated a single value of exceptions for both.¹⁰⁸ The question used by CBC had separate answers; CBC used them.¹⁰⁹

[281] As a result, SODRAC combined the data for Internet Television and Internet Radio (because its methodology required it), whereas CBC treated the two types of Internet streaming separately. The Parties’ decisions are driven by data and methodology, notwithstanding their claims to the contrary, CBC used only the usefulness data, which were available for both types of Internet streaming separately. SODRAC used the usefulness data, the ranking measure and the combination measure; the latter two data types are only available for Internet broadcasting as a combined activity.

¹⁰⁶ This follows a “balanced” application of *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 231, 2012 SCC 34 at para 9.

¹⁰⁷ Exhibit CBC-85 contains the answers.

¹⁰⁸ Exhibit SODRAC-42 at para 103; Exhibit SODRAC-59 (Boyer and Crémieux Report) at p 155.

¹⁰⁹ Exhibit CBC-62 at paras 158-159.

B. WHICH INTERNET RADIO BICS ARE EXEMPT?

[282] Only those copies that are exempt will trigger a discount. We look at each type of Internet Radio BICs and determine which are exempt.

i. RAM Copies

[283] For the same reasons provided for conventional Radio BICs, we do not assign any value to RAM Copies. Whether they are exempt or not is therefore irrelevant.

ii. Transition Copies

a. Background

[284] Transition Copies are made for the sole purpose of efficiently moving files between servers connected through CBC's internal digital network.¹¹⁰ For example, an audiovisual file that is requested by the broadcasting studio from the storage server will entail a Transition Copy.¹¹¹ In some cases, the only way for one of CBC's internal IT processes to work is to use a Transition Copy.¹¹²

[285] Without Transition Copies, servers would receive an unmanageable number of requests for their content from other servers. For example, a Transition Copy of the Ingest/Storage Copy is made in order to move a copy onto CBC's transcoding server, which then processes the Transition Copy to generate a Transcoding Copy. Without the Transition Copy, the transcoding server would have to repeatedly call upon the server hosting the Ingest/Storage Copy for data, putting additional demand on that server and on CBC's network bandwidth (CBC-62 at para 65).

[286] CBC claimed that Transition Copies are protected under section 31.1(2) of the Act.¹¹³ The provision reads as follows:

Network services

31.1 (1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.

¹¹⁰ CBC-122; SODRAC-48 at p 57-58.

¹¹¹ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1556:12-15, 1558:19-1560:9; Dr. Murphy (Chief), Transcripts, Vol 1 (H. Conf.) 67:5-68:8, 91:20-92:11.

¹¹² Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1558:14-18.

¹¹³ Mr. Dupras confirmed that Transition Copies help manage the bandwidth and prevent bottle necks resulting from situations where many users request access to the same file: Transcripts, Vol 11 (Pub.) 1158:14 to 11660:9.

Incidental acts

(2) Subject to subsection (3), a person referred to in subsection (1) who caches the work or other subject-matter, or does any similar act in relation to it, to make the telecommunication more efficient does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

Conditions for application

(3) Subsection (2) does not apply unless the person, in respect of the work or other subject-matter,

(a) does not modify it, other than for technical reasons;

(b) ensures that any directions related to its caching or the doing of any similar act, as the case may be, that are specified in a manner consistent with industry practice by whoever made it available for telecommunication through the Internet or another digital network, and that lend themselves to automated reading and execution, are read and executed; and

(c) does not interfere with the use of technology that is lawful and consistent with industry practice in order to obtain data on the use of the work or other subject-matter.

[287] CBC claimed that it fulfills all the requirements of this section for the following reasons:¹¹⁴

- CBC provides services via a digital network, namely its internal digital network;¹¹⁵
- Creation of Transition Copies is functionally similar to caching, since like caching it involves creating a copy that allows a server to interact with the copy in a way that conserves network bandwidth, thereby facilitating more efficient telecommunication.¹¹⁶ Recall that caching is the process of making a copy that is located geographically closer to an internet user than the original copy;¹¹⁷
- CBC uses Transition Copies to achieve the same goals in a functionally similar way on its internal digital network;
- The purpose of creating Transition Copies is to facilitate efficient network telecommunications;¹¹⁸ and
- Transition Copies are identical to the source copy, and thus do not run afoul of any of the

¹¹⁴ CBC, *Closing Submissions* (2012-2018) at paras 90ff.

¹¹⁵ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1556:18-22, 1557:19-1558:9.

¹¹⁶ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1556:12-15, 1558:19-1560:9; Dr. Murphy (Chief), Transcripts, Vol 1 (H. Conf.) 67:5-68:8, 91:20-92:11; Dupras (Chief) Transcripts, Vol 11 (Pub.) 1558:14-18; Exhibit CBC-8, Narrative Description (Television) Table 2.2.4.

¹¹⁷ *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45 at paras 23, 113-114, 116 (especially para 23).

