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Canada

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Regime Public Performance of Music
Copyright Act, section 68(3)

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Statement of Royalties to be collected by SOCAN and NRCC in respect of commercial radio for the years 2003 to 2007

Reasons for decision

I. INTRODUCTION

These reasons deal with the tariffs of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and of the Neighbouring Rights Collective of Canada (NRCC) for the use of their repertoire by commercial radio stations in the years 2003 to 2007. Proposed statements of royalties were filed pursuant to subsection 67.1(1) of the *Copyright Act* (the *"Act"*). SOCAN filed separate statements for 2003, 2004 and 2005 to 2007; they were published on May 11, 2002, April 19, 2003 and June 28, 2003. NRCC filed a single statement for the whole period; it was published in the *Canada Gazette* on May 11, 2002. Potential users or their representatives were advised of their right to object to the statements. Only the Canadian Association of Broadcasters (CAB) did so.

On June 3, 2003, the Board ruled that it would deal with SOCAN's and NRCC's proposed statements for commercial radio together.[1] The hearing took place over eight days starting May 18, 2004. Final arguments were heard on June 10, 2004.

[1] In 2002, for the first time, the Board jointly examined SOCAN's and NRCC's proposed statements of royalties: see Board's decision of March 15, 2002 on the SOCAN-NRCC Pay Audio Services Tariff for the years 1997-2002.

A. History of the Tariffs

SOCAN Tariff 1.A sets the royalties that the commercial radio stations pay for the communication to the public by telecommunication of musical works in SOCAN's repertoire. SOCAN distributes those royalties to authors of these works. NRCC Tariff 1.A sets the royalties that these radio stations pay as equitable remuneration for the communication to the public by telecommunication of published sound recordings of musical works in NRCC's repertoire.[2] NRCC distributes those royalties to makers of sound recordings and to performers whose performances are embodied in those recordings.

Music played on radio mainly comes from published sound recordings embodying musical works. For that reason, some may think that the tariffs under review represent different sides of the same coin. Yet, the history of each tariff, which bears repeating here, is significantly different.

i. SOCAN Tariff 1.A

Authors have owned the right to play their music on radio since 1924.[3] A year later, Canada's first music performing rights society, the Canadian Performing Rights Society (CPRS, which in 1946 became the Composers, Authors and Publishers' Association of Canada or CAPAC) was set up. In 1931, the *Act* was amended to provide that the government could ask a commission of inquiry to examine a performing rights society's tariffs, which Cabinet could then vary. In 1936, at the recommendation of such a commission of inquiry,[4] the *Act* was further amended to provide that all performing rights tariffs would have to be approved by the newly created Copyright Appeal Board before they came into force. The first radio tariff was certified for the year 1937. The tariff applied to all radio stations, commercial as well as public. It set a lump sum payment of $70,000, or roughly 8¢ per radio receiving set within the broadcast range of one or more Canadian stations.[5] That amount was then apportioned amongst radio stations according to a formula there is no need to discuss in these proceedings.

In 1940, Canada's second performing rights society, Broadcast Music Inc. (BMI Canada, which in 1978 became the Performing Rights Organization of Canada or PROCAN), was incorporated. Following an application by BMI Canada, the Board certified for 1941 a further tariff for a lump sum corresponding to 1¢ per receiver set. The total amount of royalties payable to CPRS and BMI Canada was then roughly $121,000. The amount of royalties per set remained essentially

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[2] Playing music on radio can involve other uses protected by copyright that are not at issue in these proceedings, such as the right to reproduce musical works and sound recordings of musical works.

[3] Playing music on radio first constituted a performance in public. Since 1993, as a result of amendments to the definitions of "musical works" and "performance", playing music on radio constitutes a communication to the public by telecommunication.

[4] *Report of the Honourable Judge Parker, Ottawa, Secretary of State, 1935*.

[5] That rate was the same that Cabinet, acting on the report of the Parker Commission, had set for 1935-1936. The formula was easy to apply at the time, since every radio receiving set was licensed.

the same until 1946.[6]

In 1947, for the first time, the certified tariff segregated the amounts to be paid by commercial stations from those owed by the Canadian Broadcasting Corporation (CBC).[7] Commercial stations paid roughly 7¢ per set to CAPAC and 1.5¢ per set to BMI Canada. The BMI Canada rate was increased to 2¢ in 1948. The combined rate for commercial stations remained at 9¢ per set until 1951;[8] that year, the amount of royalties payable to both collectives was roughly $196,000.

In 1952, the Copyright Appeal Board changed the rate base for CAPAC; the tariff was set at 1.75 per cent of gross revenues. Though the decision is far from clear on the point, this change probably was intended to emulate the situation in the United States at the time. BMI Canada continued to collect a lump sum corresponding to 2¢ per radio set per year until 1955. From 1956 to 1958, that amount was increased by 50 per cent to account for network programming. In 1958, the CAPAC rate was increased to 2 per cent.

In 1959, BMI Canada's tariff was also set as a percentage of advertising revenues. The rate was 0.75 per cent, for a combined CAPAC-BMI rate of 2.75 per cent. The rates remained the same until 1961.

In 1962, the BMI Canada rate was reduced to 0.6 per cent, for a combined rate of 2.6 per cent. In 1963, the CAPAC rate was reduced to 1.85 per cent, for a combined rate of 2.45 per cent. The CAPAC rate remained the same until 1978, while the BMI Canada rate increased to 0.75 per cent in 1966 (combined rate: 2.6 per cent), 0.9 per cent in 1969 (combined rate: 2.75 per cent), 1 per cent in 1972 (combined rate: 2.85 per cent) and 1.15 per cent in 1973 (combined rate: 3 per cent). Most increases reflected agreements reached with CAB.

In 1978, after an extensive hearing, the Copyright Appeal Board increased the combined rate to 3.2 per cent in order "to adequately reflect what the Board considers to have been the growth in the intrinsic value of music to the industry." [9]CAPAC's rate was cut to 1.75 per cent; PROCAN's was raised to 1.45 per cent. From 1979 until 1986, the rate remained the same, again reflecting agreements between the collectives and CAB. In 1982, however, CAPAC's rate was further reduced to 1.66 per cent while PROCAN's increased to 1.54 per cent, maintaining the combined rate at 3.2 per cent.

In 1987, the collectives sought to increase the rate to 3.5 per cent while CAB asked for a decrease to 2.9 per cent. The collectives argued that broadcasters relied on music more than ever to attract advertising revenues and that music, as the primary input in radio programming, was

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[6] A third collective, the American Performing Rights Society, was granted a quarter of a penny per receiving set, but only for 1944.

[7] To be more precise, the Board increased the CAPAC rate to 14¢ per set and then equally apportioned it between the CBC and private broadcasters. The BMI Canada tariff only targeted private broadcasters. BMI Canada and the CBC had reached a separate agreement which was not reflected in the certified tariff for some years.

[8] Some transitional provisions in the 1950 tariff accounted for Newfoundland joining Confederation.

[9] *Final Report to the Minister of Consumer and Corporate Affairs for the year 1978*, 165, at page 177.

seriously undervalued. They added that a more specialized use of the repertoires was being made, enabling niche programming, and that this should translate into a higher rate.

For its part, CAB sought relief for radio broadcasters. It asked that the Canadian tariffs reflect the American rate then in effect. It warned of a looming crisis. Radio faced increased competition from other media who were appropriating a growing slice of the advertising pie. Increased use of Canadian music, imposed by the Canadian Radio- television and Telecommunications Commission (CRTC), was not helping matters. A decrease in the rate, CAB argued, would help alleviate the increased financial burdens confronting the industry.

For the first time, the collectives and CAB filed studies that sought to establish the share of a radio station's air-time devoted to music. The collectives' study, based on the promises of performance of 180 stations, concluded that music accounted for 67.2 per cent of overall programming net of advertising. CAB's study, based on the number of plays per hour for 54 stations over a week, put that figure at 69 per cent.[10]

Having examined the studies, the Copyright Appeal Board "failed to discover how the current situation differs from that of preceding years".[11] Still, it concluded that "music accounts for close to 70 per cent of the average station's programming".[12] The Board knew how much music a radio station played in 1987, but it could not determine if that was more or less than before. In the end, the Board found no justification for changing the rate, which remained at 3.2 per cent.

