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Members Mr. Justice William J. Vancise
Mr. Stephen J. Callary
Mrs. Sylvie Charron

Proposed Tariffs Considered 22.B to 22.G (Internet – Other Uses of Music) 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] These reasons deal with the second part of Tariff 22 of the Society of Composers, Authors and Music Publishers of Canada (SOCAN). The reasons dealing with the first part, online music services, were issued on October 18, 2007.¹ We postponed dealing with the other uses of music on the Internet, so as to be able to conduct the extensive consultations we expected the wording of the tariff for those uses would require.

[2] These reasons certify the rates for these other uses. As we stated in *SOCAN 22.A (2007)*, these reasons should be read in conjunction with that decision, the descriptive and analytical parts of that decision applying *mutatis mutandis*.

¹ Hereafter *SOCAN 22.A (2007)*.

A. USER-BASED TARIFFS AS OPPOSED TO USE-BASED TARIFFS

[3] Tariffs can be set for given users or groups of users, or according to uses irrespective of who makes the use. Use-based tariffs are generally more responsive to variations in types and amounts of consumption. They generally favour users, who can buy only the rights they need: a restaurant that plays only background music will not pay for a karaoke licence it does not need. This is the approach SOCAN proposed to take in this instance. We have however decided to certify a user-based tariff, for the following reasons.

[4] First, the nature of music uses on the Internet continues to evolve. The list of uses SOCAN sought to target is incomplete; new ones will inevitably surface. A use-based tariff might not adapt to the constantly evolving Internet environment, at least for now.

[5] Second, it might be difficult to match the uses that SOCAN describes to what actually occurs over the Internet. For instance, would someone who transmits an audio signal containing mostly music and some spoken word be similar to pay audio or to commercial radio? Yet the tariffs SOCAN proposed for these items are significantly different.

[6] Third, those who already require a SOCAN licence for their primary activity tend to use music on the Internet essentially to support that activity. The main purpose of the website of a radio station is not to generate revenues, but to stimulate interest in the station's broadcasts.

[7] Our decision to certify a user-based Internet tariff is not to be taken as the approach that we will use for all tariffs in the future. We expect that the relative importance of websites in the overall business strategy of some music users will increase; in time, websites will become for some an independent, significant source of revenue. Existing monitoring tools, that already allow a precise assessment of music consumption, will be further refined; better, cheaper tools will be developed. We will re-examine this issue in the future. As other developments occur, a use-based approach may prove to be more appropriate.

[8] Thus, the following analysis deals with items based on users as we have defined them, rather than uses as proposed by SOCAN. Each user's activities will however be examined in detail.

II. ITEM B – COMMERCIAL RADIO

[9] As is the case with many other users, commercial radio broadcasters use music on their websites in many different ways. First, they generally webcast their conventional radio signal, more or less simultaneously (a "simulcast"). They can also webcast an audio signal, independent of the conventional signal, that may or may not include music. They could also offer audiovisual webcasts, audiovisual downloads, podcasts and games.

A. AUDIO SIMULCASTING

[10] Professor Stanley J. Liebowitz, SOCAN's expert, proposes to use the rate set by the Board for commercial radio as a proxy for the simulcast of a radio station's signal. He contends it is necessary to make an adjustment to reflect the difference in profitability between the two services. This proposed adjustment is based on the notion of sunk costs. In his opinion, the cost of creating the radio programming as well as the administration costs are unaffected by the Internet transmission because the Internet signal is the same as the conventional signal. The removal of the programming and administration costs from the Internet service results in savings of 177.5 per cent as a share of the remaining costs. Professor Liebowitz then attributes half of this increase in savings to the rights owners. If one uses the conventional radio rate of 4.4 per cent, this produces a rate of 8.3 per cent for the webcast of the radio signal.

[11] SOCAN proposes a rate of 8 per cent, to be applied only on revenues generated by the sale of advertising on the websites.

[12] Professor Frank Mathewson, the expert of the Canadian Association of Broadcasters (CAB), argues that new uses for inputs already in use (such as music) should receive royalties in the same proportion as the existing use with the result that the rate to apply to simulcasting should be the same as the rate applying to the conventional radio signal. The only adjustment necessary is to the rate base. When simulcasters earn website-only advertising revenues, Professor Mathewson argues that the existing SOCAN rate should apply only to that portion of the revenues that are associated with music. The Solutions Research Group (SRG) report² found that about 30 per cent of the total number of page views on radio stations' websites consisted of streaming sessions involving either webcasting or simulcasting sessions. Hence, in his opinion, roughly 70 per cent of page views are unrelated to streaming sessions (either simulcasting or webcasting), and website-only revenues should correspondingly be reduced by about 70 per cent before the rate is applied.

[13] We agree that the existing conventional radio tariff rate is the appropriate proxy for the simulcast of the conventional signal. However, we disagree with the adjustment proposed by SOCAN based on Professor Liebowitz's theory that all broadcasting and administration costs are sunk costs, with the result that profitability of the radio station signals simulcast is almost double that of the conventional radio.