¹¹⁸ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1556:12-15, 1558:19-1560:9; Dr. Murphy (Chief), Transcripts, Vol 1 (H. Conf.) 67:5-68:8, 91:20-92:11; Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1558:14-18; Exhibit CBC-8, Narrative Description (Television) Table 2.2.4.

prohibitions contained in section 31.1(3).¹¹⁹

[288] SODRAC claimed that CBC's arguments are not supported by a technical expert report. SODRAC argued that in any case, the exception does not apply to content producers such as CBC but only to intermediaries who provide "services in relation to the Internet or another digital network". CBC is not a service provider acting as an intermediary. SODRAC further argued – alternatively – that CBC does not meet the conditions set out in subsection 31.1(3). SODRAC also quoted Dr. Murphy according to whom Transition Copies do not facilitate telecommunication because a "telecommunication" must occur over a "long" distance.¹²⁰ Dr. Murphy was also of the opinion that the Transition Copies are not cache copies.¹²¹

[289] CBC replied that section 31.1(2) does not require that the services in question be provided to third parties. This was a deliberate choice by Parliament since other subsections of 31.1 do limit themselves to third-party service providers. That is notably the case with subsection 31.1(4). Where Parliament wished to restrict these exceptions to specific business models, it did so expressly. Additionally, section 31.1(2) would have perverse effects if SODRAC's interpretation is adopted. A company would be liable for the creation of network efficiency copies if it ran its own internal network but could escape liability simply by outsourcing its network services to a third party.

[290] In terms of the alleged requirement that "telecommunication" occurs over a long distance, CBC replied that, first, section 2 of the Act contains a definition of "telecommunication," and that definition does not incorporate a distance component. Second, where copyright exceptions involve a distance requirement as a precondition to access an exception, this is done expressly, as with the *Local Signal and Distant Signal Regulations*.¹²² There is thus no basis to imply a distance requirement here. Third, Dr. Murphy's approach would create enormous practical difficulties. Most obviously, network operators could not know in advance whether they were protected by subsection 31.1(2), because if a given transfer occurred over a "short" distance, they would be deprived of protection.

b. Determination

[291] We conclude that these copies are exempt. First, SODRAC's argument that no expert report supports CBC's technical description of its IT systems should be dismissed. Mr. Dupras's

¹¹⁹ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1556:15-17, 1561:8-20. CBC noted that neither SODRAC's Statement of Case nor Dr. Murphy's report identify any relevant industry practices or embedded caching instructions, so 31.1(3)(b) and (c) do not seem relevant here. 31.1(3)(a) is satisfied by the fact that the files are identical copies.

¹²⁰ Exhibit SODRAC-96 at para 53.

¹²¹ Exhibit SODRAC-96 at paras 54-56.

¹²² SOR/89-254.

factual description of CBC's telecommunication processes is reliable in regards of his position (Chief of IT services) and his own expertise in and knowledge of CBC's IT infrastructure.

[292] Second, regarding the scope of subsection 31.1(1) of the Act, CBC's arguments are in line with a broad and liberal interpretation of users' rights. They are also consistent with a technologically neutral interpretation of the provision: More precise language would be needed to exclude internal networks operators from the safe harbour. On the contrary, the language supports such an interpretation and it would be highly unlikely that the words "... [Internet or] another digital network" were adopted for purposes other than to include private networks operated by businesses and organizations such as universities and administrations. The *Copyright Modernization Act's* objective to support the knowledge economy driven by innovation and network connectivity is expressly stated in its preamble.¹²³

[293] Third, on the issue of telecommunication efficiency, Dr. Murphy is of the opinion that Transition Copies optimize efficiencies on the servers but that their effect on network efficiency is negligible.¹²⁴ He states that Transition Copies are not similar to cache copies. The latter are "used to speed up access to a data file".¹²⁵ He further states:

Transition copy has been created so that the originating server will not have to deliver the file to the requesting local server at a time of peak loading. As such, such a process does indeed optimize the originating server loading and server efficiency, but it does not necessarily deliver the copy to the requesting server faster. However, the effect on the local area network bandwidth or network efficiency is negligible. The copy is transferred only once from the originating server to the requesting server with or without the creation of the Transition copy.¹²⁶

[294] This implies that Transition Copies do not satisfy the requirement under subsection 31.1(2) of the Act since they do not make the network more efficient. Mr. Dupras explained that transition copies prevent bandwidth bottlenecks.¹²⁷ We accept this evidence.

[295] Furthermore, Dr. Murphy seems to conflate telecommunication efficiency with network efficiency. The Act authorizes certain copies made for the purpose of making "the *telecommunication* more efficient" [Our emphasis]. Under the Act, a telecommunication means "any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system."¹²⁸ Transition Copies are used to

¹²³ S.C. 2012, c. 20.

¹²⁴ Dr. Murphy, Transcripts, Vol 1 (H. Conf.) 92:19-23.

¹²⁵ Exhibit SODRAC-96 at para 54.

¹²⁶ Exhibit SODRAC-96 at para 55.

¹²⁷ Mr. Dupras, Transcripts, Vol 11 (Pub.) 1560:1-8.

¹²⁸ S. 2 of the Act.

facilitate access to electronic files within CBC's private network. Files located on one server are transmitted to another server in the form of a Transition Copy "so that the originating server will not have to deliver the file to the requesting local server at a time of peak server loading".¹²⁹ Making copies on a server closer to the end-user for the purpose of avoiding bottles necks will help telecommunication efficiency. Transition Copies are therefore exempt under subsection 31.1(2).

