Copyright Board Canada

Commission du droit d'auteur Canada

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Regime Collective Administration of Performing Rights and of Communications Rights
Copyright Act, subsection 68(3)

Members Mr. Justice William J. Vancise
Mrs. Francine Bertrand-Venne
Ms. Brigitte Doucet

Proposed Tariff(s) Considered Tariff No. 24 – Ringtones (2003-2005)

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

Reasons for decision

I. INTRODUCTION

[1] Cellular telephones are omnipresent; their ringtones are ubiquitous. Ringtones announce to anyone within hearing distance the phone owner's penchant for the theme from *Hockey Night in Canada*, Beethoven's *Für Elise*, *Axel F* from the film *Beverly Hills Cop* or any other music (or sound) of the owner's choosing.

[2] Ringtones are the bane of funeral parlours, theatres, courthouses and hearing rooms. They are also extremely popular. In 2003, they generated worldwide sales of USD 3.5 billion or about 10 per cent of the global music market. That revenue was expected to rise to USD 5.2 billion in 2008.

[3] Most ringtones use music. Those who own the right to communicate music have asked the Board to set a tariff for that use. For their part, wireless carriers and the recording industry contend that transmitting a ringtone does not involve a communication to the public by

telecommunication within the meaning of the *Copyright Act* [1] and that as a result, no royalty is payable.

[4] These reasons address those issues.

II. CONTEXT

[5] A ringtone is the sound (or sounds) that a cellular telephone plays to warn the subscriber that there is an incoming call. More often than not, that sound is an excerpt of a musical work.

[6] Musical ringtones currently come in three forms. Two of them provide synthesized music (hence our later references to "synthesized ringtones"). Monophonic ringtones play one note at a time; polyphonic ringtones play from four to sixteen "voices" at the same time, resulting in a more realistic re-creation of the work. The most recent and most popular ringtones are mastertones, also known as truetones, ringtunes, or mastertunes. These allow users to download and play excerpts (or clips) taken from the original sound recording of a musical work.

[7] In Canada, the person who delivers a ringtone that uses a musical work requires a licence to reproduce and, according to the Society of Composers, Authors and Music Publishers of Canada (SOCAN), to communicate that work. The person who delivers a mastertone that uses that same work also needs licences to reproduce the performer's performance and the sound recording; if SOCAN is correct, that person must also pay an equitable remuneration for the communication of the sound recording. This decision deals only with the communication of the musical work.

[8] Communicating a musical work to the public by telecommunication is an act protected by copyright. Authorizing someone else to effect such a communication is also protected. SOCAN, a collective society as defined in section 2 of the *Act*, manages those rights for virtually all of the world repertoire of music protected by copyright.

[9] Subsection 67.1(2) of the *Act* requires SOCAN to file proposed statements of the royalties it intends to collect for the use of its repertoire. For 2003, SOCAN filed its first proposed tariff for the communication of musical works "incorporated into telephone or other ringtones." It proposed a rate of 10 per cent of the ringtone supplier's revenues to a maximum of $7,500 per calendar quarter. For 2004, it proposed a rate of 10 per cent of the supplier's revenues subject to a minimum royalty of 10¢ for each ringtone supplied. For 2005, it proposed a rate of 10 per cent of the supplier's revenues subject to a minimum royalty of 20¢ per ringtone supplied. These proposed tariffs were published in the *Canada Gazette* on May 11, 2002, April 19, 2003 and

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[1] R.S.C. 1985, c. C-42, hereafter the "*Act*".

May 1, 2004 respectively. These reasons deal with SOCAN Tariff 24 for the years 2003 to 2005.[2]

[10] Potential users and their representatives were advised of their right to object to the statements. Bell Mobility (Bell), the Canadian Wireless Telecommunications Association (CWTA) and Telus Mobility (Telus) (collectively the "Wireless Carriers") objected to one or more of the proposed statements, as did the Canadian Recording Industry Association (CRIA). Two companies that create, collect and distribute ringtones (or ringtone aggregators) were allowed to intervene, i.e. Moviso and SilverBirch Studios. The first withdrew from the proceedings and the other only filed written representations and did not attend the hearing into this matter. The Society of Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) filed written comments that also reflected the view of the Canadian Musical Reproduction Rights Agency (CMRRA).

III. POSITION OF THE PARTICIPANTS

A. SOCAN

[11] SOCAN proposed a rate of 10 per cent of a ringtone supplier's revenues. It says it arrived at a rate by relying on the approach used by the Board for setting the *SOCAN-NRCC Pay Audio Services Tariff, 1997-2002*.[3]

[12] SOCAN has not filed a tariff for the performance that may occur when a ringtone is played in a public setting.

B. OBJECTORS

[13] The objectors filed a joint statement of case. They concede that downloading a ringtone is a communication by telecommunication but contend that the communication is not a public communication, but a private transaction between a vendor and a purchaser and as such, is not protected by copyright. The Wireless Carriers add that the Board's earlier decisions on the issue of what constitutes a communication "to the public" reflect a misunderstanding of the making

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[2] The proposed tariff for 2006 has not been dealt with for two reasons. First, at least one of the objectors to that proposal did not participate in these proceedings. Second, the 2006 proposal deals with ringback tones, and the proceeding for 2003 to 2005 was too far advanced to allow participants to canvass that issue. Ringbacks (also known as "caller ringtones") are defined by SOCAN as ringtones "which, when activated by an incoming call, result in an acoustic representation of a musical work that is audible to the calling party".

[3] Hereafter the Pay Audio Tariff. The related *decision is SOCAN-NRCC Pay Audio Services for the Years 1997 to 2002* (March 15, 2002), hereafter *Pay Audio (2002)*.

available right recognized in recent international copyright treaties that have not been implemented in Canada.

[14] Alternatively, the objectors submit that even if liability does exist, the rate should be no more than 1.5 per cent of the ringtone supplier's revenues. They contend that SOCAN's analysis is based on an incorrect reading of *Pay Audio (2002)* and that SOCAN's proposed tariff is inconsistent with comparable tariffs around the world. In their view, a ringtone transaction primarily engages the reproduction right. The communication is purely incidental or accessory, and the tariff should reflect this.

[15] Finally, the objectors ask that the effective rate applicable to mastertones be lower than that for synthesized ringtones. This lower rate would account for the fact that the higher price charged for mastertones results solely from the addition of non-SOCAN inputs: the original sound recording and the performance embedded in the recording. In their opinion, SOCAN should not share in these incremental revenues. Consequently, either the rate base should be reduced or the royalty rate should be discounted.

IV. EVIDENCE

[16] The purpose of SOCAN's evidence was to demonstrate that downloading a ringtone involves a communication to the public by telecommunication and that the appropriate proxy for determining the tariff is the Pay Audio Tariff.

[17] Mr. Michael Sone, Consultant, presented a study by NBI/Michael Sone Associates that provided an overview of the Canadian ringtone industry. The report dealt with the methods, technologies and licensing issues associated with the ringtone market. It addressed such topics as marketing approach, handset type, potential addressable market, similarities and differences between the downloading methods used by various service providers, the activity levels, as well as providing a detailed insight into the role played by the major aggregators in deriving ringtone and music libraries.

[18] Mr. Tom Jurenka, Partner, presented a report prepared by Disus Inc. on the technical aspects of ringtone transmissions and provided further insight into ringtone transmission and use. His testimony largely confirmed the description of what happens on the Internet, which the Board provided in an earlier decision.[4]

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[4] *SOCAN - Tariff 22 (Transmission of Musical Works to Subscribers Via a Telecommunications Service not covered under Tariff Nos. 16 or 17) [Phase I: Legal Issues]* (October 27, 1999), hereafter *SOCAN 22 (1999)*.