[14] Costs can only be considered sunk for a specific, limited period; over time, revenue streams from pre-existing properties become integrated into the overall cost analysis. A short-term increase in profits, based on a sunk cost approach does not justify a rate increase. Only an increase in revenues that would be perceived as relatively permanent, arising for instance, from new, more

² Solutions Research Group, Use and Content of Canadian Broadcaster Websites, Exhibit CAB-4, page 22.

efficient technology, could lead to an increase in the remuneration for all of the inputs, including music.

[15] The adjustment proposed by Professor Mathewson reflects the fact that websites are generally less audio-intensive than radio broadcasts because the former contain a number of pages that have no audio content. Different sections of websites however use sound very differently.

[16] There are three possible sources of advertising revenues arising from different sections of a radio station website: banner advertising generally on the website, banner advertising directly associated with simulcasting and higher conventional advertising rates due to an increased overall audience arising from the webcasting. We find that no adjustment is needed in the case of the last two sources of revenues, because they directly refer to the conventional signal. In fact, SOCAN already receives compensation in respect of the third source of revenue, to the extent that Internet audiences have an impact on the advertising rates that radio stations are able to obtain from advertisers.

[17] The situation is different with respect to general advertising on the website. The evidence, which was reinforced by the demonstrations at the hearing, is that it is possible to go to a radio station's website and never listen to the radio station's signal or more generally to listen to anything. Hence, a reduction will be applied to the rate base to account for these website pages that contain no sound.

[18] We find that the rate payable should be the effective rate applicable to a commercial radio station's conventional signal, 4.2 per cent. This rate will apply only to a proportion of the rate base described later in this decision.³

[19] Commercial radio stations pay only 3.2 per cent of their first \$1.25 million in revenues. In *Commercial Radio, 2005*,⁴ the Board found that "To alleviate the burden the increase in the tariff may impose on smaller, less profitable stations, it is necessary, at least as a temporary measure, to tier the tariff by capping the rate for those stations." *Commercial Radio, 2008*⁵ came to the same conclusion. There is no reason, however, to apply this concession to a radio station's Internet operations. The reasons that led the Board to grant this concession do not apply in the Internet environment. The regulatory burden to which commercial radio is subject imposes costs and limitations that are simply not present in the unregulated Internet environment. Fixed costs are of a different nature and magnitude. There is no "existing" rate to be "capped", temporarily or

³ See paragraph 38.

⁴ [Decision of the Board of October 14, 2005](#) certifying SOCAN-NRCC Tariff 1.A (Commercial Radio) for the years 2003-2007, at page 32.

⁵ [Decision of the Board of February 22, 2008](#) on the re-determination of SOCAN-NRCC Tariff 1.A (Commercial Radio) for the years 2003-2007, at paragraph 91.

permanently. Finally, the rate cap may be temporary. In *Commercial Radio, 2005*, the Board clearly noted that it would be up to the CAB to convince the Board that SOCAN Tariff 1.A (Commercial Radio) should remain tiered after 2007.

B. AUDIO WEBCASTING

[20] Professor Liebowitz analyzed subscription-based and advertising-based audio webcasts to obtain a proposed rate for audio webcasting similar to commercial radio stations. He used as a proxy an average of SOCAN Tariff 1.A rates for high and low music use. He calculated the rate to be approximately 3.8 per cent, and then adjusted it to arrive at a final rate.

[21] Professor Liebowitz made a number of adjustments – including one to account for the fact that there is no on-air talent which is replaced by music, that talk is twice as valuable as music and that there are no station identifications and promotions – which resulted in a rate of between 6.4 to 8.9 per cent.

[22] However, in his reply, Professor Liebowitz agreed that the appropriate proxy is the high radio rate of 4.4 per cent, and that the additional use of music should be valued the same as the existing music use. He later revised his proposed rate for audio webcasting to a single rate of 5.95 per cent.

[23] Professor Mathewson does not agree with Professor Liebowitz’s valuation of music relative to on-air talent. In his opinion, the value of the increased use of music should be equal to the value of the music already in use. The relative value of talk and music in conventional radio is not necessarily the same for audio webcasting because a listener who accesses a music audio webcast may prefer an all-music format to a talk/music mix. Finally, Professor Mathewson argues that Professor Liebowitz ignores the differences in revenues generated by the all-music webcast as opposed to the talk/music broadcast. If the revenue generated by the all-music webcast is lower, there is no economic justification for valuing the additional music in an audio webcast at a higher price.

[24] Professor Mathewson agrees with Professor Liebowitz that the appropriate proxy is the rate paid by conventional commercial radio stations. However, in his opinion, this rate should only be applied to “website-only” advertising revenues, such as banner and gateway advertisements, which are associated with content that includes music, which he estimates to be approximately 30 per cent.

