Copyright Board
Canada

Commission du droit d'auteur
Canada

Date	2007-10-18
Citation	File: Public Performance of Musical Works
Regime	Collective Administration of Performing Rights and of Communication Rights *Copyright Act*, subsection 68(3)
Members	Mr. Justice William J. Vancise Mr. Stephen J. Callary Mrs. Sylvie Charron
Proposed Tariff(s) Considered	22.A (Internet – Online Music Services) 1996-2006

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] This is the second part of a two-stage process to establish a tariff for the communication of musical works over the Internet. The Society of Authors, Composers and Music Publishers of Canada (SOCAN) filed proposed tariffs for the years 1996 to 2006.[1] In 1996, the Board decided to deal with legal and jurisdictional issues separately from the determination of the tariff. Hearings into the so-called Phase I were held in 1998. In 1999, the Board rendered its decision,[2] which was the subject of judicial review by the Federal Court of Appeal [3] and subsequently appealed to the Supreme Court of Canada.[4]

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[1] SOCAN also filed proposed tariffs for 2007 and 2008, but at the request of the parties, they are not the subject of these proceedings.

[2] Decision of the Board dated October 27, 1999, *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]* (hereafter, *SOCAN 22 (1999)*).

[3] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers* (C.A.),

[2] The Federal Court of Appeal made three important rulings when it reviewed the Board's decision. First, Internet service providers (ISP) can avail themselves of paragraph 2.4(1)(*b*)[5] of the *Copyright Act*[6] for most of the services and facilities they offer as they only provide the means of telecommunication necessary for another person, the content provider, to communicate a work. However, caching is not "necessary" to the operation of the Internet; as a result, the Board erred in finding that those who cache material can avail themselves of paragraph 2.4(1)(*b*). Second, the person who facilitates a communication generally does not authorize it unless he exerts a significant level of control over the activities of those who post content. Third, a communication that originates outside Canada can be a communication in Canada as long as it has a real and substantial connection with Canada.

[3] The Supreme Court of Canada affirmed all but one of these findings, ruling that caching enhances the Internet economy and efficiency and as such, is "necessary" within the meaning of paragraph 2.4(1)(*b*) of the *Act*. The decision contains a number of statements that are worthy of note. First, a communication occurs when music is transmitted from the host server to the end user. Second, the content provider, who makes the work available for communication, effects the telecommunication, not the host server provider. Third, in terms of the Internet, the relevant connecting factors in determining whether there is a real and substantial connection between Canada and a communication include the *situs* of the content provider, the host server, the intermediaries and the end user; the weight to be given to any factor varies with the circumstances and nature of the dispute. The decision also states that an Internet communication that crosses one or more national boundaries "occurs" at a minimum in the country of transmission and in the country of reception. Fourth, those who confine themselves to providing "a conduit" for information communicated by others fall within paragraph 2.4(1)(*b*); intermediaries whose participation is not content neutral might not. Each transmission must be looked at individually to determine whether the intermediary is fulfilling a function that triggers liability. Fifth, when massive amounts of non-copyrighted material are made accessible, it is not possible to impute to the ISP an intention to authorize the download of copyrighted material, though liability may attach if the service provider has notice that a content provider has posted infringing material on its system and fails to take remedial action.

[4] The transmission of music over the Internet involves rights other than SOCAN's. On March 16, 2007, the Board certified a tariff for the reproduction of musical works in permanent

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2002 FCA 166 (hereafter, *SOCAN v. CAIP (FCA)*).

[4] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 (hereafter, *SOCAN v. CAIP (SCC)*).

[5] "2.4(1)(*b*) a person whose only act in respect of the communication [...] consists of providing the means of telecommunication necessary for another person to so communicate the work [...] does not communicate that work [...]".

[6] R.S.C. 1985, c. C-42 (the "*Act*").

downloads, limited downloads and on-demand streams of music transmitted over the Internet.[7] As will become clear, that decision will be important in determining the tariff in this instance.

[5] For the following reasons, we have decided to deal at this time only with those uses that are targeted in *CSI – Online Music*. First, this part of the tariff will, in all likelihood, generate the bulk of Tariff 22 royalties. Second, dealing with the other uses targeted in Tariff 22 raises administrative and wording issues that will require extensive consultations with the parties. The tariff for these uses will be certified at a later date. That being said, for the sake of convenience and coherence, the descriptive and analytical parts of these reasons are written as if we were dealing with all of proposed Tariff 22.

II. THE PARTIES

[6] Pursuant to subsection 67.1(2) of the *Act*, SOCAN filed a Tariff 22 proposal for each year from 1996 to 2006 inclusive. The tariff targets the communication to the public by telecommunication of musical works by means of Internet transmissions or similar transmission facilities. Each tariff was published in the *Canada Gazette* as required by the *Act*.

[7] Potential users and their representatives were advised on each occasion of their right to object to the proposed statement of royalties. A number of them challenged one or more of the proposed tariffs. At the time of the hearing, the objectors were Bell Canada (Bell), the Canadian Association of Broadcasters (CAB), the Canadian Broadcasting Corporation (CBC), the Canadian Recording Industry Association (CRIA), Apple Canada Inc. (Apple), the National Campus and Community Radio Association (NCRA), the Entertainment Software Association and the Entertainment Software Association of Canada (ESA), Iceberg Media.com (Iceberg), Rogers Communications Inc. and Rogers Wireless Partnership (Rogers), Shaw Cablesystems G.P. (Shaw) and TELUS Communications Inc. (TELUS). Mr. Bill Deys, CKUW Radio, Bucket Records Music Inc. and the DiMA Coalition were also objectors but failed to comply with the directive on procedure and were therefore deemed to have abandoned their objections.

[8] Written submissions were also filed by CMRRA/SODRAC Inc. (CSI), Michael Dunn of Esprit Communications, CKUA Radio Network – a community broadcaster – and the Retail Council of Canada (RCC).

[9] Over time, the Board received a number of letters of comments from radio stations and individuals, as well as an electronic petition from people who supported the position of ISPs who were against SOCAN's proposed tariff charging them for the use of downloads in addition to the

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[7] Decision of the Board dated March 16, 2007 certifying the *CSI Online Music Services Tariff, 2005-2007* (hereafter, *CSI – Online Music*).

private copying levy. As a result of the decision in *SOCAN v. CAIP (SCC)*, that issue has since become moot.

[10] The hearing dealing with the determination of the tariff started on April 17, 2007, occupied 13 days and ended on May 8, 2007.

III. TERMINOLOGY

[11] At the outset, it would be helpful to define a number of terms that will be used throughout this decision.

[12] An Internet transmission can be a download or a stream.

[13] A *download* is a file containing data (in our case, one or more sound recordings of part or all of a musical work) the user is meant to keep as his own. The person who receives a *permanent download* is authorized to use it forever, though the digital rights management (DRM) software attached to the file may limit the number and kind of copies that can be made. A *limited download* can be used as long as the user's subscription is paid up; the DRM will prevent further use of the content if the subscription expires.

[14] A *podcast* is a form of download. Podcasting is a term used to describe a collection of technologies for automatically distributing audio and video programs over the Internet using a publisher/subscriber model. Podcasting is often used to distribute radio-style shows, but can serve to distribute any form of audio-visual content.

[15] A *stream* is a transmission of data that allows the user to listen or view the content at the time of transmission and that is not meant to be reproduced, even though a "temporary" copy sometimes is stored on the user's hard drive. An *on-demand stream* is one the content of which is selected by the user; streamed content also can be selected by the person who offers the content. Streams can be further subdivided in other categories.

[16] *Simulcast* is a portmanteau of "simultaneous broadcast"; it generally involves broadcasting a program or event at the same time on more than one medium. For the purpose of this decision, simulcast refers to streaming a radio or television signal simultaneously to its transmission over the air, on cable or by satellite.

[17] A *webcast* also involves the streaming of content. That content may be pre-existing, as when a broadcaster allows users to hear or view part of its programming after it has been broadcast. It may also be original, as when a person operates a so-called "Web radio" signal, posts a video on a Web site such as YouTube or allows visitors to his MySpace Web page to listen to an original recording.

[18] *Previews* are a marketing tool offered by online music services, among others. A preview is an excerpt (usually 30 seconds or less) of a sound recording that can be streamed so that consumers are allowed to "preview" the recording to help them decide whether to purchase a (usually permanent) download.

[19] The Mechanical Licensing Agreement (MLA) is the agreement entered into between the Canadian Musical Reproduction Rights Agency (CMRRA) and CRIA. It licences record labels to reproduce musical works onto prerecorded CDs.

IV. POSITION OF THE PARTIES AND EVIDENCE

A. SOCAN

[20] SOCAN is a collective society as defined in section 2 of the *Act*. It administers the performing rights of the world repertoire of music protected by copyright in Canada. Specifically, SOCAN administers the right to communicate musical works to the public by telecommunication and the right to authorize such communications which, according to SOCAN, are involved in the uses described in Tariff 22.

[21] SOCAN's Tariff 22 proposal targets the communication of musical works "by means of Internet transmissions or similar transmission facilities". The manner in which SOCAN proposed to do this has varied over time.

[22] For 1996 to 2005, SOCAN filed tariffs in substantially the same form. The tariffs targeted "telecommunication services" broadly, including websites and other Internet service providers. If a service did not earn advertising revenues, the tariff would be 25¢ per subscriber, per month; otherwise, the service would pay a percentage (3.2 per cent from 1996 to 2000 and 10 per cent from 2001 to 2005) of all its revenues with a minimum fee of 25¢ per subscriber, per month. The proposed tariff claimed a royalty from any entity in the Internet chain, though SOCAN's preference was that the fees be paid by the entities that provide end users with access to the telecommunication networks.