[19] Mr. Paul Spurgeon, SOCAN's Vice-President of Legal Services & General Counsel and Mr. Paul Hoffert, composer, testified about the need for a ringtone tariff, its proposed structure, the importance of music in ringtones, the benefits of ringtones to wireless carriers and the business relationship between carriers and third-party suppliers. Mr. Spurgeon outlined how the tariff proposal submitted by SOCAN was developed and why, in his view, the Pay Audio Tariff was a useful proxy to use in setting a ringtone tariff.

[20] Professor Stanley J. Liebowitz offered his comments on the economic analysis filed by Professor Frank Mathewson on behalf of the objectors. Specifically, he challenged Professor Mathewson's claims that the best available proxy was the price paid for the communication of ringtones in foreign markets, that the Pay Audio Tariff was a poor proxy for the ringtone tariff, and that the amount paid for mastertones should be no higher than the average amount paid for other ringtones.

[21] For their part, the objectors relied on the testimony of four representatives of the wireless telephony industry, one economist, the representative of one ringtone aggregator and three representatives of the recording industry.

[22] The panel representing the wireless telephony industry consisted of Messrs. Robert Blumenthal, Vice-President Products and Services, Telus Mobility; Upinder Saini, Senior Director for Wireless Internet Services, Rogers Wireless; Peter Barnes, President and CEO, CWTA; and Ken Truffen, Director of Data Marketing and Business Development, Bell Mobility. This panel provided an overview of the industry in Canada and of the development of the Canadian ringtone market. Among other things, the panel explained that the staged introduction of ringtones in Canada was mandated by the network capability as well as the memory capacity of handsets available to handle data and to play original music.

[23] Professor Frank Mathewson analysed the economic aspects of SOCAN's proposed tariff, described some economic approaches available to set the royalties for a ringtone tariff and commented on a number of benchmarks we might use to identify a range of possible outcomes. His conclusions were that the pay audio market was too dissimilar to the ringtone market to constitute a useful benchmark, that the foreign licence fees paid for the use of music in ringtones offered a more reliable benchmark, and that the effective rate for mastertones should be lower than for other ringtones to reflect the fact that the higher price for mastertones is driven by factors that have nothing to do with the use of SOCAN's repertoire.

[24] Mr. Alex Crookes, Chief Technology Officer of M-Qube, described the company's function as aggregator. Its clients are companies that offer ringtones, whether they be wireless carriers or third-party ringtone suppliers such as MuchMusic. Mr. Crookes described how content is acquired and ringtones are created. The aggregator must identify the strongest part of the melody of a tune and then create the files that will be offered to wireless carriers. For synthesized

ringtones, in-house musicians use a MIDI [5] format to create the electronic transcription of music to be offered as ringtones to wireless carriers. For mastertones, an original digital representation of a song is converted into a number of different formats suitable for reproduction on a cell phone.

[25] Once ringtones are created, M-Qube places them within its clients' ringtone websites by storing them on servers accessible to consumers. M-Qube has a store front of inventory of binary objects – ringtones – in its repository of content, which can be retrieved for delivery to specific carriers' handsets. M-Qube assists its clients with the technological aspects of ensuring that consumers are able to access the website, select and purchase ringtones, and ensuring that ringtones are then successfully downloaded to the consumer's handset. M-Qube also assists in the billing function technology.

[26] Finally, the recording industry panel composed of Mr. Graham Henderson, President of CRIA; Ms. Christine Prudham, Vice-President, Legal and Business Affairs at Sony BMG Music (Canada) Inc.; and Mr. Marcel Deluca, Vice-President, Business Affairs at Warner Music Canada Ltd., provided an overview of the effect of issues relating to the ringtone industry on the recording industry. They described in some detail the differences between mastertones and synthesized ringtones, as well as the value added to the mastertone by the performance and by the sound recording.

V. TECHNICAL ASPECTS OF RINGTONE DELIVERY

[27] Ringtones were virtually unknown five years ago. In 2003, on approximately 6 million downloads in Canada, ringtones generated approximately $9.6 million in revenue. The figures for 2004 reveal that the market has expanded dramatically.

[28] A ringtone is a sound excerpt of any kind. The quality of the sound reproduced varies with the technology. Before 2000, handsets on the market only offered products with a limited choice of alternatives to the traditional phone ring. The first generation of ringtones amounted to a few variations of a single synthesized tone that provided combinations of short and long bursts of sound, which was downloaded to a handset and could be converted to music by a synthesizer in the handset. Monophonic ringtones produced a tinny sound reminiscent of a single wind instrument. In 2000, the technology improved to the point that multiple tones, or polyphonics, could be embedded in the phone's chipset.

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[5] Musical Instrument Digital Interface (MIDI) is a protocol and set of commands for storing and transmitting information about music. MIDI output devices interpret this information and use it to synthesize music.

[29] Mastertones are the next generation of musical ringtones. They allow the use of the actual recorded version of the musical work. They are a compressed version of an extract of the original sound recording that is converted to an audio file and then downloaded to a handset.

[30] Manufacturers produce handsets that have the ability to download additional ringtones from the websites of wireless carriers or those of affiliated third-parties. Purchasing and using a ringtone is easy, although the technology behind it is quite sophisticated and complicated. The cell phone subscriber gains access to a ringtone supplier's website using the wireless browser in the subscriber's handset or using a personal computer. The wireless carriers' websites require the necessary links to guide the user through the ringtone catalogue for each type of handset. Next, the website needs to be WAP or SMS enabled [6] so that, once ordered and paid for, the ringtone can be "pushed" to the user's handset. Links are also required so that payment can be accepted by credit card or assigned to a subscriber's service bill. Finally, the website must be included in the phone's browser menu, since direct access from the handset is the preferred method for users.

[31] When end users decide to order a ringtone, they access the handset browser and click on the "Ringtones" icon to take them to the carrier's server. There, they are presented with a menu, they make their choice and when payment is accepted the ringtone is delivered directly over the network. Those who wish to order from a computer can gain access to the website, make the selection and once payment is accepted, have the ringtone delivered either to the handset as attachments to SMS messages or downloaded to the computer and then transferred to the handset over a cable, through a wireless modem or using Bluetooth technology.[7]

[32] New phone models drive ringtone popularity. Buzzer tones are dull and not very appealing to the youth market. The arrival of sophisticated polyphonic handsets allowed aggregators to produce ringtones that better re-created the original song. More sophisticated phones with larger memory capacity then allowed aggregators to supply high quality excerpts of actual sound recordings. Further advances now allow consumers to use their handset as a digital audio recorder, download complete sound recordings onto the handset and listen to them at their leisure. Everything indicates that the market for wireless telephony, and with it, the demand for ringtones, will continue to expand so long as fidelity and memory capacity continue to increase.

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[6] Wireless Application Protocol (WAP) is an application environment and set of communication protocols for wireless devices designed to enable access to the Internet and advanced technology. Short Messaging Service (SMS) is a short message sent to or from a mobile phone by a subscriber.

[7] Bluetooth technology enables short-range wireless connections between a computer and different peripherals including cell phones.

[33] Cell phone users might prefer to obtain ringtones from a variety of suppliers. In Canada, however, access to ringtones is totally controlled. Handsets play only paid ringtones downloaded in specific formats, provided by wireless carriers or affiliated third-party suppliers. Canadian carriers have learned from the experience of other markets. In Europe, for example, carriers deployed an open, borderless platform to facilitate SMS; that platform was essentially taken over by third-party suppliers. Canadian wireless carriers have taken the approach of ensuring that ringtones that are made available to their clients are legitimate and paid for copies, which are delivered in a secure fashion.[8] North American wireless carriers control both product and services, with handsets being a perfect example.