From 1988 to 1992, as result of an agreement, the rate remained the same, with one important exception. In 1991, the newly created Copyright Board [13] set a "low-use" rate of 1.4 per cent for stations using protected musical works less than 20 per cent of their broadcast time. In 1993, the Board maintained these rates even though SOCAN had asked that they be increased and CAB that they be reduced. Subsequently, either because no one objected or as a result of agreements, things have remained the same ever since.

In short, the rate for SOCAN Tariff 1.A or its equivalents was set at 2.75 per cent in 1959, declined to a low of 2.45 per cent in 1963 and then gradually increased to 3.2 per cent in 1978. It has remained constant since. The Board or its predecessor never explained how it valued the underlying rights. At best, three things are clear. First, from 1959 until 1978, the Copyright Appeal Board appeared to set the CAPAC and BMI Canada rates separately. After that, the Board opted for a "top down" approach: it first set an overall rate and then apportioned it between CAPAC and PROCAN. Second, also in 1978, the Board concluded that music was worth more to the commercial radio industry than had been thought in the past and increased the price accordingly. Third, in 1987, the Board found that the amount of music played on radio corresponded to what the newly filed music use studies indicated, but that the studies contained nothing that might lead one to conclude that radio was using more (or less) music in 1987 than

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[10] *Final Report to the Minister of Consumer and Corporate Affairs for the year 1987*, 425, at page 430; 15 C.P.R. (3d) 129, at page 136.
[11] *Ibid.*, 431; C.P.R. page 137.
[12] *Ibid.*, 440; C.P.R. page 145.
[13] The amendments creating the Copyright Board came into force in 1989.

previously; it went on to rule that the rate set in 1978 remained fair.

ii. NRCC Tariff 1.A

In 1997, the protection and benefits that the *Act* affords a performer's performance or a record producer's (or maker's) sound recording were enhanced significantly.[14] For example, the communication to the public by telecommunication of a published sound recording now triggers a right to equitable remuneration. The maker of a sound recording and the performer whose performance is embedded in that recording each are entitled to an equal share of the remuneration. In the case of the sound recording of a musical work, the remuneration must be paid to a collective society. NRCC administers those remuneration rights.[15]

NRCC filed its first proposed statement of royalties to take effect on January 1, 1998, to cover the next five years. The proposed tariff targeted several groups of users of sound recordings, including commercial radio. NRCC wanted stations to pay 4.68 per cent for advertising revenues between $1.25 and $1.5 million; that rate increased progressively to 9.78 per cent on revenues in excess of $5 million.[16] In support of its proposal, NRCC offered a number of valuation models, all of which the Board rejected. Instead, the Board used SOCAN Tariff 1.A as a starting point and set a one-to-one relationship between the rights of authors of musical works on the one hand and the remuneration rights of performers and makers on the other. The general rate was set at 1.44 per cent to reflect the relative importance of NRCC's eligible repertoire. The Board set a rate of 0.63 per cent for stations that qualify as low music use stations for the purposes of the SOCAN tariff and a rate of $100 per month for all-talk radio stations that use NRCC's repertoire only as production music.

B. PARTIES' POSITIONS

NRCC seeks a tariff of 2 per cent of a station's first $625,000 in annual advertising revenues, 4 per cent on the next $625,000 and 6 per cent on the rest. Low-use stations would pay 43 per cent of those rates. NRCC agrees with the Board that equitable remuneration should be equitable to rights owners and users and should reflect the value the rights holders contribute to and the benefits the users derive from recorded music as programming content. To achieve this, it offers a new valuation model. According to the model, a station that would broadcast protected sound recordings of protected musical works for all of its broadcast day should pay 19.5 per cent of its revenues for so doing. Then, as in other proceedings,[17] NRCC relies on how well authors, performers and makers fare in the prerecorded CD market to allocate that amount roughly equally among them, before any adjustment for repertoire.

NRCC proposes that the tariff be tiered to address any concerns that might exist about the

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[14] The relevant provisions are found in Part II of the *Act*.

[15] Another collective, the *Société de gestion des droits des artistes-musiciens* (SOGEDAM), also exists but has not filed tariff proposals with the Board for the last several years.

[16] As we will see later, the *Act* already sets the amount to be paid on a station's first $1.25 million in advertising revenues.

[17] Board's decision of December 17, 1999 on the Private Copying Tariff for the years 1999 and 2000; *supra* note 1.

financial impact of the tariff on low-revenue stations. It asks that stations qualify for the low- use rate on the basis of their use of its own repertoire, not SOCAN's. NRCC also asks that the all-talk category be removed because it is too difficult to administer.

SOCAN wants 5 per cent of a station's gross income for 2003 and 2004 and 6 per cent for 2005 to 2007. Low-use stations would pay 2.2 and 2.6 per cent. SOCAN generally supports NRCC's valuation model. It disagrees with NRCC on the allocation of that value; as in the past, it maintains that royalties for the right to communicate should not be set by reference to the reproduction right market in general, or the private copying tariff in particular.

SOCAN rejects a tiered rate structure, arguing that once a proper tariff rate is arrived at, the percentage of revenue formula automatically ensures that stations earning less revenue pay less. Given the all-encompassing nature of its repertoire, it sees no need for an all-talk category in its tariff. Should the category be extended to SOCAN, it advocates very strict reporting rules and penalties for invalid claims to all-talk status. SOCAN also asks for an adjustment to the definition of gross income, but prefers that the definition of advertising revenues used for NRCC not be applied to it. Finally, SOCAN asks that its tariff's reporting requirements be made the same as those for NRCC.

CAB maintains that the proposed tariffs are disproportionate to any value radio broadcasters might derive from the use of music. If anything, CAB is convinced that the value of the societies' repertoires has declined and that the rates should be reduced. CAB wishes to retain the all-talk category; a tighter definition of production music should address any actual or potential difficulties in the administration of the tariff. It also wants all those that qualify as low music use stations for the purposes of the SOCAN tariff to continue to benefit from the NRCC low-use rate. CAB would extend the all-talk category to the SOCAN tariff; it claims that there is no reason for stations that only use production music to pay more than a nominal fee for the use of SOCAN's repertoire.

C. EVIDENCE

NRCC's evidence focussed mainly on the importance of the remuneration right for performers and makers, on the financial health of the commercial radio industry and on the use of music by commercial radio stations. Messrs. Paul Audley, Marcel Boyer and Stephen Stohn set out NRCC's method for arriving at the overall value of its and SOCAN's rights and for apportioning that value. Given their understanding of the Board's earlier decisions dealing with NRCC's tariffs, they put special emphasis on the contribution of makers of sound recordings.

NRCC and SOCAN jointly commissioned two studies. Mr. Douglas Hyatt presented his findings on the impact of both tariffs on the radio industry. Erin Research Inc. produced a music use study, which is discussed later.

SOCAN relied on those portions of NRCC's evidence relating to the overall value of music to radio. Broadcasting experts Ms. Monica Auer, Messrs. Sjef Frenken and Robert Linney explained the evolution of Canada's radio industry and the role of music in this development.

Both collectives addressed various administrative issues. Ms. Diana Barry, Executive Director of

NRCC, described the difficulties encountered in administering the all-talk portion of the tariff. Mr. Paul Spurgeon, Vice-President, Legal Services and General Counsel at SOCAN, explained why, in his view, the definition of "gross income" should be extended to include barter, trade and contra and why the reporting requirements for SOCAN should be changed to be the same as NRCC's.

CAB provided background, financial and historical evidence on the commercial radio industry, the challenges it faces and the contributions it makes to the Canadian music industry. Mr. Peter Macaulay replied to the collectives' financial evidence. Senior radio executives, radio programmers and managers explained the various facets of using music in radio programming. Mr. Ken Goldstein testified on the past financial performance of the radio industry and possible future trends; as in the past, he emphasized what he perceives to be the competitive challenges and economic uncertainties facing the industry. CAB did not file a music use study or an alternative valuation model; instead, it asked Mr. Barry Kiefl and Mr. Peter Fleming to reply to the evidence of Erin Research and to the analysis of Messrs. Audley, Boyer and Stohn.