[23] SOCAN's proposal for 2006 itemizes several categories of music uses and shifts the focus away from Internet service providers towards websites. In all cases, SOCAN asked for a percentage of the greater of gross revenues or gross operating expenses, with a minimum monthly fee of $200. The rates proposed in the published statements were: 25 per cent for music sites that offer downloads or on-demand streams; 20 per cent for audio webcasts similar to a pay audio service, 15 per cent for webcasts similar to a commercial or CBC radio station and 7.5 per cent for webcasts similar to a non-commercial radio station; 15 per cent for webcasts of commercial and CBC radio signals and 7.5 per cent for non-commercial signals; 15 per cent for audiovisual webcasts similar in content to over-the-air or cable television; 15 per cent for

webcasts of television station signals; 10 per cent for game sites, including gambling; and 10 per cent for other sites that communicate music.

[24] In its statement of case, SOCAN revised its initial proposal and asked for the following rates: 10 per cent for downloads with previews, 7 per cent for downloads without previews and 16.7 per cent for on-demand streams; 9 per cent for audio webcasts similar to a pay audio service, 6 per cent for webcasts similar to a commercial or CBC radio station and 3 per cent for webcasts similar to a non-commercial radio station; 8 per cent for webcasts of commercial and CBC radio signals and 3.6 per cent for non-commercial signals; 4 per cent for audiovisual webcasts similar in content to over-the-air or cable television; 4 per cent for webcasts of television station signals; 6 per cent for game sites, including gambling; and 7 per cent for other sites that communicate music. SOCAN also asked that these rates and this structure be applied for 1996 to 2005.

[25] SOCAN made a number of concessions before and during the hearing. Minimum fees for downloads and on-demand streams would be set in accordance with the formula used in *CSI – Online Music*. SOCAN would have the option of calculating royalties based on gross operating expenses (rather than gross revenues) only until it opted for gross revenues: it would not be allowed to revert to operating expenses thereafter. Revenues generated by advertising embedded in a broadcaster's signal would be excluded from the rate base. Broadcasters who benefit from a lower rate for their main activity would also benefit from a lower rate for the Internet transmission of their signal. Those who simulcast their signal would not pay for webcasting archived clips or segments. The minimum monthly fee for non-commercial radio stations would be $90, not $200. The rate for game sites would be lowered from 6 to 4 per cent. Amateur podcasters who use the SOCAN repertoire less than 20 per cent of the time and generate no revenues would pay an annual fee of $60.

[26] In support of its tariff proposal, SOCAN first submitted that, as a result of *SOCAN v. CAIP (FCA)* and *SOCAN v. CAIP (SCC)*, it is now settled law that (a) a musical work is communicated to the public by telecommunication when a server containing the work responds to a request for the musical work and transmits packets of information over the Internet and that (b) the person who makes the work available on the Internet authorizes its communication. SOCAN also relies on a number of the Board's earlier legal determinations.[8]

[27] SOCAN commissioned Mr. Tom Jurenka of Disus Inc. to update the report he prepared on the Internet business model for the 1998 hearing. Mr. Jurenka is an engineer with many years of experience with computers, multimedia and online content. He testified that the Board had

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[8] Specifically *SOCAN 22 (1999)*; Decision of the Board dated August 18, 2006 certifying *SOCAN Tariff 24 (Ringtones) 2003-2005* (hereafter, *SOCAN 24*); and *CSI – Online Music*.

correctly described the Internet in *SOCAN 22 (1999)*, a position he had adopted when he testified for SOCAN in *SOCAN 24*.[9] His report[10] set out his thesis that Internet firms are subject to a number of factors, including the need to make a return on investment, the commoditization of Internet access, consumer demand for easy-to-use content and the need to supply that content. In his opinion, these factors are the key to understanding where the industry will be heading over the next few years.

[28] Mr. Jurenka offered his views on a number of technological developments that have occurred since he prepared his first report. Peer-to-peer networking uses the Internet to move large amounts of data between computers without centralized control; it will continue to grow. Open-sourced software has emerged as a viable business model. Wireless has grown exponentially and points the way forward for the Internet. The iPod – iTunes combo, which arrived in 2001, quickly dominated the pay per download model. Internet has evolved to become a necessity. Finally, the pace of change on the Internet will accelerate rather than slow down.

[29] SOCAN commissioned Erin Research Inc. to conduct four related studies in order to provide baseline information about the amount of music Canadians receive over the Internet. The first study surveyed 4,000 randomly selected Internet users to identify each site visited in the last 24 hours. On average, a person visited 7.8 sites. Fifteen per cent listened to radio over the Internet and 17 per cent visited a music downloading site. One-third visited greeting card sites and another third visited game sites. Interestingly, no one reported visiting pornographic sites.

[30] The second study examined 268 Internet sites identified as Canadian. Forty per cent of the sites and 26 per cent of the Internet pages examined used music.

[31] The third study examined the link between music and revenue. Almost all sites examined had one or more sources of revenue.

[32] The fourth study was a survey that sought to establish the value of previews. Respondents were asked to identify the amount of savings in dollars that would persuade them to switch from a site which offers previews to one which does not. The study concluded that it would require savings of at least 40 per cent before most respondents would switch.

[33] The Erin studies proved to be of limited use. The first and second studies were not directly relevant to the issues before us given that they identified types of uses and not consumption patterns. More importantly, since no one reported visiting pornographic sites and given their omnipresence on the Internet, the users' responses and the selection of sites were inherently skewed. The study that examined the link between music and revenue suffered from similar

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[9] *SOCAN 24* at paragraph 24.
[10] *Internet Industry Overview*, Exhibit SOCAN-4.

limitations: it listed the types of revenues that music can generate but provided little information about whether music "drives" either revenues in general, or revenues of a particular kind. As for the survey dealing with the value of previews, its results cannot be relied upon for two reasons. First, the questions were worded in such a way as to emphasize the value of previews. Second, consumers' estimates of value tend to be higher when they are asked to give up something they have than when they are asked how much they would be willing to pay for it: willingness to accept tends to be higher than willingness to pay.[11]

[34] Mr. Paul Hoffert, musician, professor and new media expert, reviewed the history of the Internet from its early days. He noted that millions of music files are exchanged because digital music can be easily transferred from conventional CDs to a computer or server, unlike images, movies or other content stored in analog formats. Music today continues to dominate and accounts for a very significant portion of Internet traffic (second only to pornography).

[35] Mr. Robert Linney, a broadcasting consultant, provided an overview of the evolution of content delivery in traditional and non-traditional media in Canada. He testified that broadcasters are developing more complex business models which incorporate new technology into their programming and marketing objectives. Web radio, in his opinion, provides the opportunity for a new and additional use of music to build and expand the target audience. He stated that websites of music radio stations provide services other than music, for example playlist identification, VIP club contests, Internet radio surveys and podcasts. All of these are used to promote the on-air listening of conventional radio stations. Television broadcasters also use websites to provide detailed program review or listing information. The Internet is used to cross-promote the on-air programming of the broadcaster.

[36] A panel consisting of Mr. Paul Spurgeon, Vice-President and General Counsel, and Ms. Anne Godbout, Director of Legal Services, both of SOCAN, testified on the evolution of the proposed tariffs from 1996 to the terms SOCAN finally proposed.

[37] Dr. Stanley J. Liebowitz, Professor at the University of Texas, provided an economic analysis to support and validate the royalties proposed by SOCAN. This analysis will be examined in detail when we consider the economic evidence as a whole.

[38] Based on this evidence, SOCAN contends that each category described in its modified proposed tariff reflects distinct music uses on the Internet. It argues that music is an important part of the overall content accessed on the Web, given that at least 44 per cent of sites use some form of music. As a result, it maintains that the rates it is requesting are amply justified.

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[11] See *A Review of WTA/WTP Studies*, Exhibit Coalition-16.

B. THE OBJECTORS

[39] Each objector focussed on one or more elements of the tariff. Their positions are examined in turn.

i. CAB

[40] CAB represents conventional radio stations as well as conventional, pay and specialty television stations. Its primary focus was the use of music on Internet websites operated by radio and television stations. To the extent these websites communicate music, they do so mostly by streaming rather than by downloading.

[41] CAB used a twofold approach to object to the tariff. First, it proposed specific rates and terms for those items that most concern its members: audio content similar to radio, simulcasts of conventional radio signals, audiovisual content similar to television and simulcasts of television signals. Second, CAB criticized the overall approach taken by SOCAN and its economic rationale for the proposed tariffs, and offered its own approach to the determination of the tariffs relevant to it.

[42] Two panels, one for radio and another for television, described the operation of radio and television stations and the role Internet plays in these operations.[12] According to the panels, most broadcasters use websites as an extension of their conventional operations; the object is to retain listeners or viewers rather than to derive independent revenues. Broadcasters do not segregate their Internet listeners or viewers from those who receive the conventional signal when measuring their audience. The witnesses stated that advertising that is streamed with the simulcast of a station's signal is already included in the rate base used to calculate the royalties payable pursuant to SOCAN Tariffs 1.A (Commercial Radio), 2.A (Commercial Television) and 17 (Pay and Specialty Services) for the use of music on conventional signals.

[43] CAB commissioned Solutions Research Group (SRG) to provide an overview of the use and content of broadcaster websites. SRG conducted a survey using the sample of 104 radio stations and 48 television stations identified in the Erin studies.

[44] The survey confirmed that the majority of radio sites operate as an extension of the on-air brand of the conventional station, by supporting the station's efforts to build a secure audience. Few of the sites currently generate significant revenue and those that do account for a very small

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[12] The radio panel consisted of Sylvain Langlois (Astral Media), Earl Veale (Corus) and Paul Larche (Larche Communications). The television panel consisted of Maria Hale (CHUM), Lucie Lalumière (Corus), Jed Schneiderman (CTV) and David Stevens (CanWest Global).

proportion of the overall listening audience. Seventy-seven per cent of radio websites offer continuous streaming of the broadcast signal and all offer non-audio content.