[34] Wireless carriers use aggregators to facilitate delivery to their customers. On average, the wireless carriers' revenues are shared about evenly with the aggregators, who are mainly represented in Canada by two companies. Moviso has approximately 75 per cent of the market, while M-Qube has most of the remaining 25 per cent. Moviso provides ringtone content to Bell and Rogers, which now includes Microcell. M-Qube has an exclusive contract to manage the Telus website.

VI. LEGAL ISSUES

[35] During the hearing, we asked the participants to address the following legal issues:

1. Does a ringtone constitute a "substantial part" of a musical work?

2. Is the communication of a ringtone a communication "to the public?"

3. Does playing a ringtone in a public place constitute a performance in public and if so, does the supplier of a ringtone authorize that performance?

4. If the communication of a ringtone is not a communication "to the public", can the Board nevertheless certify Tariff 24 if playing a ringtone in a public place constitutes a performance in public?

5. In cases where the ringtone supplier and the user are not both in Canada, when is there a "real and substantial connection?" For example, is the communication of a ringtone in the United States, off an American server, to a Canadian subscriber by a Canadian wireless telephone service supplier a communication in Canada?

6. Insofar as the provision of ringtones might involve the reproduction of a fixation made for a purpose other than that for which the performer's authorization was given, does the use of a ringtone involve a protected use of a performer's performance?

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[8] Testimony of Mr. Blumenthal, tr., p. 452.

[36] Having read the participants' submissions, we concluded that it is necessary to deal with only two issues to determine whether SOCAN is entitled to collect royalties for the transmission of a ringtone from a supplier to a cell phone user. Those issues are whether a musical ringtone uses a "substantial part" of the musical work, and whether transmitting a ringtone involves a communication "to the public" by telecommunication as contemplated by paragraph 3(1)(*f*) of the *Act*.

A. SUBSTANTIAL PART OF MUSICAL WORK

[37] Copyright includes the sole right to communicate a work "or any substantial part thereof". A musical ringtone rarely, if ever, uses an entire work. Thus, to attract copyright protection it must, by necessity, use a substantial part of a work.

[38] CRIA "assumed" for the purpose of this hearing, that a musical ringtone uses a substantial part of a musical work. For their part, the Wireless Carriers urged us not to rule on the question, as they did not consider it necessary for the resolution of the issues before it. We agree that the Board, like courts, should generally avoid addressing legal and other issues in the abstract without the benefit of factual records.[9] Nevertheless, we are of the opinion that the issue needs to be resolved, for two reasons. First, the issue is central to the determination of whether there is a right protected under the *Act*.[10] Second, there is an evidentiary base before us that permits us to decide the issue.

[39] Mr. Truffen testified that wireless carriers are aware that ringtones have been enthusiastically embraced by the 16 to 24 year-old demographic. It is important to this group of individuals to express their individuality and personality. The "cool factor" [11] of a musical ringtone identifies an individual with a particular song, artist or type of music such as country or rock, to broadcast certain beliefs and ideas. Consumers expect the ringtone to connect them to that song. The same point was made by Mr. Hoffert when he described the connection that young people have to particular songs. To demonstrate the importance of the musical work to that demographic, he used (and even sang a few bars of) the well-known rock classic "Smoke on the Water".[12]

[40] A musical ringtone must be able to deliver its message within a 30-second clip. As Mr. Crookes stated: "Unless it sounds like that song by that artist you are not really selling what you

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[9] *BMG Canada Inc. v. John Doe*, [2005] 4 F.C.R. 81.
[10] See Board's decision of March 6, 2006, re: *Breakthrough Films & Television Inc., Toronto, Ontario.*
[11] Testimony of Mr. Truffen, tr., p. 406.
[12] Tr., p. 115.

claim to be selling."[13] Mastertones are marketed to emphasize the performing artist and the song. Aggregators create ringtones that capture the most identifiable elements of the song. Mastertones are created by taking an actual segment of a sound recording after determining "which number of seconds out of that track will be the most appropriate for the market."[14] Synthesized ringtones are created by drawing out the strongest part of the melody, whether it is the core or a specific part of the verse, transcribing that portion first into a musical notation and then into a machine-readable format.[15]

[41] To determine what constitutes a "substantial part" of a work is subjective and necessarily involves considering a number of factors. We accept that there is no set formula. What is important is whether the substance of the original work was taken or not, as well as the listener's impression of the work. McKeown puts it this way:

> Under the prior definition of "musical work" the question of infringement was not decided by a note-for-note comparison, but on the basis of whether the substance of the original work had been taken or not. The determination was made by the ear as well as the eye. Typically, expert evidence was presented to the court to assist in identifying similarities or differences, although it has been suggested that the determination should be made on the basis of the response of the ordinary reasonable listener.
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> The absence of a requirement in the current definition of musical work for writing, or other graphical evidence of the work, is consistent with an increased emphasis on the aural impression created by the work.[16]

[42] Musical ringtones are created from either a distinct and recognizable element of a song like a melody or a hook, or directly reproduced from a sound recording. They are intended to be "the best representation possible" of the original.[17] The objective is to make the ringtone as obvious as possible to trigger recognition of the song in almost anyone. For example, the theme from *Hockey Night in Canada* can only be recognized and instantly experienced by the listener if the essence (or substance) of the theme is captured.

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[13] Tr., p. 558.
[14] Testimony of Mr. Crookes, tr., p. 562.
[15] Testimony of Mr. Crookes, tr., p. 556.
[16] John McKeown, *Fox: Canadian Law of Copyright and Industrial Designs on Copyright*, 4d (Toronto: Carswell, 2005) at ¶ 21:5(b).
[17] Testimony of Mr. Crookes, tr., p. 559.

[43] The notion of "substantial part" was considered in *Canadian Performing Rights Society Ltd. v. Canadian National Exhibition Association.*[18] The Court recognized the importance of the element of distinctiveness:

> … it is not merely by comparing the respective lengths of the whole work and of the part played that one is to reach a decision as to whether the part played is a substantial part, and that the fact that in the present case anyone who saw the performance and who was familiar with the work would have known that the elephant was performing to the tune of "Walkin' My Baby Back Home" is very important, if not conclusive. I have not had the advantage of hearing "Walkin' My Baby Back Home" played, and I do not know whether there are parts of it that it might be difficult to identify as such; but it does appear that the chorus, or part of the chorus, which one would expect to be quite distinctive, was played and that the part played was recognizable and in fact recognized; and I think that the reasonable finding, upon the evidence available, is that a substantial part of the work was played.[19]

[44] Chief Justice Rose followed the English Court of Appeal in *Hawkes and Son (London) Ltd. v. Paramount Film Service Ltd.*,[20] a case that involved the playing of twenty seconds of the *Colonel Bogey March*. The Master of the Rolls, Lord Hansworth, held that 20 seconds was a substantial part of the work because it would be recognized by any person. Lord Justice Slesser in a concurring judgment described it as "a substantial, a vital, and an essential part which is there reproduced."[21]

[45] Although quantity is not determinative, it is still an important factor. A typical musical work lasts between 3 and 5 minutes; the melody may last at most a minute, the "hook" even less. The typical ringtone uses about 30 seconds of a work, which is clearly a substantial part of that work.

[46] In our opinion, a musical ringtone constitutes a substantial part of a musical work. If there were no substantial part of the musical work reproduced, there would be little or no incentive to the consumer to purchase it. There would, therefore, be little economic motivation for a wireless carrier to offer a ringtone from an unsubstantial and therefore unrecognizable portion of a musical work.