Both the collectives and CAB provided background information on the royalties American commercial radio stations pay to American licensing bodies.

II. ANALYSIS

A. MUSIC AS RADIO PROGRAMMING COMPONENT

Music and spoken word (news, information, sports) are the components of radio programming.[18] Music, most of which is on sound recordings, occupies by far most of the air-time on radio. There are many reasons for this.

Music is inexpensive; at most, it represents one fifth of a station's programming expenses.[19] Spoken word is not. On-air talent is generally well paid. News and public affairs programming is expensive to produce. This may explain why broadcasters have repeatedly asked (and obtained) from the CRTC that spoken word content requirements be reduced.

Music, though inexpensive, plays a pivotal role in a station's success as a business. It can help attract more listeners; it can also help attract the right kind of listener. Music allows a station to brand itself. Branding is crucial to the listener's choice of station; this results in better targeting, which translates into more advertising revenues. The fact that music can so effectively and efficiently add to a broadcaster's bottom line is significant.

As important as it is to radio, music only acquires its full value once it has been combined with other inputs. The first is spoken word content. On-air talent plays an important role in branding

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[18] The only other possible component is silence, which radio avoids as much as possible.
[19] See Exhibit NRCC-7, Table 13, page 34. On average, royalties paid to SOCAN, NRCC and CMRRA/SODRAC Inc. (CSI) represent 9.8 per cent of programming expenses for stations whose annual revenues are $625,000 or less, 11.9 per cent for stations with revenues between $625,000 and $1.25 million, and 20.8 per cent for larger stations. As a percentage of revenues, the rates are 3.5, 3.6 and 4.9 per cent.

the station. This explains why broadcasters are willing to pay so much more per unit of air-time for that talent than for music. The second is overall packaging or programming. The arrangement of musical selections is crucial even to services that provide uninterrupted music.[20] Playing random selections is not an option.

Programming a radio station is at once art and science. In this regard, the testimony of CAB's Radio Programming Panel is very enlightening.[21] Programming a music station involves several stages. You decide first what kind of music the station will play. You then determine how the music will flow, how it will be scheduled and presented. Music is central to these first two stages. After this, other components are built in: the on-air talent, the announcers, news content, and the amount and type of community involvement desired. Production values are injected to ensure that the station has entertaining elements to keep the audience listening to it. Commercials are finally factored in, which involves designing the "hot clock" for the station. This "clock" maps out when the critical elements are presented and for how long. All of these elements have to be blended into the radio station model, with a view to catering to the audience the station is trying to attract.

In the end, much depends on a broadcaster's ability to judiciously select talent and music and put these elements and others together. As Mr. Bob Harris, an experienced broadcaster, put it: "It is paramount to what we do as radio, . . . to meld those two elements together to create an engaging, compelling environment where listeners will continue to come back."[22]

B. VALUING THE RIGHTS

Parties explored a number of valuation models before the Board. NRCC explained why, in its view, the SOCAN rate was not a good starting point and developed a new valuation model instead. SOCAN relied on NRCC's approach to arrive at an overall value. CAB sought a tariff that is more aligned to the American rates. These and other models that were mentioned are looked at in turn.

i. The Rate in the United States

CAB continues to maintain that Canadian rates should reflect those in effect in the United States. The argument might have carried significant weight half a century or so ago. In 1952, the Copyright Appeal Board might have sought to emulate the American situation, though the reasons for so doing remain unclear. One might have been that American music and programs then made up a much larger part of what was heard on Canadian airwaves than is now the case.

For reasons that have been outlined many times over the years in decisions dealing with radio and other tariffs, the Board continues to reject CAB's argument. Those reasons were stated clearly and succinctly in 1993, in a decision dealing with both SOCAN's radio and television

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[20] See, generally, Board's decision of March 15, 2002 on the SOCAN-NRCC Pay Audio Services Tariff for the years 1997-2002.
[21] Transcripts at 1497 ff.
[22] Transcripts at 1513.

tariffs:

i. The American regime rests on a consent decree between the licensing bodies and the Department of Justice. The decree was the result of an examination undertaken by the Department, under the aegis of American antitrust legislation. By contrast, the Canadian regime was established by Parliament, and is an integral part of the legislation governing copyright.
ii. In the United States, the agreement between a licensing body and a user is binding; the Rate Court adjudicates only upon request, absent an agreement. In Canada, ... [t]he *Act* requires that the Board certify all proposed tariffs, and empowers it to raise issues of its own even in the absence of any objection.
iii. The [U.S.] Rate Court has interpreted the word "reasonable" in terms of a market price. In Canada, both the Board and courts of law have stated that a market price is not the only price that may be reasonable.[23]

Further reasons now exist for rejecting the American rate as a starting point for the Canadian commercial radio tariff.

First, even if Canadian radio, both as a business and as a regulated industry, was comparable to the radio industry in the United States half a century ago, it certainly no longer is. The American industry is consolidated far more than what is the case in Canada, and probably far more than the CRTC will ever allow. Feature uses of music have declined in the United States; in Canada, as we will see later, they have increased.[24] Finally, Canadian stations must broadcast minimum amounts of Canadian musical content; French-language stations must broadcast minimum amounts of Francophone musical content. In the United States, musical content is not regulated.

Second, since 2001, the American Society of Composers, Authors and Publishers (ASCAP) and BMI royalties have been set as a flat fee that is allocated among stations pursuant to a formula developed by the committee that acts on behalf of the radio industry in its negotiations with these performing rights societies.[25] This approach bears a striking resemblance to the one Canada favoured in the 1930s and abandoned in the 1950s. Rates have evolved in different directions, as a function of different and sometimes incompatible considerations.

Third, the Canadian *Act* and Board practice clearly foster, and the *Act* sometimes imposes, collective administration. In the United States, collectives are generally perceived as organizations to be scrutinized for anti- competitive behaviour.

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[23] *Copyright Board Reports 1990-1994*, pages 359 and 360. The passage is found in the part of the decision that deals with commercial television. However, reference is made to this passage in the part of the decision that deals with commercial radio: see page 352.
[24] On these two points, see Exhibit CAB-15, pages 4 and 5.
[25] On this point, see Exhibit CAB-15, pages 9 and 11. A third performing rights society, the Performing Rights Organization for Songwriters and Publishers (SESAC) also collects royalties from American broadcasters under a "rate card that SESAC has developed unilaterally. This rate card sets fees based on a station's market size and its highest one-minute advertising rate.": CAB-15, page 12.

Fourth, the rights radio stations require to broadcast music is significantly different in each country. For example, American stations are not required to pay anything for their use of sound recordings or performers' performances in over-the-air broadcasts.

For all these reasons, the Board finds it impossible to make useful comparisons between the Canadian and American rates in this market.

ii. NRCC's Valuation Model

Messrs. Audley, Boyer and Stohn developed the model NRCC and SOCAN wish be used to value communication rights on commercial radio. The model seeks to estimate how much radio stations ought to pay for all the rights contained in the music they use.[26] Its focus is on assessing the degree to which recorded music helps radio stations to attract listeners, in turn generating revenues, within each day part. It involves calculating the programming expenditures of music stations and then equating the copyright payment share of these expenditures to the contribution that recorded music is assumed to make to the station's earnings. Its central assumption is that the share of programming expenses that a station devotes to music ought to be the same as the share of revenues the use of music is thought to generate. A series of adjustments are then made, one of them to set aside an amount to account for payment of reproduction rights. The model leads NRCC to conclude that if protected sound recordings of protected musical works occupied 100 per cent of a station's air-time, that station should pay 19.5 per cent of its revenues for communication rights. The rate is then allocated according to a formula which will be discussed later.

It is not necessary to scrutinize the NRCC model more extensively, as it cannot be used to derive a fair and equitable tariff in the instant case. The model is complex, but that in and of itself is not a reason to reject it. It also represents a valid and interesting attempt at evaluating the contribution of music as an input for broadcasters, something which is difficult at the best of times. In theory, then, it could prove helpful in estimating the value of music, something the Board is always striving for in setting tariffs.