[296] In terms of satisfying the conditions of subsection 31.1(3) of the Act, Mr. Dupras testified that there are no modifications of the work, which satisfies condition 31.1(3)(a).¹³⁰ We accept this evidence. Conditions under 31.1(3)(b) and (c) do not apply in the case at hand as they concern situations where a third party embed directions on caching (or similar acts) or data-use technology in the work made available for telecommunication through a digital network. SODRAC did not provide any evidence that its repertoire embed any such directions or technology.

[297] Finally on the issue of "distant telecommunication", CBC's rebuttal of the argument that "telecommunication" requires a distance is compelling. Furthermore, Dr. Murphy did not take into consideration the definition of "telecommunication" under section of the Act. Instead he relied on a definition provided by Technopedia.¹³¹ SODRAC did not provide any legal argument that would support Dr. Murphy's interpretation of "telecommunication" as defined by the Act. This argument concerning "distance" should therefore be dismissed.

iii. Transcoding Copies

a. Background

[298] Transcoding Copies are copies made to convert a program from one file format to another.¹³²

[299] CBC argued that these copies are necessary in order to achieve compatibility with CBC's physical computer hardware. According to CBC, since the original format is a computer program, the new format is permitted under s. 30.6 of the Act, which allows computer program format-shifting for computer compatibility purposes.

[300] SODRAC argued that electronic music files are not computer programs under s. 2 of the Act. These files are not executable and are not a set of instructions to be used directly or

¹²⁹ Dr. Murphy, Transcripts, Vol 1 (H. Conf.) 67:13-20, 91:23-25-92:1-2.

¹³⁰ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1556:15-17, 1561:8-20.

¹³¹ Exhibit SODRAC-96 at para 53 and Schedule C.

¹³² Exhibit CBC-122.

indirectly in a computer in order to bring about a specific result. In computing, executable code or an executable file or executable program causes a computer “to perform indicated tasks according to encoded instructions,” as opposed to a data file that must be parsed by a program to be meaningful. SODRAC flagged that this distinction between a data file and an executable file was explained by Dr. Murphy.¹³³

b. Determination

[301] There are situations where there is no meaningful distinction between data and instructions, such as in the case of a perforated piano roll. The roll acts as the instructions to the player piano. In such circumstances, it is arguable that the roll embodies both a musical work and a computer program. This embedding is not unusual: a video game embodies both a computer program and musical works. The entire package is likely correctly treated as a computer program for the purposes of the Act. However, in terms of audio files, the better view is that they are not instructions. No evidence was adduced to support the argument that audio files are used as instructions, which would allow it to meet the definition of computer program under the Act. Rather, such files are better understood as coded data to be decoded for the purpose of representing musical content in a radio program.

[302] Not qualifying as a computer program means that s. 30.6 of the Act does not apply and Transcoding Copies are not exempt from copyright liability.

iv. Backup Copies

[303] In terms of Internet Radio backup copies, SODRAC does not contest that these copies meet the conditions in subsection 29.24(1) of the Act. However, it argued, as it did for conventional radio backup copies, that subsection 29.24(3) of the Act is a precondition to the application of the backup exception and that CBC does not have in place a system to enable it to comply with the condition, particularly automatic deletion protocols for backups.¹³⁴ SODRAC argued that section 29.24 of the Act must be considered in its entirety.

[304] For the same reasons provided under our determination on conventional Radio BICs, we hold that backup copies are exempt in the Internet Radio context.

¹³³ See *Plan d'argumentation de la SODRAC* (2012-2018) at para 19.

¹³⁴ Exhibit SODRAC-96 (Dr. Murphy Reply Report) at paras 37-39.

v. Content Delivery Network Copies

[305] CBC explained that Content Delivery Network (CDN) Copies are made by CBC in order to provide copies of its programming to a third-party content delivery network.¹³⁵ Content Delivery Networks are telecommunication service providers who facilitate transmission of large volumes of data by content companies like CBC. Without using a CDN, CBC would be unable to deliver its content to viewers over the Internet effectively.¹³⁶ Without making CDN Copies, it would be impossible for CBC to use a CDN.¹³⁷

[306] CBC claimed that these copies are exempted under subsection 31.1(2) and section 30.71 of the Act. CDN Copies are a form of either caching copy or streaming copy, and are made purely in order to facilitate the efficient delivery of content via the Internet.¹³⁸ This places them squarely within the protection of subsection 31.1(2) or section 30.71, or both.

[307] SODRAC argued that CBC did not provide any expert report to support its claims. It also argues that CBC does not have evidence that CDN Copies last only for the duration of the technological process and, as such, does not meet one of the conditions of section 30.71 of the Act. Finally, SODRAC argues that CBC cannot claim the safe harbour under subsection 31.1(2) of the Act (caching) for the same reasons as for Transcoding Copies (above).

[308] Dr. Murphy explained that CDN Copies are made by a third party, namely Akamai, “a CDN with delivery infrastructure and streaming servers across Canada and around the world. Akamai makes copies of the Internet Server Copies on its CDN infrastructure and these are instances of CDN Copies.”¹³⁹ CBC’s evidence does not contradict this fact.