B. THE MEANING OF "TO THE PUBLIC"

[47] This brings us to the fundamental issue. Unless the transmission of a ringtone involves a communication by telecommunication "to the public", we have no jurisdiction to fix the tariff submitted by SOCAN.

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[18] [1934] O.R. 610 (Ont. H.C.).
[19] *Ibid.*, at p. 615.
[20] [1934] 1 Ch. D. 593 (U.K.C.A.).
[21] *Ibid.*, at p. 606.

[48] The method by which a ringtone is transmitted from a wireless carrier's computer to a consumer's telephone has already been described and can be summarized as follows. First, the ringtone is transcribed into a variety of digital audio formats that can be played on the subscribers' handset. Second, the files are uploaded to a host server or website where the subscriber has access to them. Third, the subscriber browses the selections available. Fourth, the subscriber chooses and purchases the ringtone. Fifth, the ringtone is downloaded into the cell phone's memory. Once the subscriber selects the file containing the ringtone as the incoming call ringer, the cell phone is programmed to sound out the ringtone each time someone calls.

[49] The delivery of a ringtone fits the category of "unicast pull mode" [22] where the information is transmitted over the Internet only when the user makes a request and pulls at which point the information is "cast" towards the single recipient. Before this can occur, however, it must be possible to have access to the work over the Internet. There are therefore two stages involved in the process. First, the wireless carrier posts the ringtone on a server to which subscribers have access. Second, the ringtone is transmitted to the end user, completing the process.

[50] According to SOCAN, the Internet transmission of musical ringtones to cell phones constitutes a communication to the public by telecommunication of musical works within the meaning of the *Act*, while the posting of that ringtone on a website constitutes an authorization to communicate that work. The objectors contend that SOCAN relies entirely on statements made in *SOCAN 22 (1999)*, especially with respect to the issue of what is meant by "to the public", to the distinction between downloading and other forms of Internet music use (e.g. streaming or webcasting) and to the notion of "making available".

[51] The Wireless Carriers concede that downloading a musical ringtone involves a communication of a musical work by telecommunication but not that that communication is "to the public". In their submission, the transmission of a ringtone involves a point-to-point, one-to-one delivery of a file purchased by a consumer from a carrier's website to a consumer's handset. They assert that the transaction between the consumer and the carrier is nothing more than a private communication; there is no public element in it. CRIA generally agrees with the submissions of the Wireless Carriers on this issue. The Wireless Carriers also contend that the Board erred in *SOCAN 22 (1999)* by placing too much emphasis on the making available right; they rely heavily on the 1993 decision of the Federal Court of Appeal in *Canadian Cable Television Association v. Canada (Copyright Board)* [23] to support that position. CRIA takes no position with respect to the second issue.

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[22] *SOCAN 22 (1999)*, at p. 17.
[23] [1993] 2 F.C. 138 (C.A.), hereafter *CCTA (1993)*.

[52] In *CCTA (1993)*, the Federal Court of Appeal adopted the principle set out in *Messager v. British Broadcasting Co.*[24] That case involved an opera played for a few friends in a private studio that was also broadcast to the general public. The Court stated:

> [T]he defendants […] clearly gave a public performance. Instead of gathering the public into a vast assembly room, they set in motion certain ether waves knowing that millions of receiving instruments in houses and flats were tuned to the waves sent forth, and knowing and intending also that acoustic representation of the opera would thereby be given to an enormous number of listeners. If I did not hold this to be a public performance by the defendants I should fail to recognize the substance and reality of the matter and also the object and intent of the Copyright Act.[25]

[53] The Federal Court of Appeal held that the plain and usual meaning of the words "in public" is "openly, without concealment and to the knowledge of all."[26] The Court also accepted that the words "to the public" are broader than "in public".[27]

[54] This is not the first opportunity that the Board has to look at the issue of what constitutes a communication to the public by telecommunication in the context of the Internet. The Board first tackled the issue in *SOCAN 22 (1999)*, a decision that was challenged (and reversed) on issues that are not relevant to this analysis. There, the Board found that Internet transmissions are communications by telecommunication by reason that the transmission of packets of information over the Internet meets the definition of telecommunication in section 2 of the *Act*. One question remained for the Board to decide: does the transmission of data from a host server to the computer of an end user involve a transmission "to the public"?

[55] The Board concluded that it did. It found that such a communication was "to the public" because the music files are made available on the Internet openly and without concealment, with the knowledge and intent that the files be conveyed to all who might have access to the Internet.

[56] We agree in every respect with the findings, analysis and conclusions of the Board, the essence of which are as follows:

> Most court decisions dealing with the meaning of "public" in the *Act* addressed the expression "performance in public", not "to communicate to the public". Nevertheless, since the Federal Court of Appeal has ruled that the expression "to the public" is broader than "in public", it can safely be assumed that a telecommunication is to the public every time a performance would be public in similar circumstances. These decisions also make it clear

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[24] [1927] 2 K.B. 543.
[25] *Ibid*. at pp. 548-549.
[26] *CCTA (1993)*, at p. 153.
[27] *CCTA (1993)*, at p. 148.

> that expressions such as "in public" and "to the public" are to be interpreted by taking a realistic view of the impact and effect of technological developments and in a manner consistent with their plain and usual meaning "that is to say openly, without concealment and to the knowledge of all".
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> Consequently, a communication intended to be received by members of the public in individual private settings is a communication to the public. The same holds true of a communication intended only for a segment of the public, whether it be through e-mail, to a newsgroup, a bulletin board service or a service offered on a subscription basis, or of a communication over a network for which access is restricted, as long as the transmission occurs outside a purely domestic setting, and even though only certain members of the public may be willing to pay a fee or take other steps to subscribe to the service.
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> [...]
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> Having said this, the person posting a file must intend it to be accessed by some segment of the public, and certainly more than a single recipient, in order for its transmission to constitute a communication to the public. Consequently, an e-mail communication between a single sender and a single recipient is not a communication to the public for the sole reason that it is sent outside the context of a domestic setting.
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> [...]
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> [...] To communicate is to convey information, whether or not this is done in a simultaneous fashion. The private or public nature of the communication should be assessed as a function of the intended target of the act. In other words, the time frame within which the communication takes place is irrelevant; a facsimile transmission to ten thousand randomly selected persons is a communication to the public even though the transmission can only occur sequentially.
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> Musical works are made available on the Internet openly and without concealment, with the knowledge and intent that they be conveyed to all who might access the Internet. Accordingly, a communication may be to the public when it is made to individual members of the public at different times, whether chosen by them (as is the case on the Internet) or by the person responsible for sending the work (as is the case with facsimile transmissions).[28]
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> In our opinion, that reasoning is as applicable to the transmission of a ringtone to a user's handset as it is to the transmission of data to a computer considered in *SOCAN 22 (1999)*.

[57] The Wireless Carriers rely on these very statements in support of their position that *SOCAN 22 (1999)* was wrongly decided. They argue first that the Board, in deciding the issue, arrived at a number of conclusions but did not specifically rule that any particular download was or was not a communication to the public. That position misreads the Board's decision. The Board clearly

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[28] *SOCAN 22 (1999)*, at pp. 29-30 (footnotes omitted).

set out its findings under the heading "What do 'Communication', 'Telecommunication', 'Public' and 'Musical Works' Mean in the Context of Internet Transmissions?" [29]

[58] The contention by the Wireless Carriers that *SOCAN 22 (1999)* did not consider downloading of music does not accord with what the Board decided. There the Board dealt with downloads from the Internet of the same kind we are involved with here for ringtones. As SODRAC correctly pointed out in its comments, the Board did not determine that an uploading or a downloading constitutes a communication, but that between the uploading and the downloading there is a transmission, which is a communication to the public by telecommunication.