[45] All television stations surveyed operate a website but those vary greatly in size and scope. Sixteen per cent provide audio or video content where music predominates. Thirteen per cent include some streamed, full audio selections where music predominates. Ten per cent offer music previews and 33 per cent stream audio selections where music plays a secondary role; this occurs mostly on network and specialty websites rather than on the sites of independent conventional broadcasters. Forty-four per cent use music on a purely incidental basis and 40 per cent do not use music at all. Television website revenues were not substantial: in November 2006, 39 per cent reported monthly revenues of $1,000 or less. A handful of television sites reporting monthly revenues of more than $100,000 (three networks and three specialty services) skewed the mean revenue significantly.

[46] CAB commissioned a study of advertising on the Internet by Jeff Osborne of OzWorks Marketing Communications. The study concluded that non-music content influences considerably more Internet advertising purchasing decisions than music content. Sites and pages dedicated to cars, health, travel, home decorating or gardening play a much more important role than music pages. Music attracts a very small proportion of all advertising revenues and music specific pages attract a very small proportion of all page views. As for streamed and downloaded music, it represents only a small proportion of all music content, if one accounts for the large amount of informational material available.

[47] Mr. Osborne used the results of a 2006 ComQUEST Research Report to demonstrate the low share of Internet activity represented by the audio and video portions of television and radio websites. Some 1,507 Canadian respondents were asked what they did on the Internet some or most of the time in the past month. Only 3.3 per cent listened to radio stations and 0.8 per cent downloaded television programs.

[48] Mr. Osborne also examined data from ComScore Media Metrix to estimate the relative importance of visits to online music Web pages. Between October and December 2006, more than 2 million customers allowed ComScore to capture their browsing and transaction behaviour. During that period, visits for the entertainment-music category accounted for only 0.9 per cent of all Web page visits. Page views of Canadian broadcaster websites were even less: for example, figures were 0.07 per cent for Corus Radio and 0.03 per cent for MuchMusic.

[49] CAB commissioned Dr. Frank Mathewson, Professor of Economics at the University of Toronto to recommend a principled economic approach to setting the SOCAN royalties for conventional television and radio simulcasts and other audio webcasts. This analysis will be examined in detail when we consider the economic evidence as a whole.

[50] Based on the evidence, CAB draws a number of conclusions. First, music content plays a small role in the full Internet experience. Internet is just an additional delivery system to an undifferentiated group of listeners. As a result, royalty rates that are currently applicable to existing tariffs for the same or similar uses should apply to Internet uses.

[51] Second, the tariff as proposed treats podcasts as downloads of musical files. Instead, they should attract the same royalties as webcasts. SOCAN agrees.[13]

[52] Third, royalties should be based on a "page view" approach: only revenues derived from traffic on the music portion of a website would be included in the rate base. Gross operating expenses should not serve as the rate base. Revenues from radio or television simulcasts should be dealt with under SOCAN Tariff 1.A, 2.A or 17. If royalties for other musical audio and audiovisual content are only paid on the revenues associated with that content, then the application of multiple tariff items to the same website will not result in overlapping royalty rates.

[53] Fourth, something akin to a modified blanket licence should be available to ensure that programming that does not use SOCAN's repertoire does not attract royalties pursuant to the tariff.

[54] Fifth, CAB opposes the minimum fees proposed by SOCAN.

ii. CRIA and Apple

[55] CRIA and Apple jointly challenged the proposed royalties for permanent downloads, limited downloads, on-demand streaming and other sites.

[56] An industry panel consisting of Graham Henderson, President of CRIA, Christine Prudham, formerly Vice-President SONY BMG Canada, and Mark Jones of Universal Music Canada, testified about the state of the music industry in Canada, the high cost to enter the on-line music business and the cost to maintain the infrastructure. They also offered their views on the effect of unauthorized downloading of music on the industry in general and in Canada in particular.

[57] CRIA and Apple commissioned Dr. James Brander, Professor at the University of British Columbia, to provide an economic rationale to calculate the appropriate basis for determining rates for downloads and on-demand streams. Professor Brander's evidence will be analyzed in greater detail when we deal with the economic evidence.

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[13] Transcript at page 964.

[58] CRIA and Apple filed a study conducted by Pollara.[14] According to it, 92 per cent of respondents surveyed would not pay for previews while only 6 per cent indicated that they would. These findings are dramatically different from the findings in the Erin studies on which Dr. Liebowitz relied.

[59] Based on the evidence, CRIA and Apple argue that the proposed rates are excessive. In particular, they submit that the proposed rate base fails to properly account for appropriate deductions and includes revenue not directly attributable to the use of SOCAN's repertoire.

[60] CRIA and Apple submit that the appropriate proxy to use in setting the royalty for downloads and on-demand streams is the MLA. The rate for permanent downloads should be set by determining first how much should be paid for both the reproduction and communication rights, by deciding the relative importance of the two rights and then apportioning the rate between them. The appropriate rate base should be restricted to revenue which is directly attributable to the use of the SOCAN repertoire and should not include advertising revenue.

[61] CRIA and Apple adopt and rely on the evidence of Mr. Stephen Stohn in *CSI – Online Music,* who concluded that the adjusted MLA rate for permanent downloads should be 5.3 per cent of retail for singles and 6.7 per cent for albums. They propose using an average of 6 per cent. CRIA contends that online distribution of music has not increased revenues of retailers or labels and that the overall contribution of composers and publishers over the Internet is worth the same as in the physical world. It also argues that previews offered to promote permanent downloads should not attract additional royalties. For those reasons, the total amount payable for the reproduction and communication rights (the "bundle of rights") for permanent downloads should be the same as the amount payable for the reproduction right alone in the CD market, or 6 per cent.

[62] CRIA and Apple submit that the rate for limited downloads and on-demand streams should be lower than for permanent downloads, and should be set in the same way as in *CSI – Online Music*. Thus, the rate for limited downloads should be two-thirds of that for permanent downloads, while the rate for on-demand streams should be half of that for permanent downloads.

[63] CRIA and Apple contend that the Board should set a nominal rate for downloads and streams prior to the launch of Puretracks in October of 2003, given the difficulties in establishing a legitimate online business and the administrative problems in determining the appropriate liability for past use. They also contend that the retroactive application of the tariff as currently

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[14] *Song Previews: Analysis of Online Canadian Preferences*, Exhibit Coalition-9.

proposed by SOCAN raises jurisdictional issues regarding the Board's authority to impose a tariff on users without notice. They oppose the imposition of minimum royalties.

iii. The Cable/Telcos: Bell, Rogers, Shaw Cablesystems and TELUS

[64] The Cable/Telcos oppose the proposed tariff as it concerns downloading and streaming. They presented evidence of the portal webcasting business and the wireless business through two industry panels.[15]

[65] The Cable/Telcos submit once again that downloading over the Internet is not a communication to the public by telecommunication. In their submission, downloading is a point to point transmission of individual files to the consumer with the result that the *Act* is not engaged and no royalties are payable to SOCAN for such activity. If that argument fails, they agree with CRIA and Apple that the amount payable for the bundle of rights for permanent downloads should be the same as the amount payable for the reproduction right alone in the CD market and that the rate for limited downloads and streams should be discounted in the same manner as in *CSI – Online Music*.

[66] The Cable/Telcos also contend there is no evidence to support the position that the delivery of music over the Internet should be treated differently from other forms of delivery such as cable or satellite; as a result, the applicable rates should not exceed those found in SOCAN's Tariff 1.A, 2.A or 17. In their submission music plays a minor role in the broad range of products offered on their websites. Only revenues attributable to music streaming or downloading should be included in the rate base.

iv. CBC

[67] CBC offers a number of services that could be subject to Tariff 22. CBC Radio One and CBC Radio 2 are English language over-the-air radio services. Radio One consists mostly of spoken word. Radio 2 consists of spoken word programming and music relating primarily to culture and music. *La Première Chaîne* and *Espace Musique* are their French equivalent (though *Espace Musique* emphasizes music much more than Radio 2). All of these services are simulcast on CBC.ca and Radio-Canada.ca, the English and French language websites that CBC maintains.

[68] *Bande à part* and CBC Radio 3 are French and English Web radio services that consist of new and rising Canadian musical artists in the pop, rock and emerging music categories. Users

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[15] The wireless carrier panel consisted of Nauby Jacob (TELUS), Andrew Wright (Bell Mobility) and Upinder Saini (Rogers Wireless). The portals panel consisted of Isabelle Rioux (TELUS), Kerry Munro (Yahoo! Canada) and Veronica Holmes (Sympatico).

may also stream some audio and audiovisual programs previously broadcast on CBC's over-the-air and satellite-to-cable television and radio networks.

[69] CBC argued at length that SOCAN's proposal ignores its unique character and mandate. It maintains that it should have no additional liability for its simulcast use of music on the Internet. It already pays SOCAN royalties for the right to use its repertoire on its four conventional radio services. This should be sufficient, for the following reasons.

[70] Internet simulcasts are a complement to its national over-the-air distribution system. According to its mandate, CBC must make its programming available throughout Canada by the most appropriate and efficient means. The only issue then, is whether the listener turns on the radio or the computer.

[71] *Bande à part* and CBC Radio 3 are outlets for new and rising musical artists. According to CBC, artists own all of the rights in the works offered on the two services.

[72] CBC streams a select number of radio and television programs after they have been broadcast. The musical content of this programming is much lower than that of conventional services. CBC proposes to calculate the royalty by taking what it pays for its conventional signals, and applying discounts to reflect lower music use, as well as the lower value of rights on the Internet. This calculation would yield annual royalties of $6,690 for radio and $31,155 for television.

[73] CBC makes some of its program available for podcasts. In most cases, the musical content has been removed. CBC is willing to pay royalties for audio and audiovisual podcasts according to a formula similar to the one it proposes be used to set its royalties for the webcast of its conventional radio signals' content.

v. ESA

[74] ESA contends with the Cable/Telcos that no liability exists for point to point, one to one digital delivery of video games to end users. It also raises other legal issues which are addressed later. Its evidence can be summarized as follows.