[25] The CAB argues that even if the Board used SOCAN’s numbers from the Erin report,⁶ music content only represents 34 per cent of the total length of audio webcasting segments. This

⁶ Exhibit SOCAN-5, Report of Erin Research Inc.

represents 44.7 per cent of the amount of music used by conventional radio⁷ and using the 4.4 per cent rate for conventional radio, the applicable rate should then be 1.97 per cent.

[26] We agree with the parties that the best proxy available for a commercial radio station's audio webcast is the SOCAN rate that applies to conventional commercial radio stations. This rate should be further adjusted to reflect the availability of non-audio content.

[27] An upward adjustment could be justified if an audio stream contains more music than the conventional signal of a commercial radio station. However, other factors could result in a downward adjustment. For instance, a number of radio sites make available fixed-length segments that consist of discrete audio or audiovisual clips. The music content of these segments is, according to SOCAN, 34 per cent,⁸ which should justify a downward adjustment to the proxy rate.

[28] To properly calculate this adjustment, we need more information on how music is specifically used by radio stations in audio webcasts, and in particular on the relative importance of audio streams and fixed-length segments. In the absence of such information, we can only conclude that these two adjustments tend to cancel each other out. Therefore, no adjustment will be made to the proxy, and we apply the same rate for this category as we did for conventional radio stations.

C. AUDIOVISUAL WEBCASTING, GAMES AND OTHER USES

[29] Commercial radio stations use music on their website in many other ways than audio webcasting and simulcasting. Indeed, SOCAN proposes that when a commercial radio site (or any site) offers multiple types of uses, the highest licence fee apply to the relevant use, and the licence fees resulting from the application of any additional tariff items be discounted by 10 per cent. The CAB disagrees with this approach. It contends it is more than double dipping, it is "supersizing".

[30] The Erin Research Inc. study, provides evidence on the prevalence of each of these different types of music use.⁹ However, there is no evidence to indicate the relative importance of each of these different types of uses on a particular site, and the relative importance of music for each of these uses. Hence, we cannot quantify in any reliable manner the contribution of each of these uses to the site's revenues. The only useful conclusion we can reach is that all of these activities should be considered at once, and the conventional radio rate be applied.

⁷ 34 per cent is 44.7 per cent of the percentage represented by music in the total programming time of radio stations, i.e., 76 per cent. This number, used by the CAB, is consistent with what the Board found in earlier decisions in regard of SOCAN Tariff 1.A for commercial radio stations.

⁸ Exhibit SOCAN-5, page 52.

⁹ Exhibit SOCAN-5, Table 28.

D. RATE AND RATE BASE

i. Rate

[31] We find that for all of the different types of music use by a commercial radio broadcaster on its website, the SOCAN Tariff 1.A rate, including the lower music use provisions, will apply. The specific rates we are certifying are found in the [Appendix](#).

ii. Rate Base

[32] For their conventional signal, commercial radio stations only include their advertising revenues in the calculation of their royalties. This is because advertising revenues are a proxy for the audience that stations manage to attract; other income, such as production income, is not.

[33] On the Internet, however, advertising income is not the only form of income that depends on how popular the site is. Subscription income would be another, as would the sums the operator of a site gets every time a visitor clicks to be transferred to another site. In the absence of any evidence demonstrating that websites derive any form of income that is not dependant on the number of visits, we find that it is preferable to include all Internet-related income in the rate base. We also must take into account the fact that on the Internet, music is not always programmed in a linear manner and may be used, and “paid for”, under infinitely variable conditions and business models. The tariff will reflect this for all categories of revenue-generating websites.

[34] We also find that only a portion of the total revenues of a commercial radio site should be subject to the tariff. The SRG result that about 30 per cent of all page views consisted of streaming sessions involving either webcasting or simulcasting only provides a partial image of music use, which can also be associated to a certain extent to other activities such as audiovisual webcasting and games. We have no information on these latter uses.

[35] At first blush, it would seem that only revenues that can be associated to music should be included in the rate base. This raises at least three issues. First, it might be difficult or impossible to segregate revenues on that basis. Second, to allow a user to focus solely on music-related income would inevitably lead to disputes as to what is or not music-related. Such disputes ought to be avoided as much as possible, at least until a system for tracking and allocating music-related income can be designed.

[36] Most importantly, focussing solely on music-related income will result in a double discount if commercial radio stations pay at the same rate for Internet music use as for over-the-air music use. Over-the-air rates take into account that while all radio (and television) content involves sounds, not all such content is music, let alone SOCAN music. That is precisely why the Board set a low music use rate several years ago. Put another way, a radio (or television) station pays

royalties to SOCAN on income generated by non-musical audio content such as news, current events or talk; the rates are set accordingly.