In practice, however, the model suffers from significant flaws, both in the manner in which it arrives at an overall value for the relevant rights and in the manner in which it allocates that value amongst rights holders.

The model is inherently imprecise because it is based on a series of unproven assumptions. For example, music occupies 63.5 per cent of air-time between 6:00 a.m. and 9:00 a.m. The model then posits that its use brings in half the revenues generated during that period. That figure is unsupported in fact. The model also assumes that the right to reproduce a performance and the right to reproduce a sound recording each are worth the same as the right to reproduce a musical work, but offers little to support that assumption.

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[26] This includes not only the communication of musical works and of sound recordings (including the performances embedded thereon), but also the reproduction of musical works and of sound recordings.

More importantly, the model is highly volatile. Small changes in the share of revenues that music is thought to bring in leads to large variations in the rate. Having concluded that music brings in 60 per cent of a station's revenues, NRCC arrives at a combined rate of 19.5 per cent. If music brought in 55 per cent of revenues, the rate would be 15.6 per cent, which is one-fifth less; if it brought in 65 per cent, the rate would be 24.5 per cent, which is one-quarter more. Such a highly unstable model cannot be useful because of the uncertainty it would create.

Had the Board opted to use the NRCC model, it would have applied at least one significant correction. The model assumes that a minute of music brings in about half the revenues that a minute of spoken word contents generates. In the Board's view, this does not sufficiently recognize the fact that on-air talent is by its nature exclusive and as such, commands a significant premium. The ratio that the Board would have applied probably would have brought the final rates within the range of those that the Board sets later in this decision.

iii. Alternative Valuation Models

NRCC looked at a number of other ways in which to assess the value of the underlying rights. One involves comparing program expenditures and profitability for television and music format radio stations; this, NRCC argued, demonstrates that music radio stations are not paying a fair price for the music they use. Another compares program expenditures and profitability of radio stations according to the amount of music they use. Stations that use much less music have lower profits and higher programming expenses; NRCC argues that music royalties should rise so as to make the profitability of all stations roughly equal. A third considers a hypothetical auction approach similar to the one that was proposed during the first hearings dealing with pay audio services.

These comparisons are of little use. The first involves a comparison with television, an altogether different industry. The third has already been rejected by the Board, for reasons with which this panel agrees.[27] All focus on achieving a risk-adjusted rate of return on capital, which boils down to an attempt at stripping radio of "excess" profit. Taking profitability into account in setting a fair tariff is one thing; regulating profitability is another.

iv. The Appropriate Starting Point

For the reasons set out above, the Board does not intend to use any of the starting points analyzed to date. Another obvious possibility is, as in 1999, to start with the SOCAN rate. The SOCAN tariff structure has remained the same for close to fifty years. The rate has not changed since 1978. It has been the subject of agreements for a significant share of the period since. It offers stability, while at the same time being amenable to adjustments based on the evolution of the market. It is also less volatile than the model NRCC offered.

NRCC argues that the SOCAN rate does not properly reflect the value commercial radio derives from the use of musical works, let alone sound recordings. The appropriate way to deal with this

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[27] *Supra* note 20, page 8.

concern is not to ignore the SOCAN rate. It is to look at the history behind the rate and the evolution of the market to see if, given the circumstances, the current rate is fair, too high or too low.

v. Adjusting the Starting Point

There is no need to spend much time debating whether the rate should be lowered. The Board found the arguments that CAB advanced in this respect unconvincing. Thus, as the Board's analysis on the industry's ability to pay royalties will show later on, the future is not as bleak as Mr. Goldstein would lead one to believe. Also, for reasons that have been stated time and again, the Board refuses to take into consideration the fact that commercial radio makes substantial contributions to the Canadian music industry or that it provides ongoing promotional support to Canadian artists in setting the tariff.[28]

On the contrary, the Board is of the opinion that the rate ought to be increased on three accounts. First, all other things being equal, the current rate is too low. Second, radio now uses more music than in 1987. Third, radio now uses music more efficiently.

a. Music is worth more than the Board previously thought

Over the last several years, the Board has alluded to the possibility that music on commercial radio might be undervalued.[29] The evidence presented at this hearing now allows the Board to conclude that the SOCAN repertoire has been undervalued for years, for the following reasons.

First, royalties represent too small a percentage of programming expenses.[30] Larger stations pay at most a fifth of their programming expenses as music royalties of any sort. Stations earning less than $1.25 million in annual advertising revenues pay half of this. This is not enough for what constitutes the core content of most commercial radio stations.

Second, through their submissions before other agencies, radio stations have demonstrated repeatedly that they value music more than what they have been willing to concede before this Board. Many have asked the CRTC to "flip" from the AM to the FM band. Many have asked the CRTC to broadcast less spoken word, so as to play more music. Whether those requests were granted or not is irrelevant at this stage of the analysis. In this panel's view, simply by making the requests, stations demonstrated that music is worth more to them than what is currently paid for it.[31]

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[28] Board's decision of August 13, 1999 on NRCC's Commercial Radio Tariff for the years 1998-2002, page 29; Board's decision of March 28, 2003 on CMRRA/SODRAC Inc. (CSI) Commercial Radio Tariff for the years 2001-2004.

[29] *Supra* note 20, page 12.

[30] Concluding that music's share of radio's programming expenses is too low is not the same as regulating the industry's profit.

[31] In 1993, by contrast, evidence of the effect of deregulating spoken word content was insufficient for the Board to reach any definite conclusion: see Board's decision of December 6, 1993 on SOCAN's Tariff 1.A (Commercial

SOCAN's repertoire has been historically undervalued. Although the report by Messrs. Audley, Boyer and Stohn cannot be used to quantify the undervaluation, the Board believes, based on the evidence taken as a whole, that it is important and lies in an interval between 10 and 15 percent. Because the evidence is not more precise in that respect, the Board prefers to be careful and considers that an increase in the rate of about 10 per cent, bringing the rate to 3.5 per cent, is appropriate at this stage of the analysis.

b. Radio now uses more music than in the past

Commercial radio now uses more music than the Copyright Appeal Board concluded it did in its 1987 decision. This is confirmed both by direct evidence and by inferences to be drawn from the record of these proceedings.

In preparation for these proceedings, the collectives asked Erin Research Inc. to analyse the use of feature music [32] on music format commercial radio stations. According to NRCC, the methodology is unprecedented in its precision: never before has music use been monitored and measured second-by-second.[33] This was done by listening to logger tapes of the programs broadcast by 27 stations on each of a Saturday, a Sunday, and a sample weekday, usually a Wednesday.

Results of the study were reported in two parts: the first tabulates the use of sound recordings as feature content broadcast between 06:00 a.m. and midnight; the second also includes music used in other contexts such as within programming, in-station IDs and promos and in commercials, for the entire 24-hour day. The main conclusion of the study is that the use of sound recordings as feature content represents 76.1 per cent of overall program content. Based on the study, and taking into account the fact that music use has increased more during peak times than off peak, NRCC concludes that commercial radio uses 10.6 per cent more music than the figure the Board retained in 1987.

CAB did not conduct its own music use study. Instead, it chose to cast doubt on the results, reliability and comparability of the Erin music study. CAB argued that the sample was too small in size, not representative, not randomly selected, and, even if it were, that the size of the sample would result in an unacceptable statistical margin of error.

It does not sit well with CAB to challenge the reliability of the Erin music study based on the size of the sample it used. CAB agreed to provide logger tapes for a maximum of 30 stations.[34] Furthermore, CAB has fiercely resisted past attempts to collect data from a larger sample of

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Radio) for the year 1993, *Copyright Board Reports 1990-1994*, 345, at pages 349-350.

[32] Feature music is foreground music, not used as theme music for a newscast or a weather report, or for commercials or station IDs or promos, or a live performance, or music used in the background and picked up during broadcast, as during a hockey game.

[33] The 1987 music use study was based only on the number of works played, which were then assumed to be of a certain length.