[75] The use of music in online video games and on game publishers' sites is marginal. Video games consist of millions of lines of software code which, when played by the end user, process the data entered by the user and generate an audiovisual output. That output is generally comprised of many components, including images of the playing environment, characters and objects as well as full motion video segments, narrative text and voice over, and sound effects. The music component of a video game typically consists of a minute portion of the overall audiovisual output and, in ESA's submission, an equally negligible piece of the overall software program that is a video game. Between 0 and 5 per cent of the development budget of games can

be attributed to music. Generally, a video game publisher will enter into an agreement with a third-party rights holder to provide the music for incorporation in the video game. ESA argues therefore that the rights holders are fully compensated in advance of the game's publication.

[76] ESA submits that if the Board must certify a tariff, the only acceptable proxy is the low music use tariff set in SOCAN Tariff 17, which is 0.8 per cent of advertising revenues. They also submit that the distinction between downloading and streaming should be maintained and that the rate should be 0.8 per cent for streaming and 0.3 per cent for downloading. A discount of at least 90 per cent should then be applied to take into account that music is never the main feature of any communication that might occur on a video game publisher's site. The revenue base should only be that part of the site associated with the music use. ESA also agrees with CRIA's objection to the minimum fees.

vi. Iceberg

[77] Iceberg is Canada's largest music streaming Internet service. It provides over 100 channels operated by Standard Interactive, a division of Standard Broadcasting. In general, it supports the position of CAB insofar as it relates to streaming. In its submission, the rate should be no higher than for conventional radio stations. The royalty should only apply to revenue generated from the use of music. This should be determined using page views as they form the basis for generating advertising revenues. Operating expenses should be used as a rate base only if a site or service is not designed to generate commercial revenues.

vii. NCRA

[78] NCRA is a national organization representing 46 non-profit community and campus radio stations. Community radio offers an eclectic and philosophically alternative music product. They provide an opportunity for artists who would not otherwise find a voice to be heard in the Canadian broadcasting system. Like CBC and CAB, NCRA contends that Internet is just another method of transmission and as a result should not attract another tariff. In any event, the stations that simulcast on the Internet already pay royalties on these expenses pursuant to Tariff 1.B (Non-Commercial Radio other than the Canadian Broadcasting Corporation).

[79] NCRA contends the proposed tariff is inappropriate and if certified would result in the elimination of Internet broadcasting of community radio. It requests that the relevant sections of Tariff 22 be eliminated and that Tariff 1.B apply to both simulcast and Internet only stations. Even the revised minimum tariff of $90 per month proposed by SOCAN does not reflect the economic reality of community and campus broadcasting and is beyond the means of the community based non-profit organizations to pay. NCRA requests that the minimum payable as applied to them should be more in keeping with their ability to pay.

viii. Written Submissions

[80] CSI submitted that it does not agree with the position of SOCAN and its expert, Dr. Liebowitz, that the reproduction right for limited downloads is worth only two thirds of the value of permanent downloads. It argues the rate should be equal.

[81] RCC contended that the tariff requested for "other sites" is unrealistic and that the tariff and minimum fees proposed would impose undue hardship on retailers that use music incidentally on their website. It also brought to our attention a recent American decision regarding the right to download and stream music.[16]

[82] Michael Dunn contended that a tariff in the form requested by SOCAN would impede the development of a vibrant Canadian based independent radio network. He argued there should be a royalty based only on gross revenues with a threshold below which no royalties would be payable.

[83] CKUA Radio Network is a community radio broadcaster that was the first radio station in Canada to stream its signal via the Internet. It is the largest community radio network in Canada with 16 FM transmitters in Alberta and is carried by Star Choice satellite. CKUA opposes the tariff proposed by SOCAN on Internet simulcasts by reason that it is a double assessment, exorbitant and, if granted, would jeopardize the growth of community Internet radio in Canada.

V. LEGAL ISSUES

[84] A number of legal issues must be resolved before determining whether or not the tariff can be certified. They can be summarized as follows:

1. Is the transmission of a download a communication to the public by telecommunication within the meaning of paragraph 3(1)(f) of the *Act*?
2. Is offering previews fair dealing for the purpose of research within the meaning of section 29 of the *Act*?
3. Is there any legal impediment to certifying the tariff starting in 1996 as originally filed or as now proposed? This is the so-called retroactivity issue.
4. Are services whose servers are located outside Canada subject to the tariff?

[85] ESA also raised a number of issues that are best addressed together.

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[16] *United States* v. *American Society of Composers, Authors and Publishers, et al.*, No. 41-1395, (S.D.N.Y. April 25, 2007).

A. IS THE TRANSMISSION OF A DOWNLOAD A COMMUNICATION TO THE PUBLIC BY TELECOMMUNICATION WITHIN THE MEANING OF PARAGRAPH 3(1)(*F*) OF THE *ACT*?

[86] The Board and the courts have examined this issue several times in the past. In *SOCAN 22 (1999)*, the Board advanced three propositions, which the Supreme Court of Canada restated as follows in *SOCAN v. CAIP (SCC)*:

> [30] [...] an Internet communication occurs at the time the work is transmitted from the host server to the computer of the end user, regardless of whether it is played or viewed at that time, or later, or never. It is made "to the public" because the music files 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 transmission)".

[87] On judicial review, these propositions were not directly challenged. Still, the Federal Court of Appeal and the Supreme Court of Canada, both in the course of reviewing *SOCAN 22 (1999)* and in other decisions, have made a number of statements that would tend to support them.

[88] In *SOCAN v. CAIP (FCA)*, the Federal Court of Appeal stated that:

> [174] [...] even when end users receive data in a form that requires them to open the file to listen to the music after downloading it to their hard drive, the music is communicated when it is received on the computer of the end user who requested its transmission, whether or not it is in fact ever heard.

[89] In *SOCAN v. CAIP (SCC)*, the Supreme Court of Canada made two important statements:

> [42] [...] The Board ruled that a telecommunication occurs when the music is transmitted from the host server to the end user. I agree with this. [...]
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> [45] At the end of the transmission, the end user has a musical work in his or her possession that was not there before. The work has necessarily been communicated [...] If the communication is by virtue of the Internet, there has been a "telecommunication". [...][17]

[90] Finally, in *CCH Canadian Ltd. v. Law Society of Upper Canada*,[18] the Supreme Court of Canada stated that:

> [78] [...] 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

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[17] Throughout the decision, Binnie J. used the word "telecommunication" as a shorthand for "communication by telecommunication": see paragraphs 42, 45 and 85.
[18] 2004 SCC 13 (hereafter, *CCH Canadian (SCC)*).

> 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.

[91] In *SOCAN 24*, the Board, after examining the question at length, concluded that the transmission of a ringtone is a communication "to the public".[19] This decision is currently the subject of an application for judicial review. The application challenges both the Board's conclusion and the proposition, which was conceded before the Board, that such a transmission is a "communication".[20]

[92] In the matter before us, both propositions are challenged. In effect, the objectors rely on the arguments that are contained in the application for judicial review of *SOCAN 24*.

[93] We find the four quotations in paragraphs 88 to 90 compelling. We agree with what the Board said in 2006 about the public nature of Internet transmissions in general, and of ringtones in particular; we find it equally applicable to downloads. Given that the issues are now raised directly before the Federal Court of Appeal and indirectly before us, and given that the objectors in *SOCAN 24* chose not to debate before the Board a conclusion which they now dispute before the Federal Court of Appeal, we feel compelled to deal with the arguments.

[94] First, the transmission of a download over the Internet communicates the content of the download. Arguments advanced to challenge the proposition that the transmission of a download does not involve a communication are neither convincing nor relevant. The statement of the Supreme Court of Canada according to which a work has necessarily been communicated once the end user *possesses* a musical work that was not there before, clearly targets downloads, not streams. The statement of the Federal Court of Appeal according to which "music is communicated when it is received on the computer of the end user who requested its transmission, whether or not it is in fact ever heard", makes it clear that music that cannot be heard at the time of transmission (i.e., a download, not a stream) is communicated nevertheless. Both statements support the proposition that a work is communicated even if it is not used or heard at the time of the transmission or indeed ever.

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[19] *SOCAN 24* at paragraphs 47 to 71.

[20] Challenging by judicial review an issue that was conceded before the Board might trigger the application of certain principles governing collateral attacks of administrative decisions that the Court will no doubt examine. Others may wish to keep in mind the practical consequences of such a course of action. If a legal proposition that is conceded before the Board can be examined on judicial review, the Board will have no choice but to test every legal principle underpinning every decision it makes, including principles that no one challenged. The Board would then insist on the parties providing, no doubt at substantial expense, the evidentiary base required to address every single issue: see for example, *SOCAN 24*, at paragraph 38, where the Board decided the issue of whether a ringtone constitutes a substantial part of a work as contemplated by subsection 3(1) of the *Act* to avoid just such a challenge.

[95] Attempts to distinguish streams from downloads are based on technical and legal assumptions that are incorrect. Both are broken down into packets and transmitted, on request, to each end user individually, in separate transmissions and at different times.[21] Neither is audible during the communication. Both must be stored, even if only temporarily, before they can be played. The only difference is that a stream is programmed to appear to be erased as it is played,[22] while a permanent download is not.[23] If the transmission of a download does not involve a communication, then neither does the transmission of a stream. This would mean that CBC does not communicate the news items it posts for later webcasts or the contents of its broadcast signal when it is simulcast. This would also mean that none of the items in proposed Tariff 22 has any legal foundation whatsoever.