[309] As such, because Akamai is a network service provider and presumably exempt under section 31.1 of the Act, CBC would not be liable for CDN Copies and, would not either be liable for authorizing CDN Copies: If there is no infringement of the reproduction right, there cannot be an authorization of infringement.¹⁴⁰

[310] In our view, the issue is whether a discount should apply to account for the lack of liability. A discount is warranted to the extent that the base price accounted for authorizing CDN Copies in the first place, i.e. liability would ensue but for a licence. However, Internet Service Providers and any telecommunication intermediaries such as the telegraph were never liable

¹³⁵ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1596:19-1598:11 (definition and purpose, especially 1598:1-11).

¹³⁶ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1599:2-18.

¹³⁷ Mr. Dupras (Chief) Transcripts, Vol 11 (Pub.) 1599:19-23.

¹³⁸ Exhibit SODRAC-48 (Dr. Murphy Report (2012-2018)) at paras 261-262, 279-281.

¹³⁹ Exhibit SODRAC-48 at para 261.

¹⁴⁰ *Columbia Pictures Industries Inc. v Gaudreault*, 2006 FCA 29 (CanLII), <http://canlii.ca/t/1mh27>.

under the Act.¹⁴¹ No permission is therefore necessary and any licence pertaining to BICs or distribution copies would hence not cover such activities. A discount is therefore unwarranted. We therefore treat CDN Copies as non-exempt for the purpose of calculating BICs value.

C. WHAT IS THE VALUE OF EXEMPT INTERNET RADIO BICS?

[311] For the reasons explained in the conventional Radio BICs section, we use the usefulness data, unweighted and normed, to determine the value of BICs. As such, we can follow CBC's treatment and produce different measures of the value of exceptions for Internet Radio BICs.

[312] Table 13 sets out the calculations for Internet Radio.¹⁴²

Table 13: Calculations for Internet Radio

Copy	Usefulness	Exempt	Share
Internet Ingest	5	No	18.52%
Music Library	4	No	14.81%
Internet Server	4	No	14.81%
Internet Backup	3	Yes	11.11%
Content Delivery Network	5	No	18.52%
Other: Transition	3	Yes	11.11%
Other: Transcoding	3	No	11.11%
TOTAL			77.78%

[313] It remains to transform these calculations into final amounts payable. For Radio BICs, we found a base royalty of \$331,649.25. Since the Parties agreed that the royalty prior to adjustments for Internet Radio BICs will be 7 per cent of the base royalty for Radio BICs,¹⁴³ we multiply this by 7 per cent to obtain the base royalty for Internet Radio BICs, obtaining \$23,215.45. This figure must then be adjusted for repertoire and exceptions as previously determined. We observe that the base royalty already contains the adjustment for chain of title, since it is not time dependent. Table 14 shows the calculations.

Table 14: Internet Radio BICs

Year	Base Royalty	Repertoire	Exceptions	Partial Years	Royalties
2012	\$23,215.45	32.74%	95.54%	0.75	\$5,446.31
2013	\$23,215.45	31.81%	77.78%	1	\$5,743.92
2014	\$23,215.45	32.49%	77.78%	1	\$5,866.71
2015	\$23,215.45	29.78%	77.78%	1	\$5,377.37

¹⁴¹ *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45, at paras 92, 101-103, and 115 (particularly re.: caching).

¹⁴² For 2012, the exceptions figure is 95.54%, since there are no exceptions applicable for the period April 1, 2012 through November 6, 2012.

¹⁴³ CBC, *Closing Arguments* (2012-2018) at para 41.

2016	\$23,215.45	31.71%	77.78%	1	\$5,725.87
2017	\$23,215.45	31.71%	77.78%	1	\$5,725.87
2018	\$23,215.45	31.71%	77.78%	0.25	\$1,431.47
TOTAL					\$35,317.51

[314] The amount owing for Internet Radio BICs is \$35,317.51 for the entire period of the licence.

D. INTERNET TELEVISION BICS

[315] We do not calculate the value of exceptions or chain of title deficiencies for Internet Television, since the base to which the top-up for Internet Television is applied is conventional television, and exceptions and repertoire are already integrated into the base price. For reference, in our decision on conventional Television BICs, we use standard price proxies, which already include the value of exceptions and repertoire. Accordingly, no adjustments are necessary to the Internet Television BICs prices, other than a 4 per cent calculation. The 4 per cent adjustment, like the 7 per cent one discussed above, is based on an agreement among the Parties.¹⁴⁴ Table 15 gives the details.

Table 15: Internet TV BICs

Year	TV BICs	Internet TV BICs
2012	\$218,271.11	\$8,730.84
2013	\$174,103.09	\$6,964.12
2014	\$173,531.33	\$6,941.25
2015	\$320,013.43	\$12,800.54
2016	\$282,727.66	\$11,309.11
2017	\$290,092.68	\$11,603.71
2018	\$72,523.17	\$2,900.93
TOTAL		\$61,250.50

[316] The amount owing for Internet Television BICs is \$61,250.50 for the entire period of the licence.

VI. WHAT ARE THE ROYALTIES FOR DISTRIBUTION-INCIDENTAL COPIES

A. BACKGROUND

[317] Distribution-incidental Copies are those which CBC must create in order to distribute its programming to Canadian or international licensees. For example, CBC content is offered by VIA Rail and Air Canada.

¹⁴⁴ CBC, *Closing Arguments* (2012-2018) at para 40.