[37] On the other hand, some account must be taken of the fact that while sound is omnipresent in a radio station's over-the-air signal, this is not true of the same station's website: a significant number of page impressions deliver no audio content. Therefore, if the Tariff 1.A rate is to be used as starting point to set the tariff for a commercial radio station's Internet activities, then the portion of Internet-related revenues that are subject to the tariff should be a function of audio content to all other content, measured by the number of page impressions.

[38] We will thus establish that the rate base will consist at most of 50 per cent of the station's Internet-related revenues. Radio broadcasters will be allowed to further discount the rate base by monitoring and reporting the ratio of audio page impressions to all page impressions on their site. We do not wish to force all stations to monitor their Internet activity, hence our decision to remove some of the revenues from the rate base. On the other hand, we did not wish to set too large a discount and thereby risk that no radio station would have benefited from further shrinking its rate base. Removing half of the revenues from the rate base should relieve many stations from monitoring their Internet activity, while allowing SOCAN and the Board to learn more about the importance of these different types of uses.

III. ITEM C – NON-COMMERCIAL RADIO

[39] Non-commercial radio broadcasters also use music in different ways on their website.

A. AUDIO SIMULCASTING

[40] SOCAN proposes a rate of 3.6 per cent for non-commercial radio stations. SOCAN did not file any evidence or justification in support of this proposed rate.

[41] The National Campus and Community Radio Association (NCRA) argues that Internet simulcasting is not a new use that would justify a rate different from 1.9 per cent which is what the stations are currently paying for the conventional activities. Indeed, NCRA claims that because the current SOCAN Tariff 1.B (Non-Commercial Radio) is based on gross expenses, non-commercial stations have already been paying royalties for Internet simulcasting based on this tariff, because SOCAN has not instructed broadcasters to omit the costs associated with the Internet broadcasting activities from the total gross expenses.

[42] The stations have already been paying for these Internet activities, and NCRA claims the application of this tariff retroactively would constitute double payment to SOCAN. NCRA also points out that their member stations do not advertise on their websites. Finally, they argue that no minimum payment should apply to them.

[43] As is the case for simulcasting of commercial radio stations, we find that the rate currently applicable to conventional activities of these radio stations should continue to apply to the Internet simulcasting activities of the same radio stations.

B. AUDIO WEBCASTING

[44] SOCAN proposes that a rate of 3 per cent be applied to audio webcasting similar to a non-commercial radio station. This rate is apparently based on the argument that all users, even the smallest, require a licence to use SOCAN's music, and that SOCAN should not be expected to subsidize small users for their use of music.

[45] NCRA contends that insofar as audio webcasting is concerned, Internet broadcasters should be treated the same as a conventional, non-commercial radio broadcaster and that the existing SOCAN Tariff 1.B rate (1.9 per cent), should apply to the Internet.

[46] We agree with SOCAN that it should not be expected to subsidize users for their use of music. However, we agree with NCRA's submission on the rate to apply to non-commercial radio webcasting. Moreover, in our opinion, an adjustment should be made to reflect the relative use of music by conventional and Internet broadcasters. We are unable however to make this adjustment because of a lack of data on music use.

[47] Thus, as was the case for simulcasting, we find that the conventional rate for non-commercial radio stations should also apply to their webcasting activities.

C. AUDIOVISUAL WEBCASTING-SIMULCASTING, GAMES AND OTHER USES

[48] We do not have much evidence concerning the use of music within these other activities that non-commercial stations might do on their websites. Demonstrations at the hearing seemed to indicate that a minimum use of music, if at all, was involved in relation to these other activities. We can only then conclude that the conventional rate should apply, to the extent it is relevant, to these other activities.

D. RATE AND RATE BASE

[49] We find, as we did for commercial radio, that for all of the different types of music use by a non-commercial radio broadcaster on its website, the SOCAN Tariff 1.B rate will apply.

[50] We will also use the 50 per cent rationale used for commercial radio to discount the rate base. In this case, non-commercial radio broadcasters will apply the 1.9 per cent royalty rate to only 50 per cent of the expenses associated with the website. Stations will be allowed to further discount the rate base in the same way as commercial radio broadcasters.

IV. ITEM D – COMMERCIAL TELEVISION, NON-BROADCAST TELEVISION, PAY AUDIO SERVICES, SATELLITE RADIO SERVICES

A. AUDIOVISUAL SIMULCASTING

[51] Professor Liebowitz proposes to use the 1.9 per cent rate set by the Board for commercial television stations (SOCAN Tariff 2.A) as a proxy for the simulcasting of television station signals, and adjust it to reflect the difference in profitability between the two, just as he did for radio stations. His theory is that Internet television is almost pure profit because the Internet signal is the same as the conventional signal, and the costs of creating the television programming as well as the administration costs are unaffected by the Internet transmission.

[52] Professor Liebowitz estimates that the savings as a share of the remaining costs for the Internet transmission of the signal are in the range of 240 per cent. He argues that half of this increase in profitability should be allocated to the rights owners. Using the conventional television rate of 1.9 per cent results in a rate for television simulcasting of 4.19 per cent. SOCAN therefore proposes a rate of 4 per cent, to be applied only on revenues generated by the sale of advertising on the websites.