[96] Therefore, from a copyright perspective, common sense dictates that the content of a download is communicated when it is received, whether or not it is ever used, just as the content of a fax is communicated when it is received, whether or not it is ever read. *CCH Canadian* makes it clear that any fax transmission is a communication, whether private or public. Since a fax transmission normally results in the delivery of a physical copy, *a fortiori* the delivery of a digital copy (the download) must also involve a communication.[24]

[97] Second, the transmission of a download to a member of a public is a communication to the public. Downloads are "targeted at an aggregation of individuals".[25] They are offered to anyone with the appropriate device who is willing to comply with the terms dictated by the person who supplies the downloads. One or more transmissions of the same work, over the Internet, by fax or otherwise, to one or more members of a public each constitute a communication to the public. Any file iTunes offers to its clients is communicated to the public as soon as one client "pulls" the file.

[98] The proposition that a communication is not to the public unless recipients share a simultaneous (or near-simultaneous), common experience is incompatible with the notion that a

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[21] The fact that each user receives a separate set of packets explains the limitations that stations must put on the number of persons who can access their simulcast at the same time, unless they incur increased bandwidth costs: see, for example, the testimony of Mr. Linney, transcript at page 516.

[22] We say "appear to be" because streamed files may be stored for some time in a temporary Internet files folder.

[23] Interestingly, as we noted at paragraph 13, a limited download does contain instructions that prevent the use of the file if the subscription is not renewed.

[24] An American court recently ruled that the transmission of a musical file does not involve a "performance": *United States* v. *American Society of Composers, Authors and Publishers, et al.*, No. 41-1395, (S.D.N.Y. April 25, 2007). That decision is not persuasive in Canada. The American Copyright Act centres on the notion of "performance" which is significantly different from the Canadian notion of communication. The American definition of performance expressly provides that a remote performance can occur only if there is an audible rendition at the time of delivery. The Canadian definition of communication contains no such express requirement.

[25] *CCH Canadian Ltd. v. Law Society of Upper Canada* (C.A.), 2002 FCA 187 (hereafter, *CCH Canadian (FCA)*) at paragraph 100.

file is communicated even if it is never opened. It runs contrary to the statement of the Federal Court of Appeal according to which "a series of sequential transmissions may infringe the right to communicate to the public."[26] It also challenges common sense: if the proposition were true, the content of a learned paper posted on the Internet would not be communicated to the public if it was read (on screen or after being downloaded) by several persons but at vastly different times. In effect, to require simultaneity or commonality of experience would lead to the absurd result that most of what is viewed or heard by hundreds or even thousands of Internet users would involve private communications within the meaning of the *Act*.

[99] Third, Internet transmissions are not just another form of delivery, for the simple reason that paragraph 3(1)(*f*) of the *Act* specifically targets communications *by telecommunication*.[27] While the notion of telecommunication itself must be interpreted in a way that takes account of technological developments,[28] any attempt to compare delivery of music online with delivery of music on physical media is inherently flawed from a copyright perspective. Sending a music file over the Internet is protected by the *Act*; sending a music CD in the mail is not.

[100] Fourth, SOCAN members are not double dipping. The communication and reproduction rights are separate rights, often owned by separate persons, administered through separate channels and subject to separate regimes. The person who copies a work to effect a broadcast of that work "commits two torts"[29] and should pay for both acts. The same should hold true when the sequence is inversed and someone communicates a work to a member of the public with a view to providing that person with a copy of the work.

B. IS OFFERING PREVIEWS FAIR DEALING FOR THE PURPOSE OF RESEARCH WITHIN THE MEANING OF SECTION 29 OF THE *ACT*?

[101] All music sites that offer downloads allow users to listen by way of a preview to an excerpt of a work. This preview is used either to determine whether the track suits the user's tastes or to verify that the track is the one the user wants to buy. On average, a buyer examines 10 previews before purchasing a track. Many sites that sell physical CDs also offer previews.

[102] The availability of previews raises two questions. The first is essentially economic and concerns whether their availability and use should attract compensation over and above what is paid for a download or a CD. The second is legal and concerns whether the way in which services deal with previews involves a protected act under the *Act*. Although none of the parties addressed the legal issue directly, we must deal with it.

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[26] *CCH Canadian (FCA)* at paragraph 101; *CCH Canadian (SCC)* at paragraph 78.
[27] *SOCAN 24* at paragraph 70.
[28] *SOCAN v. CAIP (FCA)* at paragraph 122.
[29] *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] 2 All E.R. 1496 (CA), at p. 1507, per Greene L.J. as cited in *Bishop v. Stevens*, [1990] 2 S.C.R. 467 at 477f.

[103] Section 29 of the *Act* provides that fair dealing for the purpose of research or private study does not infringe copyright. The notion of fair dealing was examined extensively by McLachlin C.J.C. in *CCH Canadian (SCC)*. She started by recasting the nature of the fair dealing "exception" in these terms:

> [48] [...] Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."

[104] The Chief Justice then outlined what is involved in claiming fair dealing generally, and fair dealing for the purpose of research in particular:

> [50] In order to show that a dealing was fair [...], a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair.
>
> [51] The fair dealing exception [...] is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research." Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.

[105] Chief Justice McLachlin also referred to a list of factors which Linden J.A. had proposed to help determine whether a dealing is fair:

> [53] At the Court of Appeal, Linden J.A. acknowledged that there was no set test for fairness, but outlined a series of factors that could be considered to help assess whether a dealing is fair. Drawing on the decision in *Hubbard*, *supra*, as well as the doctrine of fair use in the United States, he proposed that the following factors be considered in assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.

[106] She concluded her analysis this way:

> [60] To conclude, the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair. These factors may be more or less relevant to assessing the fairness of a dealing depending on the factual context of the allegedly infringing dealing. In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.

[107] The Chief Justice then found that a person who facilitates the fair dealing of another may avail herself of section 29 in one of two ways:

> [63] [...] Section 29 of the *Copyright Act* states that "[f]air dealing for the purpose of research or private study does not infringe copyright." The language is general. "Dealing" connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not un duly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.
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> [64] [...] although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process.

[108] In this instance, our only concern is whether the way in which services deal with previews constitutes fair dealing for the purpose of research. Services that supply previews do not conduct research. It must therefore be demonstrated that they supply previews with the view to facilitate the research of others. Only then can it be argued that previews are offered "for the purpose of research".

[109] Section 29 of the *Act* only applies to research and private study. The Supreme Court of Canada has made it clear that "research is not limited to non-commercial or private contexts."[30] Planning the purchase of a download or CD involves searching, investigation: identifying sites that offer those products, selecting one, finding out whether the track is available, ensuring that it is the right version or cover and so on. Listening to previews assists in this investigation. If copying a court decision with a view to advising a client or principal is a dealing "for the purpose of research" within the meaning of section 29, so is streaming a preview with a view to deciding whether or not to purchase a download or CD. The object of the investigation is different, as are the level of expertise required and the consequences of performing an inadequate search. Those are differences in degree, not differences in nature.

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[30] *CCH Canadian (SCC)* at paragraph 51.

[110] It is not sufficient, however, that the dealing be for the purpose of research for section 29 to apply. The fairness of the dealing must be assessed according to the factors outlined by Linden J.A. in *CCH Canadian (FCA).*

[111] The first factor is the purpose of the dealing. If the user's dealing is for the purpose of research, supplying previews with a view of facilitating that purpose satisfies this factor as long as reasonable safeguards are in place to ensure that the user's dealing in previews is fair (for example, that it is not a substitute to the purchase of the track). The record of these proceedings shows that such safeguards are in place. Previews are streamed. They are not exchanged on P2P networks unless they are hacked. They offer an excerpt of the work that is long enough for the user to do his research, but short enough and of a sufficiently degraded quality that it cannot replace the complete work.

[112] The second is the character of the dealing. Listening to an excerpt of a track to decide whether to purchase it or not is generally a fair dealing. So is facilitating that activity.

[113] The third is the amount of the dealing. Streaming a preview to listen to it once is a dealing of a modest amount, when compared to purchasing the whole work for repeated listening. Helping the user to decide his course of action with respect to a purchase of the whole file is presumptively fair.

[114] The fourth is the possible alternatives to the dealing. These alternatives are not apparent. Inciting users to resort to P2P networks would create difficulties that need not be discussed here. Listening to a preview probably is the most practical, most economical and safest way for users to ensure that they purchase what they wish. And as the Supreme Court of Canada noted, the availability of a licence is not relevant to deciding whether a dealing is fair.[31]

[115] The last two factors are the nature of the work and the effect of the dealing on the work. Musical downloads offered by services are objects of commerce. Anything that is done to increase the probability of sales accords with the nature of the work. Offering previews encourages sales of downloads, which in turns benefits copyright owners.

[116] We conclude that generally speaking, users who listen to previews are entitled to avail themselves of section 29 of the *Act*, as are those who allow them to verify that they have or will purchase the track or album that they want or to permit them to view and sample what is available online. Some users may use previews in a manner that does not constitute fair dealing;

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[31] *CCH Canadian (SCC)* at paragraph 70.

this does not compromise the position of the services, so long as they are able to show "that their own practices and policies were research-based and fair".[32]

C. IS THERE ANY LEGAL IMPEDIMENT TO CERTIFYING THE TARIFF STARTING IN 1996 AS ORIGINALLY FILED OR AS NOW PROPOSED? (RETROACTIVITY)

[117] CAB concedes that the Board has the power to certify a tariff that takes effect in 1996, but argues the Board cannot certify tariffs which are potentially more prejudicial than the tariff originally sought by the collective. There is no need to address this issue. The tariff will provide that royalties will be capped to what was requested in the proposed tariffs.