[34] See Exhibit NRCC-26.

stations.[35] In the end, a sample of 27 stations was retained. CAB's own conduct in this and other proceedings was the main reason why NRCC used a sample of the size that was selected.

More importantly, several reasons lead the Board to conclude that insofar as it may be unreliable, the Erin music study underestimates the increase in the use of music.

CAB maintains that the Erin music study sample overrepresents AM stations. The Board agrees. A sample of 14 AM and 13 FM stations does not adequately represent today's commercial radio industry.

In 2002, FM stations represented 60 per cent of all stations and accounted for 75 per cent of the audience of commercial radio. As a result, the study almost certainly undervalues the amount of music actually used by the bulk of commercial stations. An analysis of the data found in the study confirms that FM stations tend to play more music than AM stations. On average, the monitored stations used sound recordings as feature content 67.3 per cent of air-time. For AM stations, the figure was 59.4 per cent; for FM stations, it was 75.8 per cent. Moreover, 12 of the 13 FM stations used sound recordings more than the overall average, while 9 of the 14 AM stations used sound recordings less than on average.[36] Based on this information, and given the fact that FM stations now represent a much larger share of the market than in 1987, the only logical conclusion is that NRCC's estimate of the increase in the use of music by the overall industry is conservative.

CAB also points out that few high-revenue FM stations are part of the sample. Intuitively, this might tend to underestimate the amount of music used, as most of the large FM stations are music stations. On this point, however, the Board's analysis of the data found in the Erin music study does not allow the Board to reach any firm conclusion. Any uncertainty that may result from the fact that the study might have given too much weight to so-called small and medium stations appears to be of little consequence. The distribution of small, medium and large stations according to their relative use of sound recordings as feature content is fairly even; no obvious, significant discrepancy stands out. Thus, of the 17 stations that used sound recordings more than the overall average, 6 were small, 6 were medium and 5 were large. Conversely, of the 10 stations that used sound recordings less than the overall average, 3 were small, 3 were medium and 4 were large.

On the whole, then, the Board concludes that any imperfection in the Erin music study would tend to skew the actual use of music towards a higher increase than 10.6 per cent.[37]

CAB expressed concerns about the methodological differences between the Erin music study and the 1987 music use studies. It pointed out that in 1993, SOCAN itself questioned the validity of the 1987 studies. It also argued that other studies filed since 1987 would tend to show that the use of music has decreased, not increased, since they were conducted. In the end, all of this is

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[35] See, for example, Board's decision of March 28, 2003 on CMRRA/SODRAC Inc. (CSI) Commercial Radio Tariff for the years 2001- 2004, page 25.
[36] These figures are either found in, or derived from Exhibit NRCC-5, page 19, Table 10.
[37] Exhibit NRCC-7, page 19.

irrelevant. The reliability of the Erin music study is crucial; the reliability or comparability of earlier studies is not. For the past, the only truly relevant information for our purposes is what the Board concluded, not what the studies said. The last time the Board formed a firm conclusion about the amount of music used on radio was in 1987. It is not possible to form an impression of what the Board thought of these studies in decisions made since then. Therefore, the proper comparison to be made is between the Board's 1987 conclusions and the Board's conclusions in this instance, based on the evidence on record.

A number of other indicia further support the conclusion that radio uses more music now than in 1987.

First, broadcasters are now allowed to use less spoken word content. Between 1984 and 2001, 99 stations applied to the CRTC for permission to change their spoken word content; of those, 90 stations wanted to reduce it.[38] It is not unreasonable to conclude that this resulted in an increase in music content.

Second, the number of FM stations has increased more than the total number of stations. This is the result of AM stations converting to FM. There have been well over 60 such "flips" since 1998. New FM stations have been added; very few new AM licences, if any, have been issued.[39] Since FM is a better technology to transmit music, it would be reasonable to conclude this has led to an overall increase in the use of music on radio.

As the Board explained in the past, "[a]djusting for greater use does not run contrary to the notion of a blanket licence. The blanket character of the licence makes variations in use irrelevant after the price has been set, not before. There are numerous tariffs which account for different use patterns within that tariff or between tariffs." [40]

The Board concludes that the 10.6 per cent NRCC derives from the Erin music study represents a minimum for any increase on this account. An adjustment of 13 per cent or more might better reflect the actual increase in music use. Nevertheless, the Board prefers to use the only figure available to it, even if it might be too conservative in so doing. The Board will apply an adjustment of 10.6 per cent to reflect the proper increase at this stage. This brings the rate to 3.9 per cent.

c. Radio now uses music more efficiently

Radio generally now uses music more efficiently than in 1987, in part due to an increased use of music, generating more revenues.

Changes in the regulatory framework have left the industry free to use more music, allowing it to

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[38] Exhibit SOCAN-2, page 20.

[39] According to Exhibit CAB-4, pages 11 and 12, from 1998 to 2002, the total number of stations increased by 42, FM stations increased by 93 and AM stations decreased by 51. The number of "flips" for the period roughly corresponds to the decrease in the number of AM stations.

[40] *Supra* note 20, page 14.

reduce the use of spoken word content, for financial and operational reasons. This simple substitution results in higher profits. This seems confirmed by the fact that, as we will see later, the increase in financial performance from 1998 to 2002 was strongest for music stations.

Radio stations are programmed to reach the optimal group of listeners to deliver "ears", to maximize the stations' appeal to advertisers. This programming depends on the right mix of music, packaging, on-air personalities, promotions and information. Part of this ability to better target consumers by station format is attributable to music. The more efficient the music in attracting and retaining listeners, the more efficient the station format, and the more efficient the eventual advertising campaign.

Music is now used and emphasized much more in radio programming than it was in 1987. Broadcasters first developed niche programming in the 1980s; they now create music mixes corresponding to particular psychological profiles. Some of the more successful stations now have first names such as Bob, Jack, Joe and Ted. The common factor in these stations is that the music programmed is designed to create a personality for the station that is intended to attract an ever more precise audience. Bob, a hard-working rock'n roller, is meant to appeal to a mostly female, 35- to 54-year-old audience. Jack is a tougher rocker, meant to appeal to the male 35- to 50-year-old. The ability to create a music personality format for a station depends at least in part on the station's ability to use more music.

Advertisers will buy spots on radio stations that reach their target audience, both demographically and psychographically. A station's choice of music plays a role in narrowing the target. When Jack was introduced in Calgary, the result was a marked increase in market share. Branding thus can increase ratings. Even absent an increase in ratings, branding can increase revenues by allowing for better focus and therefore, a more targeted, more saleable audience.

The evidence thus shows that these formats have had a major impact on market shares and revenues.[41] As well, radio stations now lure listeners with promises of "more music all the time", and uninterrupted blocks of music, such as "ten in a row commercial-free". These are other examples of how increasing the use of the repertoires spawns more efficient uses, in turn generating more revenues.

Finally, it is significant that with all the diversity of advertising channels offered to those who want to publicize their wares, radio still manages to grow its revenues year over year.

The Board has stated in the past that "rights holders are entitled to receive additional benefits from new uses of the repertoire."[42] The same is true of increased uses. In the Board's view, radio's increased use of music has helped it to create significant efficiencies, a share of which should go to rights holders.

Between 1998 and 2002, advertising revenues for the industry have increased by about $160

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[41] Exhibit SOCAN-3, page 9.
[42] *Supra* note 20, page 16; *supra* note 35, page 13.

million. This is, on average, $40 million a year. There is no precise way to measure the exact contribution of music to this increase. The Board considers that 5 to 10 per cent of the annual increase in revenues would adequately compensate the rights owners for efficiencies broadcasters were able to derive, in part due to the increased consumption of music. The range that would generate such increases in royalties is between 4.1 and 4.3 per cent. The Board chooses the midpoint of this range which brings the tariff rate to 4.2 per cent.

vi. The Relationship Between the NRCC and SOCAN Rates

NRCC's attempts to disconnect itself from the SOCAN tariff remain unconvincing. For the reasons set out in 1999, the Board remains of the opinion that the NRCC rate should be set as a function of the SOCAN rate.[43]

The Board has consistently set a one-to-one ratio between both rates since certifying the first NRCC tariff in 1999.[44] NRCC did not challenge that approach until 2002, when the Board certified the pay audio services tariff. It then asked the Federal Court of Appeal to review the approach; the court rejected the application.[45]

NRCC again attempts to convince the Board to abandon the one-to-one ratio. It proposes to allocate roughly one third of the royalties to authors, one third to makers and one third to performers before any repertoire adjustment. This proposal relies on two main arguments. First, this corresponds to what happens in the prerecorded CD market. Second, all things being equal, each of the three colleges of rights holders involved should be treated equally.