[53] Professor Mathewson agrees that Tariff 2.A is the appropriate proxy and argues that the rate should only apply to revenues attributable to the streaming of the television signal. He claims that music streaming represents only 1.3 per cent of television stations' website activity.

[54] We have already rejected Professor Liebowitz's sunk cost analysis and find that the conventional television tariff rate should be used as the proxy for the simulcast of a television station's signal.

[55] The only other possible adjustment pertains to overall music use on the site. The evidence shows that very few television broadcasters simulcast their signal. According to the SRG report, only 1.3 per cent of all pages viewed on a television station's website include some audio content. Thus, in our opinion, the rate of 1.9 per cent should not apply to all of the revenues generated by the website.

B. AUDIOVISUAL WEBCASTING

[56] Some television stations' websites make available to users an audiovisual signal that is different from their conventional signal. The signal may contain music as well as other programming elements. SOCAN proposes a rate of 4 per cent for this type of use. It however has not provided any specific evidence on audiovisual webcasting, and simply proposes that the rate be the same as the rate that applies to the simulcast of a television station's signal.

[57] The CAB submits that the rate should be the same as SOCAN Tariff 2.A and Tariff 17 (Pay and Specialty Services), that is 1.9 per cent, discounted by between 19 per cent to 24 per cent to

account for lower music use. It argues the rate should only be applied to music-related revenues and not to all website revenues. The CAB estimates that 1.3 per cent of total website revenue is related to music.

[58] We agree with the CAB that the existing conventional television tariff is the appropriate proxy for this use.

C. AUDIO WEBCASTING, GAMES AND OTHER USES

[59] Although the Erin Research report provides some examples of various types of music use by television stations, it does not provide any evidence on the importance of music use. Once again, we can only conclude that the conventional television rate should apply to these other activities.

D. RATE AND RATE BASE

[60] We find that for all of the different types of music use by a commercial television broadcaster on its website, the SOCAN Tariff 2.A rate will apply.

[61] The evidence indicates that 1.3 per cent of all pages viewed on a television station website involve audio streaming. We do not have evidence on other types of uses of music on the website. As previously mentioned for commercial radio,¹⁰ it is important that the percentage of revenues forming the rate base be such that there is enough incentive for radio stations to further shrink their rate base, thus providing SOCAN and the Board with useful information. Hence, we establish that the rate will apply to 10 per cent of the revenues of a commercial television website. Further discounting by stations will be allowed under the same conditions as noted above.

[62] SOCAN proposed that in the case of the simulcast of television signals, the low music use provisions available to users in its Tariff 17 apply. We agree and fix a rate of 0.8 per cent of the revenues of a commercial television website when music constitutes less than 20 per cent of broadcast time.

E. PAY AUDIO AND SATELLITE RADIO SERVICES

[63] SOCAN proposed a use-based tariff, not a user-based one. Consequently, it did not propose anything specific to digital pay audio or satellite radio services. This does not leave us without a benchmark. Just as commercial radio, these services should pay at the same rate as for their main SOCAN tariff, subject to further discounting upon adequate monitoring and reporting. Even though the satellite radio tariff is not yet set, it is possible to certify the Internet tariff for these services by using the same approaches applied by the Board to CBC Television in 1991.

¹⁰ See paragraph 38.

V. ITEM E – CANADIAN BROADCASTING CORPORATION (CBC); ONTARIO EDUCATIONAL COMMUNICATIONS AUTHORITY (TVO); SOCIÉTÉ DE TÉLÉDIFFUSION DU QUÉBEC (TÉLÉ-QUÉBEC)

A. CBC

[64] CBC websites provide simulcasting of radio signals, audio and audiovisual webcasting as well as other types of activities.

B. AUDIO SIMULCASTING

[65] SOCAN proposed a rate of 8 per cent for the simulcast of the CBC radio signal, based on applying the same rate it proposes for conventional radio. Professor Liebowitz provided no specific analysis of CBC in order to justify the proposed CBC tariff. SOCAN appears to base its position on the notion that public and private radio stations should be treated the same in the Internet environment.

[66] CBC contends there should be no additional liability arising from simulcasting its signal on the Internet. In its submission, simulcasting just duplicates a conventional, over-the-air signal. It is just another way of listening to the radio.

[67] CBC's Internet audience is, at the moment, marginal. CBC argues that the right to Internet streaming should be included in its existing tariff (SOCAN Tariff 1.C). In support of this position, it provided evidence of agreements with artists associations such as the American Federation of Musicians of the United States and Canada (AFM), the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) and the *Union des artistes* (UDA) which shows that rights holders have agreed to include these rights in the bundle of rights for which they already receive payments from CBC.