[118] The proposed tariffs for 1996 to 2005 target communications by "telecommunication services" to "subscribers". The tariff as proposed now targets communications by "online music suppliers" to "users". CAB, CRIA and Apple argue that the notion of user is wider than that of subscribers, which presuppose "specific arrangements for participation in return for a fee".[33] From that, they conclude that the tariff for 1996 to 2005 can apply only to subscriber-based services. We disagree. The proposed tariffs for 1996 to 2005 define "subscriber" as "a person who accesses or is contractually entitled to access the services or content provided by the telecommunication service in a given month". That definition does not presuppose a formal contractual arrangement (accesses or is contractually entitled to access) or the payment of a fee. Neither are the notions of subscription and payment inextricably linked; users commonly "subscribe" to a variety of services for free in the virtual and material worlds. For these reasons, we find that the proposed tariffs for 1996 to 2005 target all the uses that SOCAN now seeks to include in the certified tariff.

[119] SOCAN undertook not to pursue small users retroactively. SOCAN will however claim royalties from large users starting in 1996. Each situation will be looked at on a case by case basis by SOCAN. Common sense and economics will prevail.[34]

D. ARE SERVICES WHOSE SERVERS ARE LOCATED OUTSIDE CANADA SUBJECT TO THE TARIFF?

[120] *SOCAN v. CAIP (SCC)* settles this issue. Using a server located outside of Canada does not of itself isolate a content provider from liability under the tariff. The applicability of the *Act* to communications that have international participants will depend on whether there is a real and substantial connection between Canada and the communication. According to Binnie J., "a

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[32] *CCH Canadian (SCC)* at paragraph 63.
[33] *Brief on Legal Issues*, Exhibit CAB-8 at paragraph 30.
[34] Transcript, pages 938 to 940.

telecommunication from a foreign state to Canada, or a telecommunication from Canada to a foreign state, 'is both here and there'."[35]

[121] The problem with this proposition is that it requires looking at each communication individually to determine if the connection to Canada is sufficiently strong for the communication to happen "here". In practice, this is impossible to do. As a result, we will have to resort to rough approximations to determine what is included in the tariff and what is not. The proposition also creates the possibility of a "layering of royalty obligations"[36] which might need to be addressed in future proceedings.

E. ISSUES RAISED BY ESA

[122] ESA raised a number of legal issues that can be disposed of succinctly.

[123] Game software may not be music, but that statement misses the point. The communication of software in which music is embedded involves the simultaneous communication of the music, just as the communication of a television program containing music involves the simultaneous communication of the music it contains.

[124] ESA argues that all music used in video games is pre-cleared. Given the difference that exists between Canadian and American copyright legislation, it may well be that music ESA's members think is pre-cleared is not, at least for Canada.

[125] ESA is incorrect in stating that if SOCAN fails to adduce sufficient evidence, the Board is unable to determine what is a fair tariff. If there is a potentially protected use of SOCAN's repertoire, SOCAN is entitled to a tariff. The lack of evidence may affect the amount of the tariff, but not its existence. It is just as incorrect to advance that *de minimis* uses do not justify the certification of a tariff. The absence of a tariff deprives SOCAN of a recourse.

[126] Finally, ESA argues that the solution to the use of music in games should be contractual, not regulatory. This cannot be so, at least within the context of the SOCAN regime. As the Board stated in the past, an argument can be made that agreements between SOCAN and users are void as a matter of public policy.[37]

VI. ECONOMIC ANALYSIS

[127] We turn now to the economic analysis to establish the tariffs proposed by SOCAN.

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[35] *SOCAN v. CAIP (SCC)* at paragraph 59.
[36] *SOCAN v. CAIP (SCC)* at paragraph 152 (LeBel J. dissenting).
[37] See decision of the Board dated April 21, 2006 certifying *SOCAN Tariff 19 (Fitness Activities and Dance Instruction) 1996-2006*, at pages 5 to 7.

[128] Professor Liebowitz, SOCAN's expert, provided an economic analysis and proposed methodologies to help determine the rates for items 1 (Music Sites), 2 (Audio Webcasts), 3 (Radio Simulcasts), 4 (Audiovisual Webcasts) and 5 (Television Simulcasts). Professor Liebowitz essentially used a methodology that consisted of selecting the best available proxy and then made adjustments to it based on an analysis of the specific characteristics of each market.

[129] Professor Liebowitz's analysis of item 1 is based on the comparative profitability of the digital market and the traditional CD market. For items 2, 3, 4 and 5, he examined webcasts and simulcasts and concluded that sunk costs[38] contribute to a significantly more profitable market on the Internet than in the traditional media.

[130] Professor Mathewson, CAB's expert, provided an economic analysis for the proposed rates for items 2, 3, 4 and 5. He also examined the relative importance of music on websites to determine the rate base of the tariff.

[131] Professor Brander, the expert for CRIA and Apple, provided an economic analysis with respect to the rates for item 1. He also examined the characteristics and the profitability of the digital market to determine the tariff rate applicable to music sites.

[132] Although Professors Liebowitz, Mathewson and Brander agree in most cases on the choice of proxies, they disagree on the adjustments that must be made for a number of different reasons that are specific to each item which we will examine in detail.

A. ONLINE MUSIC SERVICES

[133] We start our analysis by looking at the price to be paid for the communication of permanent downloads, limited downloads and on-demand streams.

i. Permanent Downloads

[134] Professor Liebowitz starts from the premise that since digital downloads and physical CDs are close substitutes, the best proxy available for evaluating the rights involved in the former is the rate payable for the mechanical reproduction of the master recording of the latter. This rate, which is 7.7¢ per track, is agreed to in the MLA.

[135] Professor Liebowitz then makes a series of adjustments to the proxy to reflect the very different characteristics of the download industry. He recognizes that the MLA rate is a payment for the reproduction right only and that, unlike downloads, no communication right is involved in the sale of a physical CD. The adjustments he makes to the MLA rate proxy therefore result in a

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[38] *Economic Analysis of SOCAN Tariff 22*, Exhibit SOCAN-9 at page 6.

total value for the bundle of rights. This necessitates establishing sharing options to distribute value between the communication and reproduction rights.

[136] The first adjustment is based on comparing the profitability of record companies on the Internet and in their traditional market. Professor Liebowitz contends that record companies make significantly greater profits when selling digital downloads than when selling physical CDs. According to him, because record companies save on manufacturing costs (not needed in the digital environment), on distribution, sales and overhead (DSO) costs (at least partly) and on reproduction royalties (retailers, not the labels, pay the royalties), their profitability increases many times over. Part of these additional benefits should be returned to the rights owners. His assumption is that the increase in profitability reflects an increased value of sound recordings and therefore the increase in the price paid for the bundle of rights should be the same.

[137] The second adjustment of Professor Liebowitz concerns previews. In his opinion, this feature adds value, a share of which should go back to rights owners. In support of this position, Professor Liebowitz relies on the Erin Research studies, which estimate that the value of previews to consumers could be as high as 40 per cent, and even more, and he used a conservative value of 30 per cent. This number is further divided in equal parts between consumers, sellers of downloads and owners of the communication right, resulting in a value for previews of 10 per cent for rights owners. Professor Liebowitz also explores scenarios with a value for previews of 5 per cent. These value rates are simply added to the value of the bundle.

[138] Professor Liebowitz makes a third adjustment to arrive at what he calls “parity rates”. This adjustment recognizes that the additional payment made for the bundle of rights will have a negative impact on the profit rate of the record industry. Parity rates are thus defined as payments for the bundle of rights that are equal, in percentage terms, to the net gains for the sound recording right owner (or the profit rate of the record industry).

[139] The final step in the analysis consists in assuming various sharing hypotheses between the communication and the reproduction rights. In the end, Professor Liebowitz concludes that the royalty rate for the communication right in permanent downloads should be between 8.9 and 14.6 per cent.

[140] Professor Brander disagrees with Professor Liebowitz on a number of points. He starts from the premise that downloads are not a “new market” but rather a substitute for an existing physical market, and because the productivity of SOCAN members has not changed in the substitute Internet environment, no additional payments should be awarded to SOCAN rights owners. The addition of a new communication right in the Internet environment does not create an additional economic value.

[141] Professor Brander also argues that Professor Liebowitz erred by focusing only on the benefits of delivering tracks through the Internet rather than on CDs, ignoring increased costs

such as bandwidth, computer hardware and software, formatting, storing, delivering and tracking systems, etc. These additional costs have a severe impact on the profitability of the digital business.

[142] Professor Brander also argues that previews have no value other than the indirect benefits they create by increasing sales, that their value is already fully reflected in the price of the download and that the Pollara study shows that their value is close to nothing in any event. The ability to preview exists in the physical environment; rights owners do not get compensated for this. Also, in any other market, allowing customers to learn about the product normally provides no specific return to underlying producers in and of itself. Any return arises indirectly from additional sales.

[143] Professor Brander proposes a different methodology to establish the rate for the communication of musical works. He agrees with Professor Liebowitz that the best available proxy is the MLA rate but then relies on a study prepared by Mr. Stohn for *CSI – Online Music*[39] and concludes that the current MLA rate of 7,7¢ per track translates into a percentage of retail sales (of individual tracks and albums) of about 6 per cent of Internet download revenues.

[144] According to Professor Brander, the only difference between the physical CD market and digital downloads is in the mode of distribution – essentially a technological issue. The final product enjoyed by the consumers is the same; in both cases, the songs might end up on iPods, MP3 players, CDs or other media. Therefore, the total rate for both the communication and the reproduction rights in the digital environment should replicate the amount paid in the physical environment. Based on his analysis, Professor Brander proposes that the combined CSI and SOCAN royalty rates be in the order of 6 per cent to 8 per cent.

[145] We agree with the general approach proposed by Professor Liebowitz, though we find the need to correct the model in certain respects and reject some of the adjustments he proposes.

[146] First, we agree that the appropriate proxy for the price to pay to use a musical work in a download is the price paid to reproduce a musical work onto a CD.

[147] Second, we reject the objectors' contention that the rate payable for the bundle of rights in downloads should be the same as the rate for the mechanical reproduction of physical CDs. The Board has stated on many occasions that the use of a new right, or a new use of an existing right, must be compensated for at its fair value.[40] If downloading music from the Internet involves a

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[39] *Stohn Report*, Exhibit Coalition-11.A.