[318] In its *2012 Decision*, the Board set the rate as 3 per cent of revenues, adjusted for repertoire. It did so relying on a 2000 decision in *SODRAC v MusiquePlus Inc.*:¹⁴⁵

The licence rate should then be the average of the percentage of the revenues earned by TQS and TVA and paid to SODRAC, adjusted for the relative use of the SODRAC repertoire.

[319] The Parties have agreed to the 3 per cent rate in this matter, and we do not question their choice in this arbitration context.

[320] CBC initially claimed a deduction for exceptions. It subsequently abandoned this claim, and as such, we do not consider it further.

[321] The Parties however disagree over the base on which the rate applies.

[322] CBC's position is that the rate base needs to be defined properly. First, it must exclude all copies made for distribution channels permitted under the synchronization licence. Second, the rate should apply only on licensing revenues retained by CBC and not to the share remitted to third parties (which is very common for co-productions). (*CBC Closing Submissions (2012-2018)*, at para 168)

[323] While CBC also requested that the rate base be clarified so as to exclude licensee delivery copies that are made abroad by foreign licensees, it also abandoned this request.¹⁴⁶

[324] SODRAC objects to our considering of CBC's arguments on grounds stated either in its June 27, 2017, *Reply Statement of Case*, or in its August 4, 2017, motion to adjudicate on objections. The Board summarized SODRAC's arguments in its Ruling [CB-CDA 2017-083]: CBC (i) is raising legal arguments that fall outside the scope of the issues brought before the Board; (ii) is raising for the first-time arguments challenging the royalties for the sale or licensing of a program [...].

[325] Instead of striking the items disputed by SODRAC, the Board ruled that it would address them after having heard the Parties at the hearing, including the points relating to the procedural fairness issue.¹⁴⁷

B. DETERMINATION

[326] In our view, CBC sufficiently informed SODRAC of its primary motives for challenging the rate base.

¹⁴⁵ *Applications to fix royalties for a licence and its related terms and conditions (SODRAC v MusiquePlus Inc.)* (16 November 2000) Copyright Board at p 11.

¹⁴⁶ Exhibit CBC-62, CBC, *Statement of Case* (2012-2018 Arbitration) at para 191.

¹⁴⁷ Ruling [CB-CDA 2017-083].

[327] In its Ruling 2016-025 pertaining to this matter, the Board stated that:

9. Regarding the determination of the licence for the 2012-2016 period, in light of the parties' submissions, the Board is seized of the following issues:

a. Starting November 7, 2012, the application of new exceptions that came into force on that day;

[...]

f. The royalties for the sale or licensing of a program;

[328] In the same Ruling, the Board also required that the Parties expressly notify the Board if they disagreed with this statement of seizure:

10. If they disagree with this statement of seizure, particularly regarding paragraphs (b) and (h), the parties must submit their responses and replies according to the deadlines noted in paragraph 14 of this ruling.

None disagreed.

[329] This followed SODRAC's letter to the Board of February 19, 2016, which responded to the Board's Q2 (Notice [CB-CDA 2016-010]): "The specific issues that need to be addressed [...] in respect of the examination of the 2012-2016 licence, should the case may" and which stated that:

3. The questions specific to the 2012-2016 licence (those that do not arise in the redetermination) are the following:

[...]

g) royalties for the sale or licensing of a program;

[330] In terms of SODRAC being taken by surprise and unable to adequately prepare its case, the better view is that CBC disclosed enough information to SODRAC to be properly informed of the gist of the argument. Specifically, in its February 26, 2016 letter to the Board, in reply to SODRAC's February 19, 2016 letter and in response to Notice [CB-CDA 2016-010], CBC stated the following:

(g) Royalties for sale or licensing of programming: Because CBC does not accept to become a licensee under any blanket synchronization licence, CBC does not want or accept a statutory licence for the sale or licensing of programming, since, based on SODRAC's evidence in the 2008-2012 arbitration, those rights are included in the synchronization licence for all producers. This issue should not be before the Board. [Emphasis added]

[331] While CBC made additional arguments in its *Statement of Case*, it could not be expected that the same level of detail would be provided at the earlier Statement of Issues stage. Furthermore, the rules of procedure for a fair process do not require that arguments, as opposed to the factual allegations or evidence underpinning them, be fully articulated by the Statement of Issues or the Statement of Case steps in the proceeding.

[332] We turn to the base definition issue. The question that arises is whether CBC can segregate the rate base appropriately. That is, (i) does CBC track the licensing of its programs so meticulously that it can determine whether or not the distribution-incidental copies are for channels of programs under a synchronization licence? and (ii) does CBC keep some fraction of the revenues from licensing?

[333] On question (i), it is reasonable to assume that one does not need two licences for the same activity. The Board has been asked to specify what the rate base means in a number of proceedings, including *Commercial Radio, 2010*,¹⁴⁸ and *SOCAN Concerts, 2014*.¹⁴⁹

[334] On question (ii), the evidence is clear. M^e Christophe Masse testified that CBC keeps some fraction of the revenues from licensing.¹⁵⁰

[335] Accordingly, to address (i) and (ii), the royalties payable by CBC to SODRAC for distribution-incidental copies not otherwise permitted by a licence for synchronization or other activities are:

A × B, where

(A) is 3 per cent of the revenues from the sale or licencing of programs, and

(B) is the fraction of those revenues retained by CBC after paying the third-party its share.