[59] The Wireless Carriers also argue strenuously that *SOCAN 22 (1999)*, in its consideration of what constitutes a communication to the public, placed too much reliance on the fact that "[m]usical works are made available openly and without concealment [...]" [our underlining]. [30] The "making available right" is found in Article 8 of the 1996 *WIPO Copyright Treaty*, which reads as follows:

> Article 8 – Right of Communication to the Public
>
> [A]uthors […] shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. [our underlining]

[60] Canada has signed but not ratified the WIPO Treaty. Nowhere in the *Act* is there a mention of a making available right. Still, contrary to what the Wireless Carriers argue, the Board did not confuse the right to communicate with the right to make available. It stated clearly that there can be no communication unless there has been one transmission. The work is not communicated when it is posted but rather when it is transmitted. Indeed, the Supreme Court of Canada has specifically agreed with this finding.[31]

[61] The Wireless Carriers argue that the Board made numerous references to whether a work was made available or could be accessed by a member of the public rather than determining whether communication of the work was to the public as required by paragraph 3(1)(*f*) of the *Act*. Specifically, the Wireless Carriers point to the following passages:

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[29] *SOCAN 22 (1999)*, at pp. 34 *et seq*.
[30] *SOCAN 22 (1999)*, at p. 30.
[31] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, at ¶ 42.

> [...] the person posting a file must intend it to be accessed by some segment of the public, [...] in order for its transmission to constitute a communication to the public.[32]
>
> Musical works are made available on the Internet openly and without concealment, with the knowledge and intent that they be conveyed to all who might access the Internet.[33]
>
> [...] a work is communicated to the public even if it is transmitted only once, as long as it is made available on a site that is accessible to a segment of the public.[34]

[62] In our opinion, the Wireless Carriers again misread *SOCAN 22 (1999)*. The Board did not conclude that the rights described in the WIPO Treaty had somehow been added to the *Act*. In fact, it specifically noted that the Treaty did not apply in Canada. What it did decide was that the person who posts a work on a server, authorizes the communication of that work to the public. In other words, as far as works are concerned, the authorization right already includes the Treaty making available right.[35] The expression "making available" as used in *SOCAN 22 (1999)* is not equivalent to the term of art used in the Treaty. It is simply a reference to the fact that a work must be posted on the Internet before it can be transmitted and downloaded to the end user.

[63] The Wireless Carriers contend that the downloading of musical ringtones is a point-to-point, one-to-one delivery of a music file purchased by a consumer and that the communication is private and not a communication to the public. We disagree. Ringtones are uploaded onto a website for the specific purpose of marketing and communicating them to any subscriber who wishes to download the ringtone to a cell phone. The ringtone is marketed to a phone-owning public and placed on a website in a catalogue for communication to members of that segment of the public who buy the product. Wireless carriers offer to sell a musical ringtone to all their subscribers, not to one individual and the fact that a member of the public receives the work in a private setting does not turn what would otherwise be a communication to the public into an individual transaction. This is no different from any other Internet subscription music service accessible to a member of the public.

[64] In *CCH Canadian Ltd. v. Law Society of Upper Canada*,[36] the Supreme Court of Canada, the Federal Court of Appeal and the Federal Court all found that the transmission of a single copy of a work by fax to a single individual was not a communication to the public by telecommunication. That is a true point-to-point transaction – one originating from a single point

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[32] *SOCAN 22 (1999)*, at p. 29.
[33] *SOCAN 22 (1999)*, at p. 30.
[34] *SOCAN 22 (1999)*, at p. 36.
[35] The situation may be quite different with respect to other copyright subject matters.
[36] [2004] 1 S.C.R. 339; [2002] 4 F.C.R. 213 (F.C.A.); [2000] 2 F.C. 451 (F.C.T.D.), hereafter *CCH Canadian*.

and intended to be received at a single point. The Supreme Court of Canada did, however, find that a series of sequential or repeated transmissions *might* constitute communication to the public. McLachlin C.J. put it this way at paragraph 78:

> I agree with these conclusions. The fax transmission of a single copy to a single individual is not a communication to the public. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright. However, there was no evidence of this type of transmission having occurred in this case.

[65] Thus, messages with identical content (musical ringtones) sent to different individuals can be a communication to the public even though they are sent individually. On the other hand, messages with different content sent to different individuals may not be a communication to the public if they constitute singular, individual transactions. In all instances, the most determinant factor will be whether the communication is made or not within a "domestic circle".

[66] Simultaneity is not a prerequisite for a communication to be "to the public". The Board reached that conclusion in *SOCAN 22 (1999).* It stated:

> 4. A communication need not be instantaneous or simultaneous to be a communication to the public.
>
> [...] To communicate is to convey information, whether or not this is done in a simultaneous fashion. The private or public nature of the communication should be assessed as a function of the intended target of the act. In other words, the time frame within which the communication takes place is irrelevant; a facsimile transmission to ten thousand randomly selected persons is a communication to the public even though the transmission can only occur sequentially.[37]

The earlier quoted statement of McLachlin C.J. in *CCH Canadian* supports such an interpretation.

[67] The Board also stated that to require simultaneity would run contrary to the requirement to take a realistic view of the input and effect of technological developments. The Board concluded that any interpretation requiring simultaneity must be set aside for reasons of policy. It said:

> Such an interpretation must also be set aside because it might render nugatory all Canadian copyright legislation in the world of telecommunications, by putting future advances in interactivity, addressability and transmission on demand outside of the realm of copyright protection. As was pointed out by proponents of Tariff 22, the fact that the Internet is interactive and fully addressable by members of the public who choose to access the work

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[37] *SOCAN 22 (1999),* at p. 30.

> does not change its underlying purpose of allowing the transmission of the work to anyone who is provided with access to the Internet and who wishes to receive the work.[38]

[68] We agree. Wireless carriers are trying to sell as many copies of every single musical ringtone as possible to maximize sales and profit. They intend, indeed they wish for, a series of repeated transactions of the same work to numerous recipients. This, in our opinion, amounts to a communication to the public.

[69] The objectors further argue that unlike streaming, downloading is not audible during the communication; the communication is not available to or accessible by any other person. Downloading does not involve "tapping into" an ongoing communication of a work to multiple people. This argument is based on a false assumption. Streamed music is not audible during the communication; the end user's computer must first store and arrange in proper order the packets it received before it can play them. We agree with Mr. Jurenka, who stated that the only difference, technically speaking, between the two is the intention of use by the consumer. Both of them are a transmission, and both of them can be "to the public".

[70] Finally, CRIA contends that the downloading of ringtones is just another form of content delivery just as, for example, email is replacing regular mail. This argument focuses not on the public or private character of the communication, but on the mode of delivery. In this respect, the *Act* is not technologically neutral. The copyright consequences of sending a ringtone over the Internet rather than by mail are different because the *Act* so provides. SOCAN is entitled to a royalty in the first scenario and not in the second not because one form of communication is private and the other public, but because the *Act* protects a communication to the public when it is achieved by telecommunication, but not when it is achieved by ordinary mail.

[71] We therefore conclude that purchasing a musical ringtone over the Internet involves a transmission which constitutes a communication to the public by telecommunication.

VII. SETTING THE TARIFF

[72] In this part, we review closely the various methodologies proposed by the participants, and then set the tariff based on the methodology we prefer.

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[38] *SOCAN 22 (1999)*, at p. 31 (footnote omitted).

A. METHODOLOGIES PROPOSED BY THE PARTICIPANTS

i. SOCAN

[73] SOCAN would set the royalty payable for the communication right according to the comparison with the reproduction right it says the Board used in *Pay Audio (2002)*. According to SOCAN, in that decision, the Board set the royalty payable for the communication right at 1.5 times the implicit rate payable for the reproduction right in the recording industry. SOCAN believes that the same ratio should be applied to ringtones, given the similarities it says exist between that market and the pay audio market.