[40] Decision of the Board dated October 20, 2006 certifying the *NRCC Background Music Tariff, 2003-2009*; decision of the Board dated March 28, 2003 certifying the *CMRRA/SODRAC Inc. Commercial Radio Tariff, 2001-2004*; and *SOCAN 24*.

communication to the public by telecommunication, it must be compensated for even though the end product to the consumer is the same.

[148] Third, we agree with Professor Liebowitz that the best way to account for the value of the communication right is to look at the profitability of the record industry. We also agree with him that the record companies' profitability is greater in the digital environment than in the physical CD market. The evidence demonstrates that the increase in profitability is due in part to the efficiencies that are achieved by delivering music as digital files rather than as physical discs. The bundle of rights in musical works should get a share of that increase.

[149] In *CSI – Online Music*, CSI presented a similar argument to justify its proposed rate for downloads. It argued that because record labels were able to negotiate a high royalty rate from online music services, CSI should also benefit. The proposed rate was derived by applying to online music services the ratio between the royalties paid for the reproduction of musical works and sound recordings in the ringtone market. The Board rejected this approach for a number of reasons. First, ringtones could not be used as a proxy for downloads because the two markets are not even distant substitutes. Second, the ringtone market was found to be not mature and stable enough.

[150] Professor Liebowitz used a somewhat different approach. He proposed to increase the transfer for musical works based on the increased profitability of record companies in the same market, downloads. Furthermore, the download market has more potential for future growth and longevity than the ringtone market and is more likely to become a dominant business model. By contrast, the market for self-standing ringtones may well be short lived. It is possible to rip part of a download containing a complete musical work to create a ringtone; it is not possible to use the excerpt contained in a ringtone to create a file containing the complete work.

[151] Professor Liebowitz calculated that the profits of record companies represent 7 per cent of revenues in the CD market and several times more for downloads, depending on whether one assumes that all or half of the DSO costs are saved. He arrived at these results by using iTunes' costs for the second quarter of 2006. The objectors rightly argued that costs for the full year of 2005 would be more reliable and that the additional costs associated with Internet downloads should be taken into account.

[152] Mr. Jones and Ms. Prudham provided information on the various expenses that are associated with delivering music online. These expenses include costs associated with putting the digital delivery system in place, with digitization of the back catalogues, the changing of formats and the development and support of online sales.

[153] However, as noted by Professor Liebowitz in his reply evidence, there are a number of problems with this information. First, many of these expenses must be amortized over a number of years. Second, some of the expenses also relate to and must be attributed to the sales of CDs,

for example, the expense for digitization or fighting piracy. The result is that total yearly expenses specifically dedicated to digital downloads probably are significantly lower than the numbers initially reported by the witnesses. Neither of those witnesses, nor Professor Brander provided us with enough information to be useful. We are therefore unable to estimate in any reliable way the costs incurred by the record companies for Internet downloads.

[154] Based on this evidence, we find that the record companies' profitability is 7 per cent in the CD market and [*CONFIDENTIAL*] per cent in the digital environment. This latter finding is based on two conclusions. First, we assume that only half of DSO costs are saved, which we find more realistic than Professor Liebowitz's estimate. Second, for the reasons given by Professor Liebowitz, the additional costs incurred for downloads are relatively modest. Had CRIA and Apple provided detailed, reliable and precise information on which we could have based our calculations, our conclusions might have been different.

[155] We do not agree with SOCAN that the increase in profitability impacts only the value of the bundle of rights. In a competitive market, all the inputs used in the process should share the benefits of the increased profitability. Thus, the value of the bundle of rights should only increase by an amount equal to the increase in profitability multiplied by the current share of total expenses represented by the bundle.

[156] The increase in profitability is [*CONFIDENTIAL*] percentage points, from 7 to [*CONFIDENTIAL*] per cent of retail revenues. We now need to identify all of the inputs to which this increase will be distributed. According to Professor Liebowitz's Table 4, record companies' revenues make up [*CONFIDENTIAL*] per cent of total retail revenues. Therefore, record companies' total costs for digital downloads is [*CONFIDENTIAL*] per cent of retail revenues, the difference between revenues ([*CONFIDENTIAL*] per cent) and profits ([*CONFIDENTIAL*] per cent). These costs include promotion and marketing, recording and video, DSO, a minimal allowance for the additional costs incurred for downloads, and the artist and songwriting payments. This percentage does not include the amount paid for the mechanical right because, in Canada, the retailers of downloaded music are responsible for paying it.

[157] Then we must add an additional amount to the total costs to account for the fact that "normal profits" should also receive an additional remuneration from the digital downloads, since profit is also considered to be compensation for the use of an input. We will use the 7 per cent rate of profit in the CD market as a proxy for normal profits. The costs now total [*CONFIDENTIAL*] per cent ([*CONFIDENTIAL*] per cent + 7 per cent) of retail revenues.

[158] In *CSI – Online Music*, the Board determined that the mechanical rate of 7.7¢ payable on physical CDs is the equivalent of 8.8 per cent for digital downloads. Thus assuming record companies were paying this rate for the reproduction right, the share of the total cost of reproduction right is [*CONFIDENTIAL*] per cent (8.8 / ([*CONFIDENTIAL*] + 8.8)). The result is

that 3.4 ([*CONFIDENTIAL*]) additional percentage points should be attributed to the value of the bundle of rights for musical works resulting in a total value of 12.2 per cent for the bundle.

[159] Fourth, we see no need to adjust the rate to account for the use of previews in selling downloads. We have already concluded that services that provide previews usually can avail themselves of the fair dealing exception. We have also found the Erin studies on which Professor Liebowitz relies are of doubtful accuracy. Even if this were not so, we would not make an adjustment. The added value of previews is in triggering sales that would not occur if previews were not offered. Everyone gets a share of those extra sales. Also, previews cost money. These costs, like any other costs, can only be recouped when a download actually gets sold.

[160] The final adjustment suggested by Professor Liebowitz is the parity adjustment. It takes into account the subsequent (and circular) impact that the introduction of this new communication right tariff has on the profitability of the record companies (which is the proxy for the tariff itself). We do not agree that such an adjustment is warranted. First, as noted by Professor Liebowitz, the record companies are not responsible for paying the communication fee in Canada. Second, the amount the record industry receives from the retailers is calculated in percentages. Therefore, its profitability is unlikely to be affected by an increased payment made by the retailers on account of the communication right.

[161] The final rate we find for the bundle of rights therefore is 12.2 per cent. Having certified the reproduction right rate at 8.8 per cent before discount, the rate we establish for the communication right of permanent downloads is 3.4 per cent.

[162] It is useful at this point to draw parallels with the Board's analysis in the recent decision in *SOCAN 24*. In that decision, the Board used a ratio analysis to establish the value for the communication right in relation to the value of the reproduction right. The Board found that a ringtone was first and foremost a reproduction, which is the object of the transaction. The communication right was only used to deliver the reproduction. Other modes of delivery that did not use the communication right were potentially available.

[163] In *SOCAN 24*, the Board compared ringtones with commercial radio. There, the ratio of the value of the communication right to the reproduction right was set at 3:1, because of the ancillary nature of the reproduction right. For the ringtone market, the Board found that even though the communication right was ancillary to the reproduction right, it should be valued at more than one-third by reason that the communication right is crucial to the ringtone business model. In addition, the chances of users changing their business model and ceasing to use the communication right to avoid the tariff was found to be unlikely. On this basis, the Board decided that the value of the communication right should be equal to one-half the value of the reproduction right.

[164] Had we used a ratio analysis and applied it to the proxy we use in this instance, we would have used a 2:1 ratio and arrived at a rate of 13.2 per cent (instead of 12.2 per cent) for the bundle of rights. We conclude that these rates are sufficiently close to validate our analysis.

[165] The rate we set for the communication right creates a ratio of about 28:72 for each right in the bundle. For revenue distribution purposes in the case of permanent downloads, the International Confederation of Societies of Authors and Composers (CISAC) is proposing a ratio of 25:75. Even though we do not believe that this ratio should be used as a proxy, we nevertheless find it useful to note that it is similar to the ratio obtained here.

ii. Limited Downloads

[166] Professor Liebowitz argues there is no reason to believe that the share of music in the total value to the consumers should be different for limited downloads than for permanent downloads and, as a result, the total value of the combined communication and reproduction rights should be the same for both.

[167] Professor Liebowitz concedes that previews for limited downloads have less value than for permanent downloads, by reason of the nature of the business model. He also reduces the value of the reproduction right by one-third to be consistent with the position adopted by the parties and the finding of the Board in *CSI – Online Music*. However, Professor Liebowitz finds no reason for a lower bundle price for limited downloads than for permanent downloads and, as a result, the reduction in the value of the reproduction right translates to a higher value for the communication right, ranging from 12.1 to 15.5 per cent. SOCAN nevertheless proposes that the rate of 10 per cent apply to both permanent and limited downloads.

[168] Professor Brander argues that limited downloads are less profitable than permanent downloads by reason that the value to the consumer is more limited and therefore the royalty rate for limited downloads should be lower than for permanent downloads. Professor Brander contends the royalty rate for limited downloads in this instance be set at two-thirds of the rate for permanent downloads to be consistent with the approach adopted by the Board in *CSI – Online Music*.

[169] We agree with Professors Liebowitz and Brander that limited downloads are similar to permanent downloads. We also agree with Professor Liebowitz that the bundle of rights is of equal value, as a percentage of retail, for both. Consequently, we establish the value of the bundle for limited downloads at 12.2 per cent, which is the same rate as the bundle for permanent downloads. In *CSI – Online Music*, the Board agreed, with some reluctance, with the position submitted by all parties and set the value of the reproduction right for limited downloads at two-thirds of the value for permanent downloads. In our opinion, because the value of the bundle is the same for permanent and limited downloads, the lower rate for the reproduction

right results in a higher rate for the communication right which is equal to the difference between the 12.2 per cent bundle value and the 5.9 per cent reproduction right for limited downloads. We therefore establish the rate for the communication of limited downloads at 6.3 per cent.