[68] We reject SOCAN's proposal in this respect. It is based on the tariff proposed for the simulcast of a commercial radio station's signal similar to a Tariff 1.A broadcast station, which relies on the sunk cost analysis we have already rejected.

[69] We find that some payment should be made to SOCAN for CBC's Internet simulcasting and those payments should, as much as possible, be derived from the income arising from these Internet simulcasting activities. However, CBC currently pays a fixed amount per year, established by agreement with SOCAN, for its conventional radio activity. The amount is not tied to CBC's income or expenses. Thus, any possible increase in audience that CBC might achieve from Internet simulcasts will not automatically generate additional payments to SOCAN, as it would for example with commercial radio. We have no data on advertising or other revenues or additional audience on which to base an increase in SOCAN royalties.

[70] Therefore, for the moment, we can only consider that the current CBC payments to SOCAN already include the right to use SOCAN music on the Internet simulcasts. When the time comes to revise SOCAN Tariff 1.C, the Board will be able to reestablish a link between CBC payments and its audience, including that derived from the Internet, because the methodology used in the past to establish CBC royalties was linked to advertising revenues of commercial radio.

C. AUDIO WEBCASTING

[71] SOCAN proposes that the same rate for audio webcasting similar to conventional radio apply to this category. SOCAN again argues that in the unregulated Internet environment, private and public radio should be treated the same, and proposes the same rate of 6 per cent for audio webcasting operations of CBC.

[72] CBC claims that SOCAN fails to recognize its special public policy role. CBC accepts that some level of compensation should be paid to SOCAN for the right to communicate archived programming content on an on-demand basis but opposes SOCAN's proposal.

[73] The evidence shows that CBC's webcast programs contain about 9 per cent of the musical content of conventional radio stations. CBC deliberately chooses to webcast programs with low music content and removes the music content from some of the programs because of the inability to clear the rights.

[74] CBC contends that the value of reusing protected material on the Internet is only worth 5 per cent of the value of the original transmission and, as a result, a correction of 95 per cent should be applied to the amount paid by CBC for its conventional activities. This correction is based on a review of agreements that CBC entered into with associations such as the AFM, ACTRA, UDA and the *Société des auteurs de radio, télévision et cinéma* (SARTEC). These agreements provide for a 10 per cent step-up fee for reusing the protected material on the Internet. CBC submits that this relates to programming that was acquired on an exclusive basis. It argues that because it reuses some of the musical content on the website on a non-exclusive basis, the 10 per cent step-up fee should be reduced by half, to 5 per cent.

[75] CBC affirms that the additional payments to SOCAN for its audio webcasting activities should be based on the amount it already pays for conventional activities, discounted by 91 per cent to account for lower music use, and a further 95 per cent to account for the lower value of webcasting. Since CBC Radio currently pays \$1,486,836 pursuant to its last certified tariff, the application of the two proposed discounts results in a rate of \$6,690.

[76] We agree with SOCAN's submission that public and private radio should be treated similarly but nonetheless arrive at a different conclusion. For the reasons already stated in paragraph 68, we reject SOCAN's rate proposal. The Board has in the past (in 1991) certified the tariff for conventional activities of CBC based on the rate commercial radio paid for its conventional

activities. We find the same approach should be used in the Internet environment. We therefore adopt CBC's approach and use the amount it currently pays for radio as the proxy for setting the rate for audio webcasting.

[77] We find an adjustment should be made to account for the difference in music use between the conventional CBC radio services and its Internet audio webcasts. CBC submits that its Internet audio webcasts uses 9 per cent of the musical content of conventional CBC radio services. SOCAN argued that these calculations did not exclude music that is in the public domain. As CBC noted, doing so would actually decrease the percentage payable to SOCAN. CBC agrees to use the 9 per cent figure and because it is the only number we have, we will use it.

[78] We agree with CBC and find that a second adjustment should be made to reflect the value of reusing protected material on the Internet. When a tariff is expressed as a percentage of advertising (or other) revenues, as is the case for conventional radio, royalties will automatically adjust to the level of activity on the Internet. An adjustment is needed here because the tariff is a set amount. We will use the 10 per cent step-up fee proposed by CBC. We will not however use the 5 per cent rate that according to CBC better reflects the non-exclusive reuse of the musical content on the website. In our opinion, the evidence on the value of such exclusivity is not conclusive.

D. AUDIOVISUAL WEBCASTING

[79] For the audiovisual webcasting activities of CBC, SOCAN proposes a rate equal to 4 per cent of CBC gross operating expenses, the same rate it proposes for commercial television. SOCAN did not provide evidence to support this proposal.

[80] CBC proposes that the methodology it uses for its audio webcasting operations apply to its audiovisual operations, that is to apply two corrections: 91 per cent for music use and 95 per cent for lower value, to the existing CBC payment to SOCAN (established through agreement) for its television operations. CBC proposes an annual amount of \$31,153.50. This is arrived at by applying the two corrections to \$6,923,000, which is the rounded amount of the rate certified in Tariff 2.D targeting CBC's television (\$6,922,586).