[74] SOCAN produced data relating to the rates charged in the ringtone market for the reproduction right. Because some of the data is confidential, SOCAN's calculations cannot be reproduced here. What we can say is that if we were to use those calculations, the 10 per cent rate proposed by SOCAN would be eminently reasonable.

[75] That being said, we do not intend to use the ratio SOCAN proposes, for two reasons. First, that approach is based on a false assumption, according to which in *Pay Audio (2002)*, "SOCAN's 13% rate [...] was established on the basis that the compensation for SOCAN members should reflect an amount greater than that which they received for their reproduction rights in the sound recordings used by the pay audio services." [39] The Board made no such comparison; the witness who explained SOCAN's methodology in this instance admitted so much on cross-examination.[40]

[76] Second, as the objectors point out, pay audio services and ringtones are very different products and use music in very different ways. Pay audio services offer their subscribers a continuous broadcast of complete, unaltered selections, organized according to various musical genres. Subscribers cannot find out in advance what they will listen to; what a subscriber wants is to listen continuously to a selected musical genre. Ringtones providers offer an inventory of musical clips that can be obtained individually to be downloaded to a cell phone's memory; that consumers do not purchase to listen to them continuously. The differences in characteristics mean that pay audio services cannot be regarded as an economic substitute for ringtones, and accordingly cannot be used as a useful proxy.

ii. Objectors

[77] The objectors propose a number of possible methodologies for setting royalty rates. Professor Mathewson prepared a grid for classifying various sources of reference prices, based

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[39] Exhibit SOCAN-1, at ¶ 33.
[40] Testimony of Mr. Spurgeon, tr., p. 207.

on three factors: whether they are payment for the same right or the same right in connection with another, whether they relate to the same use of music or a similar use, and whether they are in effect in Canada or elsewhere.

[78] Professor Liebowitz, SOCAN's witness, expressed reservations concerning the usefulness of the grid. In his view, it does not take into account important aspects such as the nature of the markets, whether they are regulated or free, and the degree of competition they exhibit.

[79] We do not intend to use the taxonomy of potential sources of benchmark prices developed by Professor Mathewson. We share some of the reservations expressed by Professor Liebowitz in this regard. In addition, even if we assume that this sort of taxonomy is helpful, there is nothing to suggest that the one presented is complete or organizes benchmark prices in the most useful manner.

[80] Professor Mathewson pointed out that the Board has used rates in effect in Canada for the same right or a similar use in the past, whether the rates had been set by the Board or negotiated, as a starting point for setting a new rate. In his opinion, however, there are no rates in Canada for the right to communicate musical works in the ringtone market, or for a similar use, that could provide a useful starting point.

[81] In addition, Professor Mathewson pointed out that the Board has used foreign prices for the same use in the past as a way to validate the rates it certified. He informed us of the rates for the communication and reproduction of ringtones in a number of countries. Some were negotiated, others were established by regulatory authorities. He admitted that it may be dangerous to compare prices charged outside Canada, for one thing because we rarely know all of the factors that played a part in setting those prices.

[82] Professor Mathewson nonetheless maintained that it was possible to find useful benchmarks by making three determinations regarding the prices charged in the countries for which figures were available. First, the rate payable for the communication right varies from 1.1 to 5 per cent of a ringtone's retail price. Second, the ratio of the price for the communication right to the price for the reproduction right is between 0.1 and 0.54. Third, the total royalties paid for both rights ranges from 7.7 to 15 per cent. By applying these various factors to information relevant to the Canadian market, some of which is confidential, the objectors conclude that the rate payable in Canada for the communication right in the ringtone market should be between 0 and 5.4 per cent.

[83] Ultimately, the objectors are asking that we set the rate at no more than 1.5 per cent. That rate falls within all three ranges derived from foreign data. It is also similar to the rate found in certain American reference figures that apply in Canada. The objectors regard this comparison to be highly appropriate because, in their submission, it reflects circumstances in a neighbouring market that is probably the largest source of music used in ringtones in Canada.

[84] Professor Liebowitz argues that the foreign rates cannot be used as a starting point because Professor Mathewson's report does not contain sufficient information regarding those rates. Specifically, the report does not explain the extreme variations observed in rates for communication, or the variation in the ratios of communication to reproduction rates. He submits that without an analysis of those variations, it is impossible to determine whether Canada should position itself at the top, the bottom, the middle or completely outside the range. In his submission, it is reasonable to think that if the Canadian rate for reproduction is in the upper (or lower) part of the range for foreign countries, the rate for communication should be in the same position.

[85] We find that in this case the reference prices outside Canada cannot be used as a starting point. Once again, as the Board has frequently stated in earlier decisions,[41] we are of the opinion that the circumstances in which a price is determined are important and must be known to some extent if it is to be used as a starting point. In this case, we do not believe that we have enough information about foreign rates to do this.

[86] We also reject comparisons based on American reference figures, for two reasons. We share the reservations frequently stated by the Board regarding American figures, which need not be repeated here.[42] Most importantly, we are of the opinion that the figures given in evidence may well undervalue the communication right. The figures come from agreements that relate to a bundle of goods and of services. The agreements show that the communication right was not the primary subject of the negotiations. It is therefore possible that this right was offered at a discount in order to reach a favourable agreement for all of the goods and services involved.

B. THE METHODOLOGY WE ADOPT

[87] SOCAN filed agreements that it has signed with third-party ringtone suppliers. Those agreements are experimental, and one of them has been renegotiated downward. We will therefore not use them as reference prices. We are also of the opinion that there is no use of music that is sufficiently similar to its use in ringtones to serve as a starting point.

[88] SOCAN suggested that we set the royalty rate for the communication of musical ringtones by making a comparison with the rate for the reproduction right for those same ringtones. For the reasons given earlier, we rejected the comparator that SOCAN proposed. On the other hand we find the approach that SOCAN proposes interesting, if only because it mirrors the approach used

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[41] See, for example, *CMRRA/SODRAC Inc. (Commercial Radio Stations) for the Years 2001 to 2004* (March 28, 2003), at p. 11, hereafter *CSI - Commercial Radio (2003)*.
[42] The most recent example of this is *SOCAN-NRCC Tariff 1.A (Commercial Radio) for the Years 2003 to 2007* (October 14, 2005), at pp. 13 to 15.

by the Board to set the price commercial radio stations pay to reproduce musical works.[43] Accordingly, we will first determine the average rate payable for the reproduction of musical works under Canadian commercial agreements that were entered in evidence. We will then establish a ratio of the rate for communication to the rate for reproduction of ringtones and apply that ratio to the average rate for reproduction, in order to set the tariff for the communication right.

[89] In this instance, we could have set nominal rates, expressed as cents per ringtone, for example. We will not, for two reasons. First, the market itself seems to have already made a choice: with one exception, agreements entered in evidence all provide rates expressed as a percentage of revenue rather than as a fixed amount. Second, and more fundamentally, the value of the right we are being asked to determine should not be a constant; instead, if should vary according to the type of ringtones involved. Price variations for different types of ringtones reflect the value of the ringtones and of the underlying rights. Setting a rate expressed as a percentage of the price paid for a ringtone will allow for this variation in the value of the right to be taken into consideration.

i. Average Rate for Reproduction

[90] Nearly fifty separate commercial agreements relating to ringtones were entered in evidence in this instance.[44] These agreements vary significantly. They involve collective societies, sound recording makers and music publishers, as well as aggregators and ringtone suppliers. They deal with the communication or reproduction right in musical works, sound recordings and performers' performances,[45] either separately or together. The terms of the agreements also vary considerably. Still, they contain some useful information.