The Board did not hear any new evidence or argument that might convince it to change the relative value of the repertoires. Once again, the Board concludes that the communication of a musical work should trigger the same remuneration as the communication of a sound recording, subject to repertoire adjustments. In this respect, the Board still agrees with its statement from the 1999 decision:

> The Board prefers deciding on the basis that there is no reason to believe that the use of sound recordings on radio stations has any greater value than the use of the underlying works. Several reasons point to this solution. First, nothing requires the Board to look to the market (and especially a different market) for guidance; it is within its discretion to decide that this approach is reasonable. Second, these are similar uses of the same recordings by the same broadcasters. Third, it can be readily argued that a pre-recorded performance is worth no more to broadcasters than a pre-recorded work: in both cases, one is dealing with something that has already been fixed. Fourth, it matters not that one party was paid more than the other for making the fixation in the first place; we are dealing with two different

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[43] Board's decision of August 13, 1999 on NRCC's Commercial Radio Tariff for the years 1998-2002, page 30.
[44] See for example, *supra* notes 43 and 20; see also Board's decision of September 29, 2000 on NRCC's Tariff 1.C (CBC – Radio) for the years 1998-2002, page 6.
[45] *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, [2004] 1 F.C.R. 303, paragraph 11.

> markets and two different rights: the right to make the recording and the right to communicate it.[46]

NRCC's insistence that the matter be revisited appears to result, at least in part, from certain misunderstandings about the Board's past decisions.

First, the Board never concluded that subsection 19(1) of the *Act* creates a single right to equitable remuneration. That provision creates two interconnected but separate rights. The Federal Court of Appeal confirms the proposition, although the decision offers no supporting analysis and simply relies on "common ground between the parties".[47] The wording of subsection 23(2) of the *Act* also makes it clear that there are two separate remuneration rights, even though the rights are triggered by a single act, the communication of a sound recording.

Second, NRCC incorrectly assumes that the Board "focussed on the value of the performer's right relative to the author's" and that "the value of the maker's right has not yet been established".[48] These statements show a fundamental misunderstanding of the 1999 decision. The Board did not somehow forget to account for the contribution of makers or consider the makers' right to be subsumed in the performers' right. The Board has always realized that three groups of rights holders are involved. For one thing, and contrary to what NRCC itself has sometimes asserted, the report filed by Mr. Audley in the 1998 proceedings clearly drew the attention to the rights of the three groups.[49] The 1999 decision can be interpreted as focussing on the contribution of the performer to the detriment of that of the maker only if certain statements are taken in isolation or out of their context. Viewed as a whole, the decision shows that all the relevant rights were taken into account. This much was clear to the Federal Court of Appeal.[50]

Third, the valuation methodology used in the private copying decisions never assumed that all things being equal, authors, performers and makers should each receive a third of the royalties. The valuation approach was "bottom up", not "top down". The proportions used in allocating royalties resulted from adding the value of the various rights, not from determining a global value and then allocating it. It was pure coincidence that the model ascribed roughly equal values to the three rights. More significantly, the joint contribution of performers and makers was valued by using a single amount, of which the market allocates two-thirds to the performer and one-third to the maker.[51] In other words, the very proxy that NRCC relies on to ask for equal shares does not provide for equal shares. In any event, the Board continues to be of the opinion that the reproduction market should not be used as a proxy to allocate the value of the communication right between rights holders.

For these reasons, the Board maintains the one- to-one ratio between NRCC and SOCAN. The Board takes note of the agreement reached between parties that NRCC's repertoire now

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[46] *Supra* note 43, page 32 (footnotes omitted).
[47] *Supra* note 45, paragraph 11.
[48] Exhibit NRCC-33, page 1, paragraphs 2a), 2c).
[49] 1999 Exhibit NRCC-24, paragraphs 58, 59.
[50] *Supra* note 45, paragraphs 18 and 19.
[51] Board's decision of December 17, 1999 on the Private Copying Tariff for the years 1999 and 2000, page 46.

represents 50 per cent of all recordings and no longer 45 per cent. NRCC's rate will thus be 2.1 per cent, or half of SOCAN's.

C. ADJUSTMENTS

i. Tiering

NRCC asks for a tiered tariff. SOCAN opposes this, saying that the percentage of revenue formula self adjusts, is simple and is easy to apply. The lower tiers that NRCC proposes target revenues for which a station pays to NRCC the amount of $100 per year that is set in subsection 68.1(1) of the *Act*. As a result, tiering the tariff has a significant impact on SOCAN but none on NRCC. Its intention in proposing this approach probably is to show Parliament that the Board is able to address the specific concerns of smaller stations and that the benefit the *Act* provides to radio stations and to no other user of NRCC's repertoire is unnecessary.

The tariff radio stations pay for reproducing musical works is tiered. SOCAN's or NRCC's are not. In 1999, the Board refused to tier NRCC Tariff 1.A for a number of reasons. A flat rate tariff was the only way that equity could be assured to all parties and was consistent with SOCAN Tariff 1.A. In addition, there was no need for tiering to alleviate the burden of smaller players.

This decision increases the radio tariffs by about 30 per cent. Such an increase is significant. The fact that it will be applied going back as far as 2003 makes it even more so.

There is sufficient evidence on the record of these proceedings for the Board to conclude that stations earning no more than $1.25 million of annual advertising revenues should continue to pay at the current rate for the time being. Smaller stations make less profit, if any. Smaller ethnic and French language stations may be even more ill-equipped to absorb increases in both tariffs. The letters the Board received stating that any increase in the tariffs would seriously harm some smaller stations are not evidence of this in and of themselves. They are, however, corroborated by the financial data filed by the parties in these proceedings and by the testimony of Mr. Marc-André Levesque of *Groupe Radio Antenne 6*. Tiering the tariff allows the Board to address the concerns of smaller stations. The evidence on the record however did not convince the Board of the necessity to create two tiers of small stations, those which have annual advertising revenues of no more than $625,000 and those that have revenues of more than $625,000 up to $1,250,000. The certified rate thus has only two tiers: stations that have annual advertising revenues of no more than $1,250,000 and the others.

SOCAN is correct in pointing out that the current tariff has the benefit of being simple. That being said, "Simplicity, while laudable, ought not to become an obstacle to a fair and equitable tariff structure." [52] To alleviate the burden the increase in the tariff may impose on smaller, less profitable stations, it is necessary, at least as a temporary measure, to tier the tariff by capping the rate for those stations. The tiering may be maintained if CAB convinces the Board that the

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[52] See Board's decision of July 31, 1991 on various SOCAN's tariffs for the year 1991, *Copyright Board Reports 1990-1994*, 283, at page 293.

financial situation of smaller stations warrants not only buffering the introduction of an increase in the tariff, but tiering the tariff for the longer term.

The Board is conscious of two things. First, capping the rate for smaller stations deprives rights holders of royalties. Second, only independent smaller stations truly need a cap; small stations that are owned by large corporate groups probably do not. Both issues will need to be addressed if CAB wishes that the latter continue to benefit from tiering after the expiry of the current tariff.

A rate cap that applied only to stations earning no more than $1.25 million of annual advertising revenues would create difficulties. Stations that earn slightly more than that amount would be penalized. The solution to this problem is to cap the rate for all stations for that first tranche of revenue. In order that stations earning more than that amount do not benefit from a measure that is not intended for them, it is necessary to claw back those benefits by setting the final rate at more than 4.2 per cent on yearly revenues of more than $1.25 million.