[81] Subject to the comments made below, we agree with CBC on the two adjustments to be made to Tariff 2.D.¹¹

E. GAMES AND OTHER USES

[82] CBC provided descriptions of their websites showing that other uses of music, such as in games, are possible. No precise evidence however is available on either the music content of these

¹¹ See paragraph 83.

uses or their popularity. We will thus apply to these uses the same methodology we have used thus far.

F. RATE AND RATE BASE

[83] The amount payable would then be 1.5 per cent [$0.1 \times 0.15 = 0.015$] of the amount CBC pays to SOCAN for both conventional radio and television broadcasts. The first figure accounts for the application of the step-up approach. The second figure accounts for the level of music use. The evidence is that both audio and audiovisual webcasts use 9 per cent of the music contained in conventional broadcast signals and to take into account some music use in games and other activities, we set the adjustment at 15 per cent. CBC will be allowed to further discount the 15 per cent factor when monitoring and reporting on its Internet activity.

[84] The amount CBC paid to SOCAN in 2006 totalled \$8,409,422. The formula we certify, when applied to that amount, would generate royalties of \$126,141.33.

G. TVO AND TÉLÉ-QUÉBEC

[85] Because SOCAN proposed a use-based tariff, it did not propose a specific tariff for TVO or Télé-Québec. This does not leave us without a benchmark. In the past, the Board has set tariffs for these public broadcasters in a manner that is similar, if not identical, to that used for the CBC.¹² Therefore, we will use the same methodology as for CBC to establish the rate to be paid by TVO and Télé-Québec. The amounts they paid SOCAN in 2006 were \$300,080 and \$180,000, respectively. The amounts they would pay under this tariff would be \$4,500 ($\$300,080 \times 0,015$) and \$2,700 ($\$180,000 \times 0,015$), respectively. These amounts are also subject to further discounting upon adequate music use monitoring and reporting.

VI. ITEM F – AUDIO WEBSITES

[86] This item of the tariff will apply to operators of other sites for which the main activity or purpose is listening to audio files. This includes websites such as Iceberg that are similar to a pay audio service. By definition, the main activity for these sites is audio webcasting, but other types of activities are also carried out on them.

A. AUDIO WEBCASTING

[87] SOCAN contends that these websites provide advertising or subscription based wall to wall or all-music channels. SOCAN proposes a 9 per cent tariff for this category. The proposal is based on the average of the current tariff certified by the Board for pay audio services (12.35 per cent),

¹² Decisions of the Board of [December 7, 1990](#) and [February 18, 1993](#) certifying various SOCAN tariffs.

which are subscription-based, and the 6 per cent rate proposed by Professor Liebowitz for advertising-based services which resemble commercial radio stations.

[88] The Cable/Telcos disagree. They argue that the proxy should be the tariff for conventional commercial radio stations subject to an adjustment to reflect the difference in music use. Thus, audio webcasts that contain 100 per cent music should pay at a rate that is about 25 per cent higher than the commercial radio rate.

[89] Iceberg agrees with the Cable/Telcos that an adjustment should be made to account for the higher music use. It estimates that it uses SOCAN's repertoire for approximately 95 per cent of its programming time. This amount is based on an estimate that 5 per cent of the music used is in the public domain. Compared to 76 per cent of music used by conventional radio, this results in an upward adjustment of 23 per cent.

[90] Iceberg contends the correct rate should be 4 per cent for the low revenues and 5.5 per cent for higher revenues. Iceberg argues that these rates should only be applied to music-related revenue that comes from sale of advertisements solely inside the music player, which it estimates to be approximately 32.3 per cent of its revenues.

[91] We agree with the objectors that the digital pay audio tariff is not an appropriate proxy. The amount of music use might be similar, but differences in the business model, including that the digital pay audio signals are sold as a package with audiovisual signals, disqualifies it as a useful proxy.

[92] The Board has refused in the past to use the rate for commercial radio as the proxy for the rate to apply to pay audio services.¹³ This decision was based on the fact that these services were not seen as a close substitute to commercial radio, they did not have the same business model and they had different cost structures. We are of the opinion that although audio webcasting similar to pay audio probably does not have the same cost structure as conventional radio, they are closer substitutes to each other as they both compete for users' mouse clicks on their respective websites. Also, business models of audio webcasting sites have gotten away from the pay audio services model and come closer to the advertising revenue model. In our opinion the appropriate proxy for these audio webcasting sites is the rate applicable to conventional commercial radio subject to certain adjustments.