[91] Fourteen of the agreements provide for specific rates for reproduction activities associated with the use of musical works in creating and downloading ringtones. Generally speaking, the rates are expressed as a percentage of the retail price, with a minimum royalty per ringtone, expressed in cents.

[92] We will disregard two of those agreements. The first does not apply in Canada, and there is enough Canadian data on the record for us to set a rate using only that data. The second relates to an extremely limited repertoire. For the rest, the figures are consistent. Virtually all of the

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[43] *CSI - Commercial Radio (2003)*.
[44] Exhibits SOCAN-7, SOCAN-9 (tabs B-15, C-15, D-15, I and N), SOCAN-13, SOCAN-14 and CWTA-9. Nearly all are confidential, with the exception of SOCAN-7 (experimental licences between SOCAN and some ringtone suppliers) and SOCAN-13 (agreement between CMRRA and M-Qube).
[45] The evidence is that sound recording producers bring with them the rights of performers.

relevant rates fall into clusters that closely reflect the simple average of the rates. There are practically no outliers. The simple average of the rates set in those agreements therefore constitutes a useful starting point. That being said, we find that the minimum prices provided in the agreements would tend to raise the actual average slightly. For those reasons, we find that the average effective rate payable in Canada for the right to reproduce musical works in the ringtone market is around 12 per cent.

ii. The Communication to Reproduction Ratio

[93] The commercial radio market offers useful parallels to this case. In *CSI - Commercial Radio (2003)*, the Board first addressed the question of a tariff for the reproduction of musical works by commercial radio stations. A number of factors were considered in setting the tariff. Specifically, the Board had regard to the ancillary nature of the reproduction right in the context of the stations' broadcasting activities. It also had regard to the fact that in the radio broadcasting industry, obtaining a reproduction licence is optional: a radio station can be operated without reproducing musical works. Based on those factors, the Board decided not to set too high a tariff, which would slow down the adoption of new broadcasting technologies. All things considered, the Board set the royalty at 1 per cent, before adjusting it to take into account the portion of the eligible repertoire actually represented by the relevant collectives. One per cent represents about a third of the 3.2 per cent rate that was payable by commercial radio stations at the time for the right to communicate musical works.

[94] In the case at hand, the situation is reversed. First and foremost, a musical ringtone is the reproduction of a clip from a work stored in the subscriber's cell phone. What the subscriber wants is a file (and thus a copy) containing the clip from the work that he or she intends to use as a ringtone. The communication right only allows for the ringtone to be delivered to the subscriber in a particular manner. Other modes of delivery are possible: for example, ringtones could be sold on CD or be loaded at a point of sale. These methods are undoubtedly less effective and more expensive; nonetheless, they exist.[46] For ringtones, the communication right is therefore ancillary and as such, is worth less than the reproduction right.

[95] For commercial radio stations, the Board established a one-to-three ratio for the right it regarded as ancillary. However, for the reasons that follow, we believe that the ratio of the communication to the reproduction rates must be higher in this case.

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[46] On this point, there is a strikingly close analogy with a radio station that chooses to copy music on a server and pay the relevant royalty, rather than use a less efficient technology such as playing music off CDs.

[96] Though ancillary and optional in the ringtone market, it is nonetheless extremely profitable to obtain the communication right. It allows the use of an instantaneous electronic delivery technology that greatly facilitates the transaction, and at the same time makes it more accessible and less expensive. The communication right is crucial to the current business model of ringtone suppliers, who would not experience the success they currently enjoy if they stopped using this right.

[97] The suppliers have been using delivery technologies based on the communication right from the outset.[47] Changing the business model would involve substantial expense. Given the circumstances, the possibility that the tariff we set will significantly reduce the use of these technologies is slim.

[98] On the other hand, while the ringtone market has indeed experienced strong growth, it is still new and therefore potentially unstable. The nature of the product, the prices and the agreements among the various protagonists could all change significantly in the years to come. We must therefore be careful not to set a rate so high that it could become a barrier to the evolution of the market.

[99] For all these reasons, we believe that it is appropriate and reasonable in the circumstances for the value of the communication right to be set at half that of the reproduction right.

iii. Rate

[100] The 0.5 ratio applied to the 12 per cent average reproduction rate that we retained produces a rate of 6 per cent.

C. VALIDATING OUR CONCLUSIONS

[101] The record of these proceedings contains information that we did not use in setting the royalty rate but that can help to confirm our choice.

[102] The agreements that SOCAN has reached in relation to the communication right in the ringtone market and that cannot be used to set the tariff for the reasons stated above, provide an average rate higher than the rate we have adopted.

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[47] Broadcasters, on the other hand, had been in business for a number of years before they needed the reproduction right.

[103] Certain confidential agreements entered in evidence, relating to rights other than the right to communicate the musical work, provide for **[*CONFIDENTIAL*]**. The rate we certify is **[*CONFIDENTIAL*]**.[48]

[104] The rate that we certify is higher than any foreign rate we were informed of. However, because the average Canadian rate for reproduction is also higher, the result is that the 0.5 ratio of the communication to reproduction rates in Canada falls within the range of the foreign ratios, which was from 0.15 to 0.54.[49]

D. RATE BASE

[105] Certain ringtones use something else (voice, sound effect, public domain music) than a work in SOCAN's repertoire. According to the objectors, they account for about 14 per cent of downloads and 11.5 per cent of revenues. The objectors are asking that either those downloads be excluded from the rate base or that the rate to be applied to all download revenues be reduced by 10 per cent. SOCAN said that it preferred the first option. We retain it, especially since during oral argument, the objectors agreed. Having said this, here as in other tariffs containing a similar provision, since it is sometimes possible to clear rights for works in SOCAN's repertoire without getting a SOCAN licence, what will be excluded from the rate base are ringtones for which no SOCAN licence is required.

[106] As proposed by the participants, network usage fees are excluded from the rate base. Those charges are not a measure of the value of the ringtone; rather, they are a measure of the value of the delivery technologies. All the commercial agreements entered in evidence exclude them. Since those charges apply to all transactions carried out over the Internet by cell phone, it is unlikely that this tariff will be an incentive for suppliers to alter to their advantage the ratio of the price of ringtones to network usage fees. The market has been able, to date, to absorb the reproduction royalties currently in effect in the industry, which are higher than the rate we are certifying for communication, and no such distortions have resulted.

E. THE RATE FOR MASTERTONES

[107] SOCAN is asking that the same rate apply to all ringtones. The objectors contend that different formulas should be applied to synthesized ringtones and mastertones. They argue that applying the same rate to the higher retail price of mastertones would give SOCAN members additional revenues that they should not receive, because the higher price of those ringtones

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[48] In the public version of this paragraph, some information that is necessary to understand the decision was removed because it is of a confidential nature.

[49] See Exhibit CWTA-2, table 5, revised - June 27, 2005. Professor Liebowitz corrected the lower limit of the range, making it 0.15: see Exhibit SOCAN-1.C, p. 16.

reflects not the contribution of the musical work, but the contribution of the sound recording. The producers provide that added value, and they alone should receive the benefits.

[108] In support of their argument, the objectors say that consumers choose the performer and not the author of the musical work when they purchase a mastertone. We do not share that view. As stated above, when consumers are thinking about purchasing a ringtone, they give as much importance to the musical work, whether or not they know its author, as to the performer.

[109] We are aware that part of the added value of mastertones is attributable to producers and performers. However, as we have done in other cases, we find that authors also contribute to that added value.