[336] It is appropriate that SODRAC have the right to audit CBC's declarations in respect of the fraction of those revenues retained by CBC after paying the third party (such as a co-producer) its share. Accordingly, SODRAC shall have the right to audit CBC's books and records, on reasonable notice and during normal business hours, to verify those declarations.

VII. WHAT ARE THE ROYALTIES FOR SALE OF DIGITAL FILES?

A. BACKGROUND

[337] For the years 2012-2014, SODRAC proposed the rates in Table 16, which are identical to those it proposed for sale of physical media.¹⁵¹

¹⁴⁸ *SOCAN, Re: Sound, CMRRA-SODRAC Inc., AVLA-SOPROQ, Artisti – Tariff for Commercial Radio, 2008-2012* (9 July 2010) Copyright Board.

¹⁴⁹ *SOCAN – Tariff 4 (Live Performances), 2009-2014* (25 July 2014) Copyright Board.

¹⁵⁰ M^e Masse (Chief) Transcripts, Vol 12 (H. Conf.) 940:5-9.

Table 16: Sale of Digital Files Proposed Rates, 2012-2014

Per minute rate, per copy of program or product	Foreground music (including themes)	Background music (including transitions)
For the first 15 minutes	1.44¢	0.58¢
For the next 15 minutes	0.87¢	0.35¢
Thereafter	0.52¢	0.21¢

[338] For the years 2015-2018, SODRAC proposed a tariff of general application – SODRAC Tariff 7 (Reproduction of musical works embedded in audiovisual works for transmission by a service) – rather than have a separate rate for CBC, SODRAC proposed that Tariff 7 apply to CBC.

[339] CBC agreed with both proposals.¹⁵²

[340] There is only one point of disagreement between the Parties. SODRAC is asking that CBC be subject to royalties for copies of CBC content sold online by third parties from April 1, 2012 until Dec. 31, 2014.¹⁵³ CBC argues that this is commercially unreasonable and contrary to law.¹⁵⁴

B. DETERMINATION

[341] The 2008-2012 licence provides that:

2.01 This licence authorizes the CBC to reproduce a Work, in any material form and by any known or to-be-discovered process, with or without associated images, in conjunction with the following activities:

[...]

(f) the sale on a physical medium or online of a program, regardless of whether it is a CBC Program

[342] However, it also provides that:

3.02 Without limiting the scope of section 3.01, this licence:

[...]

(b) does not authorize the CBC to authorize a third party to reproduce a Work, except as set out in sections 2.03 and 2.04;

¹⁵¹ Exhibit SODRAC-42 at para 239.

¹⁵² Exhibit CBC-62 at para 173.

¹⁵³ Exhibit SODRAC-42 at para 242.

¹⁵⁴ Exhibit CBC-62 at p 3.

(c) does not authorize a third party, including a person to whom the CBC has sold or licensed a program, to reproduce the Works embedded into a program;

[343] Neither section 2.03 nor 2.04 allow CBC to authorize third parties to sell online CBC content. As such, it is clear that third-party online sales were not covered by the 2008-2012 licence and, it follows, neither by the interim licence (which extends the application of the 2008-2012 licence). However, it was clear from the 2012-2018 Statement of Issues that third-party online sales were an issue before the Board.¹⁵⁵ The issue is therefore whether CBC should be liable for reproductions of SODRAC's repertoire by its co-contracting parties.

[344] In its June 19, 2009, *SOCAN Tariff No. 16 – Background Music Suppliers (2007-2009)* decision, the Board addressed the question of authorizing third parties to perform music:

[50] Also, not all services purport to authorize their subscribers' performances. A supplier should not (and probably cannot) be charged for an authorization it does not provide. Consequently, if a supplier that warns its commercial clients not to play the transmitted music without paying royalties to SOCAN does not authorize the public performance of SOCAN's repertoire, the supplier may be liable for transmitting the music but not for music being played. The tariff must take this into account.

[51] The solution is to set two rates: the first for transmitting a signal, the second for authorizing clients to play in public music provided by the service. Those who do both will pay both rates. Those who do one but not the other will pay only one. Those who do neither will pay nothing. The determination of who does what will be left to SOCAN, to the suppliers and, ultimately, to the courts.

[345] It is unclear whether SODRAC is seeking a similar rate structure in terms of third-party online sales and corresponding reproductions of SODRAC's repertoire by third parties. If SODRAC is seeking to have the Board set a fee for such reproductions, then the Board cannot do that since it would create a joint and several liability of CBC and third parties not provided under the Act.¹⁵⁶ CBC does not make the copies and cannot be liable for reproductions made by third parties.

[346] If SODRAC is seeking to have the Board set a fee for authorizing such reproductions, then more evidence would be required to assess the value of the right to authorize in this particular context. For instance, information on sales and price structure of online content at the time would be needed. Also, there is no evidence available to determine whether CBC actually authorized

¹⁵⁵ SODRAC April 1, 2016 and CBC May 6, 2016 letters to the Board.

¹⁵⁶ Compare with subparagraph 2.4(1)(c)(ii) of the Act which sets a joint and several liability of two categories of users.

third parties to make copies.¹⁵⁷ Certainly, it could not authorize such copies under the interim licence.