The Board evaluates that, on average, an increase of 0.4 percentage point would remove from the group of large stations the benefits of the rate cap while maintaining the effective overall rate at 4.2 per cent. However, such an increase would cause effective rates to be much higher than 4.2 per cent for larger stations of the group, and much lower than 4.2 per cent for smaller stations of the same group, which would be an unacceptable level of variability. The Board prefers to minimize this variability by applying an increase of 0,2 percentage point to the rate applicable to yearly revenues of more than $1.25 million. CAB will be expected to provide the Board with all the data required to develop a more precise approach if need be.

Strictly speaking, subsection 68.1(1) of the *Act* makes it unnecessary to tier the NRCC rate. Nevertheless, the Board will indicate later in this decision how it would have ruled in the absence of this provision. For the reasons given in 1999, instituting a claw back for NRCC on the rate applicable to revenues in excess of $1.25 million would run “contrary to Parliament’s intent that all stations pay only $100 on their first $1.25 million of advertising revenues.”[53]

ii. Low-Use Stations

All parties agree that stations that use less protected music ought to pay less. However, to apply the same ratio as in the past to the general rate now being adopted would be unfair. That rate is being raised on three accounts, two of which are not relevant to low music use stations. The amount of music they can use remains capped at the same level as in the past; therefore, they should not pay more as a result of the industry’s greater use of music. The low amount of music that these stations use, and their negative profit margins, means that they are probably unable, or only marginally, to benefit from the additional efficiencies. The Board thus believes that these stations should not pay more as a result of this either. Their rate should be increased only to account for the historical undervaluation of music. The low-use rate is therefore set at 1.5 per cent for SOCAN and 0.75 per cent for NRCC.

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[53] *Supra* note 43, page 40.

This much smaller increase does not raise the same concerns as the increase in the general rate with respect to smaller stations. Imposing a cap is not necessary.

In 1999, NRCC and CAB agreed that all stations that benefit from SOCAN's low-use rate would also pay a lower rate to NRCC. The reasons for this were practical and political. First, it would be difficult for a radio station to determine if a sound recording is part of NRCC's repertoire without NRCC's assistance. Second, French-language stations, because of the different content regulations that apply to them, would find it much more difficult to qualify for the lower rate.[54]

NRCC now wishes that its repertoire, not SOCAN's, be used to determine who qualifies for a lower rate. CAB objects to the proposed change, citing administrative inconvenience. The Board agrees with CAB. The reasons advanced in 1999 to use SOCAN's repertoire for the purposes of NRCC's tariff remain valid. More importantly, the small gain in precision resulting from using NRCC's repertoire does not justify the added monitoring costs that would be imposed on the radio industry. Except for a few classical music stations, there is no reason to believe that any station uses one repertoire significantly more (or less) than the other. Yet the administrative burden of all low-use stations would be doubled, or even more, if the Board were to grant NRCC's request. Until tools are made available (probably by NRCC) to allow for such monitoring, it seems preferable to leave well enough alone.

Making the applicable NRCC rate a function of the use of SOCAN's repertoire might well be a temporary measure. With time, differences in the terms of the relevant rights might weaken the connection between the two repertoires. Should the need arise, NRCC will lead evidence to that effect. Then will be the time to reexamine the matter.

iii. All-Talk Radio

In light of the difficulties encountered in administering it, NRCC has asked that the all-talk category be eliminated from its tariff. By contrast, CAB asks that an all-talk rate be also included in SOCAN's tariff. SOCAN disagrees with CAB.

The evidence shows that this part of the tariff has been significantly more difficult to administer than the rest. The all-talk tariff only allows the use of production music (i.e., music used in interstitial programming such as commercials, public service announcements and jingles). Some stations that claimed to be all- talk interpreted the notion of production music very liberally. Playing Irving Berlin's "We're Having a Heat Wave" while forecasting higher than average temperatures probably helps to maintain the listener's attention, as would playing Loverboy's "(Everybody's) Working For The Weekend" on Friday's edition of the back-to-home show. In the Board's view, however, that sort of use is not a "production" use.

CAB attempted to minimize the importance of these uses, arguing that they represented an insignificant share of a station's daily air-time. That argument misses the point. Given its

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[54] Transcripts, June 25, 1998, pages 1945-1950; pages 1945 to 1947 were filed in these proceedings as Exhibit CAB-22.

experience before this Board, and especially the Board's reaction to other, so-called *de minimis* derogations in the application of television's modified blanket licence,[55] CAB ought to know that the Board shows little tolerance for "slippage", especially when users obtain a more favourable treatment after giving assurances that they will have no difficulty in abiding by the constraints attached to that more favourable treatment.

CAB believes that resorting to a more detailed definition of production music, such as the one that applied to CKO radio in the 1980s, would resolve the issue.[56] The Board is not convinced that this is a solution. CKO was a true all-talk station, as required by condition of its CRTC licence. CKO also paid considerably more than the $100 per month all-talk stations were paying to NRCC under the previous tariff.

The Board is no longer convinced of the usefulness of an all-talk category, especially in view of the comparatively lower tariff now applicable to low music use stations. There seems to be very few, if any, stations that use absolutely no published sound recordings other than in commercials, station identification or public service announcements. The evidence also shows that the addition of that category unduly complicates the administration of the tariff for NRCC, for the sake of very few stations. The all- talk category will therefore be eliminated from the NRCC tariff. Consequently, no such category need be added to the SOCAN tariff.

The definition of production music may eventually need to be reexamined as it also applies to low music use stations. However, any problem in this respect is probably marginal. Stations that claim low-use status probably try to use music much less than 20 per cent of the time to ensure their continued compliance with the tariff.

D. Final Rates

Commercial radio stations will pay to SOCAN 3.2 per cent on their first $1.25 million of annual advertising revenues and 4.4 per cent on the excess; low-use stations will pay 1.5 per cent. For NRCC, the rate would be 1.44 per cent for stations earning $1.25 million or less, absent the legislative exemption. The rate of 2.1 per cent applies to stations earning more than $1.25 million, and 0.75 per cent is the new low-use rate.

As in the past, the tariff the Board certifies takes no account of the special treatment radio stations benefit from as a result of subsection 68.1(1) of the *Act*. Parliament has decreed that all stations owe NRCC only $100 on their first $1.25 million of advertising revenues. The Board finds it necessary to indicate what it would have considered fair and equitable absent this diktat. Given the concessions afforded in the tariff, even the smallest of stations would be able to pay the tariff as certified. Allowing large, profitable broadcasters to escape payment of the full NRCC tariff on any part of their revenues constitutes at best a thinly veiled subsidy. Subsection 68.1(1) is seemingly based on no financial or economic rationale.

For 2003, the tariff as certified by the Board would yield royalties of $42.2 million for SOCAN

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[55] See Board's decision of March 19, 2004 on SOCAN's Tariffs 2.A (1998-2004) and 17 (2001-2004), page 33.
[56] Exhibit CAB-30.

and $19.8 million for NRCC. The application of the exemption in the *Act* reduces the NRCC amount to $13.3 million, representing a loss of $6.5 million a year. (See attached table)

E. THE INDUSTRY'S ABILITY TO PAY

Between 1998 and 2002, total revenues for all stations increased by 18 per cent, and Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA) margins went from 17.5 to 20.5 per cent. For music stations, total revenues increased by 20 per cent and EBITDA margins went from 20.9 to 24.9 per cent.[57]

During that same period, radio stations have benefited from a relaxed regulatory framework permitting consolidation in the industry. The CRTC's *Commercial Radio Policy, 1998* aimed to create a strong, well-financed radio industry,[58] and it seems, looking at the financial results, that it has succeeded.

Consolidation of ownership, though less intense than in the United States, has also strengthened what radio offers to the advertising industry. Broadcasters from the same corporate family now use niche music formats more than ever in order to distinguish themselves and sell advertising without encroaching upon the offer from sister stations. That and the use of ever more sophisticated marketing research tools to help identify precisely the demographics and the psychographics involved in reaching target audiences ensure that radio is better positioned than ever to deliver effective advertising campaigns.