[110] The record producers who appeared before us stated that they must collect enough royalties in the ringtone market to enable them to recover part of the cost of producing the sound recording. Certainly, we have to expect that the business decisions made by producers will take into account the revenues they anticipate earning in all markets, including the ringtone market. That being said, the royalties payable to rights holders in musical works cannot be cut simply to enable producers to increase their revenues. This would be contrary to the spirit, if not the letter, of section 90 of the *Act*.[50]

[111] The objectors' argument runs against not only market behaviour, but also their own. Agreements entered in evidence, whether they relate to the communication right or the reproduction right, and to musical works or sound recordings, all set the same rates for both types of ringtones. The same is true of foreign rates. The only two exceptions set higher rates for mastertones. In addition, creating a polyphonic ringtone clearly involves purchasing inputs (such as orchestration costs) that are not needed in a monophonic ringtone. Yet, no one is suggesting that the rate should be different for monophonic and polyphonic ringtones. If the addition of inputs required to produce one type of synthesized ringtone but not the other does not change the royalty rate, then neither should the addition of inputs needed to produce a mastertone but not a synthesized ringtone.

[112] The applicable rate and the rate base will therefore be the same for mastertones as for synthesized ringtones.

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[50] Section 90 of the *Act* provides that the remuneration rights granted to performers and makers shall not be construed, of themselves, as prejudicing the amount of royalties that the Board may fix in respect of the rights of authors.

F. MINIMUM ROYALTY

[113] At the outset, SOCAN proposed a minimum royalty of 10¢ per ringtone for 2004 and 20¢ for 2005. It then suggested that the minimum royalty be the same as the royalty to be certified by the Board for a ringtone that costs $1 to purchase. In SOCAN's submission, such a royalty is necessary in order to deal with ringtones distributed free of charge or bundled with other products in a way that makes it impossible to determine a specific sale price.

[114] The objectors argue that a minimum royalty of 20¢ amounts to assigning a minimum retail price of $2 to all ringtones. They add that a tariff that included a minimum royalty would amount to a guarantee that SOCAN will be paid for ringtones even when they are free to consumers. In their submission, this would represent a radical change in the Board's philosophy. They suggest, instead, that there be no minimum royalty, or, in the alternative, that it be set very low, whether as a monthly rate or per ringtone, to cover the administrative costs of a SOCAN licence. In their submission, the minimum royalties for SOCAN's existing tariffs have already been set low.

[115] Recently, the Board offered the principle that a minimum royalty should reflect both SOCAN's administrative costs for issuing a licence and the intrinsic value of music.[51] We agree with that principle. Here, the second factor is the reason for certifying a minimum royalty. Although it may be impossible to attach a specific price to a ringtone for any number of reasons, this does not mean that the rights holders are waiving their payment. The intrinsic value of music incorporated into a free ringtone is not nil; a minimum royalty will reflect this. Moreover, all the commercial agreements filed in evidence set a minimum royalty equal to or higher than the royalty that applies to a ringtone that retails for $1. We will therefore set a minimum royalty of 6¢ per ringtone, which is equal to the royalty that applies to a ringtone sold for $1. This minimum royalty is approved for 2004 and 2005 only, since SOCAN did not ask for minimum royalties for 2003.

G. QUARTERLY CAP FOR 2003

[116] For 2003, SOCAN proposed that royalties be capped at $7,500 per quarter. SOCAN produced no evidence in this respect, but it appears that it was attempting to take a cautious approach in a ringtone market that was still new at the time. Since it is a temporary measure for a period that has already ended, we retain the cap.

H. TARIFF WORDING

[117] SOCAN's proposed tariff targeted the "ringtone supplier", which is defined as the person supplying or authorizing the supply of ringtones to subscribers. This targets wireless carriers,

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[51] See Board's decision of March 19, 2004 dealing with various SOCAN tariffs, at p. 13.

third-party suppliers, aggregators and any other content or ringtone provider, so long as they communicate or authorize the communication of a ringtone. More than one person may then be liable for the communication of a ringtone. As the Board stated in *Pay Audio (2002)*, we are of the view that it is not our role to determine responsibility for the payment since SOCAN is entitled to seek payment from anyone of those persons, whether or not the tariff targets one of them. Under such circumstances, the tariff will be "target neutral".

[118] As is often the case, the participants' assistance in finalizing the wording of the tariff helped us in arriving at a text that reflected our intentions without raising unforeseen difficulties in its day-to-day application. This now requires only a few comments in addition to those already made with regard to other aspects of the tariff.

[119] First, while we structured the tariff so that a payment is due every time a ringtone is downloaded, the licence includes all uses administered by SOCAN that are directly connected to the sale of ringtones, including ringtone browsing.

[120] Second, we included a definition of ringtone even though, strictly speaking, it was not necessary: we doubt, for example, that anyone would attempt to argue that a mastertone is not a ringtone. A definition will be helpful once the tariff addresses ringbacks as well as ringtones. We thought it preferable to test the proposed definition immediately rather than in the future.

[121] Third, we fleshed out the reporting requirements in an effort to provide SOCAN with enough information to assess the accuracy of licensees' reports and to determine to whom royalties should be distributed. At the same time, we attempted to do so in the least intrusive manner possible from the perspective of the licensees.

[122] Fourth, the tariff contains certain transitional provisions made necessary because the tariff takes effect on January 1, 2003 while it is being certified much later. For example, even though the tariff expires at the end of 2005, it contains a reference to amounts payable before June 30, 2006. This is required because the tariff is being certified after the date it was due to expire, and that users must have a reasonable amount of time after the tariff is finalized to fulfil their obligations pursuant to the tariff.

[123] Furthermore, a table sets out interest factors or multipliers to be used on sums owed in a given month. The factors were derived using previous month-end Bank Rates covering the period January 2003 to June 2006 as published by the Bank of Canada. We consider that a penalty over and above the interest factor should not be imposed on retroactive payments in this matter, as there was no way for ringtone suppliers to estimate the amounts payable until the tariff was approved. Interest is not compounded. The amount owed for a reporting period is the amount of the approved tariff multiplied by the factor set out for that period.

[124] In the course of consultations about the wording of the tariff, the objectors sought changes to the standard audit clause found in most SOCAN tariffs. We did not make those changes. There is no evidence that SOCAN has misused its audit powers to date. Any risk of misuse is made even more remote by the fact that the tariff essentially concerns past events. This matter should be re-examined in the next proceedings dealing with this tariff.

I. Final Rates and Total Royalties

[125] For 2003 to 2005, we certify the royalty rate at 6 per cent of the price paid by the subscriber for a ringtone for which a SOCAN licence is required, net of any network usage fees. For 2004 and 2005, a minimum royalty of 6¢ per ringtone applies. For 2003, the quarterly royalties are capped at $7,500 per licensee.

[126] Based on SOCAN's figures, we estimate the amount of the total royalties generated by the tariff to be approximately $325,000 in 2003, $950,000 in 2004 and $1,570,000 in 2005. This estimate does not take into account the impact of the $7,500 quarterly cap for 2003.

J. Ability to Pay

[127] The Canadian ringtone market has grown very quickly in recent years. Mr. Sone estimated the revenues generated by ringtone retail sales in 2004 to be over $15 million, and predicted that revenues might reach $30 million in 2006. In addition, the costs associated with the production and sale of ringtones seem to be quite low. Those figures, which were not challenged by the objectors, are indications of a financially sound industry. Moreover, the rate we have set is low enough not to lead to **[*CONFIDENTIAL*]** in the ringtone market. In other words, **[*CONFIDENTIAL*]** larger than the amount of the royalties that will actually be paid. There should therefore be no consequence on market prices.[52]

Claude Majeau
Secretary General

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[52] See *supra* note 48.