[170] The combined value of the communication and reproduction rights for limited downloads is equal to 12.2 per cent, 51 per cent of which represents the value of the communication right. This is about equal to the 50 per cent CISAC is proposing for revenue distribution purposes.

iii. On-Demand Streaming

[171] Professor Liebowitz proposes that the methodology he developed for permanent downloads be used, subject to two adjustments, for on-demand streaming. First, no value should be added for previews because on-demand streaming is a form of preview. Second, he assumes the reproduction right is of relatively low value and, as a result, applies a 3:1 ratio in favour of the communication right. He obtains a range of 15.6 to 17.9 per cent. SOCAN proposes a rate of 16.7 per cent.

[172] Alternatively, SOCAN proposes a 3:1 ratio to the rate established by the Board for the reproduction of on-demand streaming. This ratio, it contends, would reflect the relatively minor role of the reproduction right for on-demand streaming. The Board set the rate for the reproduction of on-demand streaming at 4.6 per cent, which would result in a communication rate of 13.8 per cent.

[173] Professor Brander contends that to be consistent with *CSI – Online Music*, the communication rate for on-demand streaming should be one-half the rate established for permanent downloads. This would result in a rate of approximately 2.0 per cent.

[174] Again, we see no reason to believe that the bundle of rights is less valuable in on-demand streams than in permanent or limited downloads. The difference in each type of product is in the relative value of both rights. The consumer who purchases a permanent download buys a reproduction that is delivered through a communication. For limited downloads, the communication and reproduction rights are about equally important as a result of admissions made about the value of the reproduction right. In on-demand streaming, the consumer purchases the communication; the reproduction only facilitates the communication. Applying the formula we used earlier, we conclude that the rate for the communication right in on-demand streams is (12.2 − 4.6) 7.6 per cent. The communication right receives 62 per cent of the price paid for the bundle; CISAC recommends a ratio of 50:50.

iv. Rate Base

[175] SOCAN requested that the rate base consists of the greater of (a) gross revenues of the service, including revenues from the sale of downloads (whether permanent, limited or on-

demand streams) and advertising on the service's website, and (b) gross operating expenses of the service.

[176] The objectors contend that SOCAN's approach to alternate between the greater of revenues and expenses has no basis in economics and is inequitable. We agree. In all other tariffs certified by the Board, a user unable to generate a sufficient amount of revenues will pay the minimum fee, when such a fee exists. That is done here. All rates apply to a revenue base, and a sufficiently low revenue will trigger the payment of the minimum fee. It is entirely justified for a start-up company who is unable to generate enough revenues to pay the minimum fee until it is profitable enough to begin paying the full rate.

[177] The objectors also argue that the rate should be based on the amount paid by the consumer for a download, or the amounts paid by subscribers for the service, similarly to the *CSI Online Music Services Tariff*. For the reasons mentioned in *CSI – Online Music* (paragraph 109), we agree with the objectors on this point. In particular, because we do not know the extent to which advertising revenues are attributable to the use of SOCAN's music, we believe it is appropriate to use as the rate base the amount paid by the consumers or the subscribers.

v. Minimum Fees

[178] In its initial tariff, SOCAN proposed a minimum monthly fee of $200 for permanent downloads, limited downloads and on-demand streaming. In oral argument however, SOCAN significantly revised its proposal, stating its agreement with the approach used by the Board in *CSI – Online Music* to establish minimum rates.

[179] CRIA and Apple strongly object to the establishment of any minimum fees for music sites, arguing that they would handicap the industry which faces very aggressive competition from free downloads.

[180] We are keenly aware of the objectors' submissions. Indeed, temporary measures to ensure that the tariff is phased in gradually will be applied. However, in our opinion, minimum fees should be established here as in *CSI – Online Music*, to ensure that rights holders do not subsidize business models.

[181] We agree with SOCAN's submission regarding the establishment of minimum fees and will therefore use the same methodology as used in *CSI – Online Music*. There, the minimum fee for permanent downloads was established at two-thirds of what the rate generates for a 99 ¢ track. Here, the rate for permanent downloads is 3.4 per cent, generating 3.4 ¢. The minimum fee is therefore set at 2.3¢ for individual tracks.

[182] In *CSI – Online Music*, a lower minimum fee was established to take into account the fact that albums sometimes contained a large number of individual tracks. The minimum fee was

established at two-thirds of the royalties generated when the rate is applied to the average price of an album containing the average number of tracks, i.e. 13. Using the same methodology, we obtain a rate of 1.7¢ per track that is part of a bundle. That is the rate we certify.

[183] For limited downloads, a distinction was made in *CSI – Online Music* between subscriptions that authorized the copy of a file on a portable device and those that do not. Minimum fees were calculated as two-thirds of the rate applied to the average monthly subscription fees. These fees were $9.50 when reproduction on a portable device is not authorized and $14.50 when it is. If one applies the same methodology using the 6.3 per cent rate, minimum fees of 39.9¢ and 60.9¢, respectively are arrived at. Those are the minimum monthly fees per subscriber we certify for limited downloads when reproduction on a portable device is not authorized (39.9¢) and authorized (60.9¢).

[184] For on-demand streaming in *CSI – Online Music*, the Board applied the methodology suggested by CSI, which consisted of setting the minimum fee as a function of the ratio between the percentage rate for on-demand streaming and limited downloads. If we apply this methodology here, it results in a minimum fee of 48.1¢ [41] per month, per subscriber. That is the minimum fee we certify.

vi. Ability to Pay

[185] We believe that a phase-in discount is equally justified here as it was in *CSI – Online Music*. As was said then, the industry is in its infancy, with relatively low profit margins. Online music services are able to pay the tariff, but could benefit from a phase-in discount. As we did in *CSI – Online Music*, we will apply a 10 per cent discount only for the life of this tariff. The resulting rates which we certify are shown in the annexed table.

VII. TARIFF WORDING

[186] On September 27, 2007 we asked the parties' views about the wording of this part of the tariff. More specifically, we asked what adjustments would be required if we were to use the *CSI – Online Music Services Tariff* as the starting point.

[187] The parties noted that certain provisions of the CSI tariff would be redundant or irrelevant, mostly because SOCAN represents essentially the world's repertoire, while CSI does not. SOCAN also asked for a few changes that need not be mentioned here.

[188] For their part, the Cable/Telcos argued that the differences between CSI and SOCAN in the nature of the licences and of the repertoires are such that the tariff should instead reflect the

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[41] (7.6 per cent / 6.3 per cent) × 39.9 ¢.

wording of SOCAN Tariff 24 (Ringtones). For example, the CSI tariff conveys to the service the right to authorize the copies made by users. This is not needed here. Also, SOCAN may not need as much information to monitor the services' use of protected music, again because SOCAN represents the world's repertoire.

[189] On the whole, we agree with the Cable/Telcos. The tariff formula is the same as for CSI; therefore, some of the elements of the SOCAN tariff must be the same as in the CSI tariff. Thus, since the CSI tariff does not target all on-demand streams, only streams targeted in the CSI tariff are subject to this part of the tariff; others will be dealt with later on. As regards reporting requirements, however, it seems preferable to keep as close as possible to the ringtones tariff.

[190] There are other advantages to this approach. First, SOCAN's proposed tariffs said nothing about reporting requirements until the tariff for 2006; even then, the text remains laconic. Keeping close to the wording of the ringtones tariff avoids imposing terms that are not usual in SOCAN's tariffs and that were not included in SOCAN's proposals. Second, the majority of online music services are also suppliers of ringtones and as such, are familiar with the reporting requirements included in the ringtones tariff. Third, this approach seems suitable for a first tariff dealing with an already past period of time. In the long term, however, we intend to dovetail the terms of tariffs targeting the same activity, unless there are practical reasons for not doing so.

[191] Apple asked that a service have the option to send to SOCAN the same information as it provides to CSI. We agree that this should be so, at least for the period under examination.

[192] ESA commented on the wording of this part of the tariff even though it is not directly concerned by it. More specifically, it asked that no user be required to report information that it does not have or that was not requested by SOCAN in its proposed tariffs. We agree with the first request, but not the second. The period under examination has already ended. Users cannot be expected to provide information that they did not keep, at least this time. Later on, it will become possible to specify in advance the sort of information that a service must provide to SOCAN. On the other hand, we see no reason to dispense a user from providing information that it has and that will help SOCAN to effectively monitor the use of its repertoire and distribute the royalties it collects.

[193] The tariff contains certain transitional provisions made necessary because the tariff takes effect on January 1, 1996, while it is being certified much later. 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. 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 users 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.

Claude Majeau
Secretary General

TABLE

CERTIFIED RATES FOR ONLINE MUSIC SERVICES

	Rates before discount	**Rates certified, after discount**
Permanent Downloads	3.4% of the amount paid by the consumer Minimum fee: 1.7¢ per file in a bundle 2.3¢ per file in all other cases	3.1% of the amount paid by the consumer Minimum fee: 1.5¢ per file in a bundle 2.1¢ per file in all other cases
Limited Downloads	6.3% of the amounts paid by subscribers Minimum fee: 60.9¢ per month, per subscriber, if portable limited downloads are allowed; 39.9¢ if not	5.7% of the amounts paid by subscribers Minimum fee: 54.8¢ per month, per subscriber, if portable limited downloads are allowed; 35.9¢ if not
On-demand Stream	7.6% of the amounts paid by subscribers Minimum fee: 48.1¢ per month, per subscriber	6.8% of the amounts paid by subscribers Minimum fee: 43.3¢ per month, per subscriber