Under the tariff the Board certifies, a small commercial music radio station that has advertising revenues of about $400,000 (i.e., average revenue of small stations) will pay to SOCAN and NRCC a total of about $13,000 in royalties, the same as it was paying under the preceding tariff. A medium size station with annual revenues of $925,000 (average revenue of medium stations) will pay a total of nearly $30,000 in royalties, again the same as under the preceding tariff. A large music station with annual revenues of $4.5 million (average revenue of large stations) will be paying slightly more than $250,000, an increase of about $60,000 compared to the royalties paid before.

The evidence presented during the hearing clearly demonstrates that the commercial radio industry has the ability to pay the full tariff, notwithstanding the increases approved by the Board. Even if the increases had been applied as far back as 1999, the industry's profit margins would have continued to increase significantly.[59] CAB's own financial expert stated that in all likelihood, profit levels will continue to rise unabated even if the full requested tariffs were certified.[60]

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[57] Exhibit NRCC-4, pages 15 to 19.
[58] CRTC Public Notice 1998-41, Ottawa, 30 April 1998; Exhibit NRCC-4.
[59] Exhibit NRCC-4, pages 17, 19.
[60] Transcripts at 833.

F. ADMINISTRATIVE ISSUES

i. SOCAN's Rate Base

SOCAN's royalties are a function of a station's "gross income" as this term is defined in the previous tariff. NRCC's royalties are a function of a station's "advertising revenues" as this term is defined in the *Regulations Defining "Advertising Revenues"* (SOR/98-447), adopted by the Board pursuant to subsection 68.1(3) of the *Act*. The history behind the adoption of the regulations shows that the Board always intended that both definitions result in a single rate base.

SOCAN has asked that the definition of "gross income" be changed to clearly mention barter, trade and contra. However, it does not wish that its rate base be defined by using the regulatory definition that applies to NRCC. The Board sees no reason to impose an additional burden resulting from separate calculations based on potentially different rate bases when it refuses to impose, albeit for different reasons, such an additional burden on stations that pay the low music use rate.

SOCAN maintains that its definition of "gross income" may include income that is not included in the definition of "advertising revenues". The Board prefers to rely on its understanding that both definitions represent the same rate base. If this is incorrect, SOCAN will have the opportunity to demonstrate this at a later date. The Board will then be in a position to decide whether to readopt separate definitions, to change the regulatory definition of "advertising revenues" or to leave things as they now stand. For now, the regulatory definition will apply to both SOCAN and NRCC.

ii. Application of the tariff

Section 3 of the tariff defines its application. The wording of this section should be commented in two respects.

That section provides only for the right to communicate to the public by telecommunication. SOCAN also administers the right to authorize the communication of works in its repertoire. Still, the certified tariff makes no mention of that right. To include such a mention would have unduly complicated the wording of the tariff. Furthermore, the fact that no such mention is included in the SOCAN- NRCC Pay Audio Services Tariff dœs not appear to have raised any difficulty. Were the contrary to be true, the Board will consider, on application, taking corrective measures pursuant to section 66.52 of the *Act*.

Section 3 targets communications "for private or domestic use". That statement has been part of SOCAN's commercial radio tariffs for some time. Though it probably is no longer necessary, the statement was maintained out of an abundance of caution. SOCAN will be expected to explain the purpose served by the statement if it remains in its next proposed tariff.

iii. Reporting Requirements

Radio stations are required by the current tariff to report their use of sound recordings to NRCC for up to 14 days in any given year. Stations are not required by the tariff to report their use of

music to SOCAN but do so in practice, again for up to 14 days per year. SOCAN now asks that the reporting requirements be set out in the tariff; CAB does not object. The Board grants SOCAN's request.

Both NRCC and SOCAN ask that stations now be required to report for up to 21 days per year. The request is based on two assumptions. First, an increase in the reporting requirements will lead to more accurate royalty distributions. Second, the vast majority of stations currently use programming software that provides music use data in electronic form, thereby making the burden of additional reporting virtually non-existent. CAB argues that no evidence was filed in support of the increase. In addition, it might result in an excessive administrative burden on smaller stations. CAB also asks that both collectives be required to rely on the same selection of reporting days.

The Board rejects, for this time, the request to increase the number of reporting days in a year. The Board agrees that an increase in reporting requirements would lead to more accurate royalty distributions, without imposing a significant additional burden on stations that already use programming software. That is why pay audio services report their use of music for seven days each month. However, the Board remains to be convinced that the vast majority of stations currently use programming software; some doubt remains that the vast number of small or very small stations have made that transition. That being said, in the next proceedings, CAB should expect a request for evidence establishing the extent to which radio stations continue to be paper-driven, as well as a request for suggestions as to how reporting requirements may generally be increased to 21 days or even more while at the time not adding unduly to the reporting burden of stations that continue to be paper-driven.

CAB's request that both collectives share music reporting data is in accord with other similar tariffs.[61] The request is granted.

iv. A Single Tariff

As requested by CAB,[62] and for the reasons set out in the Board's pay audio services decision [63] which was confirmed by the Federal Court of Appeal,[64] the Board certifies a single tariff for both collective societies. Neither collective suffers as a result.

v. Transitional Provisions

The tariffs the Board certifies are a significant departure from the previous tariffs. To help broadcasters absorb the increase of the tariff more easily, the tariff allows them to pay additional amounts owed for past periods free of interest, over the rest of the life of the tariff.

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[61] See, for example, subsection 9(4) and paragraph 10(2)(i) of the SOCAN-NRCC Pay Audio Services Tariff.
[62] Exhibit CAB-1.A (revised), pages 14 and 15.
[63] *Supra* note 20, page 25.
[64] *Supra* note 45, paragraphs 70 to 74.

Claude Majeau
Secretary General

TABLE / TABLEAU

Estimates of Royalties Paid by Commercial Radio Stations Under the Previous and the New Certified Rates, for 2003 ($000)

Estimation des redevances versées par les stations de radio commerciales en vertu des précédents et des nouveaux taux homologués, pour 2003 (en milliers de dollars)

	Royalties to SOCAN Redevances à la SOCAN				Royalties to NRCC Redevances à la SCGDV				
	Previous Rates Taux précédents		New Rates Nouveaux taux		Previous Rates Taux précédents		New Rates Nouveaux taux		
	Rates Taux	Royalties Redevances	Rates Taux	Royalties Redevances	Rates Taux	Royalties Redevances	Rates Taux	Royalties Redevances	Royalties, Excluding the Statutory Exemption Clause * Redevances, excluant la clause d'exemption statutaire *
Music Stations Stations de musique									
Small/Petites	*3.2 %*	1,589	*3.2 %*	1,589	*$100*	14	*$100*	14	715
Medium/Moyennes	*3.2 %*	4,025	*3.2 %*	4,025	*$100*	14	*$100*	14	1,811
Large/Grandes	*3.2 %*	27,406	*4.4 %*	34,624	*1.44 %*	8,681	*2.1 %*	12,651	16,302
Total: Music Stations Total : Stations de musique		**33,020**		**40,238**		**8,709**		**12,679**	**18,828**
Total: Low Music-Use and All-Talk Radio Stations Total : Stations de radio parlée et à faible utilisation de musique	*1.4 %*	**1,846**	*1.5 %*	**1,979**	*0.63 %*	**280**	*0.75 %*	**638**	**989**
Total: All Stations Total : Toutes stations		**34,866**		**42,217**		**8,989**		**13,317**	**19,817**

* Under subsection 68.1(1) of the *Act*, notwithstanding the tariff approved by the Board, commercial radio stations shall pay, for the communication to the public by telecommunication of performer's performances of musical works, or of sound recordings embodying such performer's performances, royalties of $100 on the first $1.25 million of annual advertising revenues.

* En vertu du paragraphe 68.1(1) de la *Loi*, par dérogation aux tarifs homologués par la Commission, les stations de radio commerciales ne payent, pour la communication au public par télécommunication de prestations d'œuvres musicales ou d'enregistrements sonores constitués de ces prestations, que 100 $ de redevances sur la partie de leurs recettes publicitaires annuelles qui ne dépasse pas 1,25 million de dollars.