[347] If CBC does not authorize third-party copying, then there is no need to set a fee for the 2012-2014 period. Furthermore, if the third party does not infringe the reproduction right, in theory, the authorization cannot be infringing and triggered.¹⁵⁸ One would presume that third parties are not infringing.¹⁵⁹

[348] This in effect makes setting a standalone royalty rate for an authorization right problematic as it would be contingent prospectively or retroactively on acts carried out by third parties.

[349] Based on the foregoing, we fix the rate, as set out in table 16 above, and apply it only to copies made by CBC, as was provided under the 2008-2012 Licence.

VIII. WHAT ARE THE ROYALTIES FOR SALE OF PHYSICAL MEDIA (DVDS AND CDS)?

A. BACKGROUND

[350] For 2012-2014, SODRAC proposed the rates in Table 17, identical to those certified by the Board in its 2012 *Decision* for 2008-2012:

Table 17: SODRAC's Proposal, 2012-2014

Per minute rate, per copy of program or product	Foreground music (including themes)	Background music (including transitions)
For the first 15 minutes	1.44¢	0.58¢
For the next 15 minutes	0.87¢	0.35¢
Thereafter	0.52¢	0.21¢

¹⁵⁷ To “authorize” means to “sanction, approve or countenance”. “Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, “[g]ive approval to; sanction, permit; favour, encourage”: *CCH Canadian Ltd. v Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 at para 38.

¹⁵⁸ In its March 26, 2004 Decision (SOCAN Tariff 4 – Concerts) at pp 10-11, the Board indicated the following: Furthermore, as it was explained in *Falcon*, [quoting *Falcon v Famous Players Film Co.*, (1926)2 KB 474, 491 (C.A.)] the Authorization Right exists as a separate right to impose liability on those who sanction in others conduct that would violate copyright. Therefore, it would make no sense to impose liability on a person who sanctions that which is already duly authorized. As a result, the person who has obtained the Authorization Right for a performance shields from liability the person who performs. Conversely, the person who would otherwise need a licence for the Authorization Right does not if the person performing “under him/her” already has a licence to perform, as there is nothing left to authorize: “[i]t cannot be a tort merely to authorize or cause a person to do something that person has a right to do.” [quoting *CAPAC v CTV Television Network Ltd.*, (1968) 55 C.P.R., 132 at page 135]

¹⁵⁹ To the extent that the third party obtains another source of authorization, making CBC pay would amount to double payment.

[351] For 2015-2018, SODRAC proposed the rates in Table 18:

Table 18: SODRAC’s Proposal, 2015-2018

Per minute rate, per copy of program or product	Foreground music (including themes)	Background music (including transitions)
For the first 15 minutes	1.47¢	0.59¢
For the next 15 minutes	0.89¢	0.36¢
Thereafter	0.53¢	0.22¢

[352] SODRAC explained that the rates in Table 2 are 2.39 per cent higher than those in Table 1. This reflects an inflationary adjustment, calculated based on the inflation from 2012 to the middle of 2014. SODRAC also noted that the inflation-adjusted rates are also present in some highly confidential agreements with unrelated parties filed as Exhibit SODRAC-90.¹⁶⁰

[353] CBC accepted the rates as proposed.¹⁶¹ However, CBC asked that the increased rates “apply proactively from the date of the Board’s decision, or at most, from the date of SODRAC’s *Statement of Case*,¹⁶² when the amounts sought by were definitively revealed.”¹⁶³

[354] The question of when the new rates apply is the only live controversy in respect of the sales of physical media.

B. DETERMINATION

[355] CBC explained that “It is extremely burdensome to apply the increase from the prior penny rate retroactively, and since the rate is changing by only fractions of a cent, the additional revenues for rightsholders are minimal.”¹⁶⁴

[356] There is no need to account for each sale individually, only the total amount paid to SODRAC in regards of this activity for a given year. This is because it is possible to increase a total payment for the year by a given percentage; this is equivalent to increasing each of the components of that payment by the same percentage. We assume that CBC, as any diligent vendor, kept track of its payments to SODRAC by activity.

[357] To not adjust retroactively for inflation, as CBC has asked for, both for 2012-2014 and 2015-2018, is eroding the value of the royalties collected by SODRAC for this activity. This choice would be inconsistent with the Board’s past practices on inflation.

¹⁶⁰ Exhibit SODRAC-42 at para 234, note 275: [TRANSLATION] “To calculate inflation, SODRAC used 2012 as starting point up to the 2014 median, which yields a 2.39% inflation rate.”

¹⁶¹ Exhibit CBC-62 at para 206.

¹⁶² The Statement of Case was filed on March 27, 2017.

¹⁶³ CBC, *Closing Argument* (2012-2018) at para 172.

¹⁶⁴ *Ibid.*

[358] CBC’s request to suspend retroactivity is denied. For the years 2012-2014, for any sales already paid under the interim licence,¹⁶⁵ there is no need for any further adjustment. Any unpaid sales can follow Table 1. For the years 2015-2018, CBC shall total all amounts paid in regards of this activity under the interim licence and pay 2.39 per cent thereof. Any unpaid sales can follow Table 2.

IX. INTEREST

[359] In the *2020 Decision*, we canvassed at some length the issues relating to interest payments.¹⁶⁶ For brevity, we do not repeat the analysis contained therein, only the conclusions which we endorse here. With respect to post-decision interest, we apply the same rule as in the *2020 Decision*, namely that any payment not made by 90 days after the publication of the present decision accrues interest calculated daily, at a rate equal to one per cent above the Bank Rate effective on the last day of the previous month (as published by the Bank of Canada). Interest shall not compound.

[360] With respect to pre-decision interest, we apply the same principle as in the *2020 Decision*: The “clock” begins as of when the original payment would have been due. Unlike the *2020 Decision*, we are issuing a new licence today; all of the terms and conditions of the licence relating to payment are within our jurisdiction to set in a way consistent with the evidence of this matter.

[361] For the period April 1, 2012 through March 31, 2016, the Board set an interim licence based on the *2012 Decision*.¹⁶⁷ As a result of the decision of the Supreme Court of Canada, the Board’s interim licence was set aside in part.¹⁶⁸ The Board set a new interim licence for the 2012-2016 period, insofar as it pertains to BICs for television and internet-television, and extended both the new portion of the licence and the older portion of the licence for the period April 1, 2016 through March 31, 2017.¹⁶⁹ Finally, on consent of both parties, the Board extended the interim licence for one additional year, from April 1, 2017 through March 31, 2018, on the same terms as the 2012-2017 licence.¹⁷⁰ The upshot of all of these decisions is that there is effectively a single licence, from April 1, 2012 through March 31, 2018, providing for identical

¹⁶⁵ *Applications to fix royalties for a licence and its related terms and conditions for 2012-2017 (SODRAC v CBC/SRC) – Interim Licence, 2012-2017* (27 June 2016) Copyright Board at paras 73-74.

¹⁶⁶ *2020 Decision* at paras 176-182.

¹⁶⁷ *Applications to fix royalties for a licence and its related terms and conditions for 2012-2016 (SODRAC v CBC/SRC) – Interim Licence, 2012-2016* (16 January 2013) Copyright Board.

¹⁶⁸ *CBC v SODRAC* at para 115.

¹⁶⁹ *Applications to fix royalties for a licence and its related terms and conditions for 2012-2017 (SODRAC v CBC/SRC) – Interim Licence, 2012-2017* (27 June 2016) Copyright Board at paras 41 and 72.

¹⁷⁰ *Applications to fix royalties for a licence and its related terms and conditions for 2012-2018 (SODRAC v CBC/SRC) – Interim Licence, 2012-2018* (24 May 2017) Copyright Board.

royalty payments to be made throughout by CBC to SODRAC (the “Combined Interim Licence”).

[362] Clauses 5.02 through 5.05 of the Combined Interim Licence provide for monthly payments, whereas clauses 5.06 and 5.07 of the Combined Interim Licence provide for quarterly payments. It is worth noting that all of the putative payments occurred in the past; in that sense, the choice of payment frequency affects nothing other than the calculation of interest owed. It is considerably easier to have the payment frequencies of the final licence match those of the interim licence; this is what we do. We include two tables of interest factors, a monthly one for clauses 5.02 through 5.05, and a quarterly one for clauses 5.06 and 5.07. In both tables, interest starts to accrue from the notional due date of the payment, the end of the month or end of the quarter, and continues to accrue until the date of the present decision.

[363] Interest factors are as follows:

Table 19: Monthly Interest Factors

	2012	2013	2014	2015	2016	2017	2018
January		1.09599	1.08349	1.07099	1.06202	1.05452	1.04503
February		1.09495	1.08245	1.07002	1.06139	1.05389	1.04389
March		1.0939	1.0814	1.06919	1.06077	1.05327	1.04264
April	1.10536	1.09286	1.08036	1.06836	1.06014	1.05264	
May	1.10432	1.09182	1.07932	1.06752	1.05952	1.05202	
June	1.10328	1.09078	1.07828	1.06669	1.05889	1.05139	
July	1.10224	1.08974	1.07724	1.06586	1.05827	1.05077	
August	1.1012	1.0887	1.0762	1.06514	1.05764	1.05	
September	1.10015	1.08765	1.07515	1.06452	1.05702	1.04917	
October	1.09911	1.08661	1.07411	1.06389	1.05639	1.04816	
November	1.09807	1.08557	1.07307	1.06327	1.05577	1.04711	
December	1.09703	1.08453	1.07203	1.06264	1.05514	1.04607	

Table 20: Quarterly Interest Factors

	2012	2013	2014	2015	2016	2017	2018
Q1		1.09599	1.08349	1.07099	1.06202	1.05452	1.04503
Q2	1.10536	1.09286	1.08036	1.06836	1.06014	1.05264	
Q3	1.10224	1.08974	1.07724	1.06586	1.05827	1.05077	
Q4	1.09911	1.08661	1.07411	1.06389	1.05639	1.04816	

[364] Of course, interest only accrues on the difference between the amount owed by CBC and the amount paid by CBC. Should this difference be negative, that is, if CBC has paid SODRAC more than what it owes pursuant to the final licence we approve today, SODRAC must repay the overpayment, using the interest factor tables to determine the amount of interest owing. We believe that calculations of overpayments and underpayments, including the associated interest amounts, are easier if done on an item-by-item basis, since some clauses have monthly payments

and some have quarterly ones. Nevertheless, we leave the mechanics of payment calculations to the Parties.

[365] Finally, for all intents and purposes, this decision is self-sufficient and the Parties shall refer to it for the purpose of identifying their respective obligations.