[93] We must make an adjustment to reflect the differences in the amount of music use. Conventional radio stations use music approximately 76 per cent of the total programming time. The programming time of music on an audio webcasting service is close to 100 per cent. We agree

¹³ [Decision of the Board of March 15, 2002](#) certifying the SOCAN and NRCC Pay Audio Services Tariffs.

with the objectors that there must be a correction for the fact that some of the music webcasts might be in the public domain and for this purpose we accept the evidence of the objectors and use a correction of 5 per cent. The proxy rate of commercial radio therefore must be increased by 25 per cent (95 per cent / 76 per cent) to account for the higher music use of audio webcasts. The effective rate for commercial radio is 4.2 per cent, we therefore establish a rate of 5.3 per cent of revenues for those audio webcasting services that are high users of music.

B. AUDIOVISUAL WEBCASTING, AUDIOVISUAL DOWNLOADING, GAMES AND OTHER USES

[94] No specific information is available to us on these activities that other audio sites might perform on the Internet. We will thus use the same basic approach as before, and rely on the monitoring of music use to eventually reveal this information.

C. RATE AND RATE BASE

[95] This category includes high users of music such as an audio webcasting site. It also includes other users that, even though their primary activity consists of allowing listening to audio files, do not use music to the same degree. Thus, it is fair and equitable to create three groups of users: (a) high users of music, that is where music constitutes 80 per cent or more of their “broadcast time”, will pay a rate of 5.3 per cent; (b) medium users, that is where music use is between 20 and 80 per cent of “broadcast time”, will pay the same rate as do conventional radio stations for the Internet-related activities, i.e., 4.2 per cent; and (c) low users, that is where the music is less than 20 per cent of “broadcast time”, will pay 1.5 per cent of their revenues.

[96] The reasons (set out in paragraph 19) that lead us not to set a lower rate for the Internet revenues of low-income radio stations also apply to all other Internet music users. The factors that led the Board to cap the commercial radio rate for smaller stations in 2005 and 2008 do not exist for Internet users.

[97] As we did with commercial radio broadcasters’ websites, we find that only a portion of the total revenues should be subject to the tariff. All things considered, including the types of music use described above, we find that the rate base will be 50 per cent of the website’s revenues. Users will be allowed to further discount the rate base by monitoring and reporting Internet activity.

[98] A further discount must be applied. The approach the parties relied upon and which we use relies on an assumption that practically all of the traffic on the site of a Canadian radio or television station involves a communication in Canada. As a result, we did not allow these users to delete visits from outside Canada from their rate base. It would not be reasonable to do the same in respect of all other sites, whose focus may be largely or even exclusively non-Canadian Internet users. Canadian sites will be allowed to remove from their rate base 95 per cent of visits from outside Canada, based on an assumption that all communications ending in Canada are communications in Canada, while only a small proportion of communications that end outside of Canada

nevertheless are communications in Canada. Non-Canadian sites will be allowed to remove all non-Canadian visits, based on the assumption that such visits never have a sufficiently substantial connection with Canada to constitute a communication in Canada.

VII. ITEM G – GAME SITES

[99] SOCAN proposes a tariff of 4 per cent of the gross revenues or expenses for the communications of musical works from the SOCAN repertoire from a game site or service. Professor Liebowitz did no analysis of game sites. Professor Hoffert demonstrated different game sites where music was played in the background, either on the main page or during the game. The rationale for the 4 per cent tariff is the similarity between music use in game sites and in television programs and movies.

[100] The Entertainment Software Association and the Entertainment Software Association of Canada (ESA) submits that to the extent the Board may be required by the *Copyright Act* to certify a tariff, the starting point should be the low music use rate of 0.8 per cent of SOCAN Tariff 17 as a proxy for the streaming of games. It then proposes an adjustment, by using the relative difference between SOCAN's proposed rates for music downloads and streaming, to bring down the rate for game downloads to 0.3 per cent.

[101] ESA argues that music is not the main feature of a game and music costs represent between 0 and 5 per cent of the overall game production costs. ESA therefore applies a 90 per cent discount which results in tariffs of 0.08 and 0.03 per cent for streaming and downloads, respectively.

[102] ESA contends a final adjustment based on the Canadian share of overall traffic on game sites is required. According to the ESA panel, the Canadian market represents approximately 5 per cent of game sites traffic. Assuming that 5 per cent of the traffic equates to 5 per cent of the revenues, ESA proposes rates of 0.004 and 0.0015 per cent of revenues or expenses for game streaming and game downloading, respectively.

[103] We agree to use the low music use rate of 0.8 per cent as the proxy for operators of game sites. We disagree with the adjustment proposed by ESA to take into account the difference between streaming and downloading of games. ESA appears to have arbitrarily chosen the 0.8 per cent rate as a suitable proxy for game streaming. If it had chosen this rate as the proxy for downloads, the rate for game streaming would be 1.9 per cent. In the end, we do not have enough evidence, in particular on music use differences, to allow us to establish a different rate for streamed or downloaded games.

[104] ESA requests that the tariff be discounted because music is never the main feature in a game software or game site; it is used in the background. We do not agree with this adjustment. The use of SOCAN Tariff 17 proxy already assumes to a large extent that music is not the main feature. Correcting for this could result in double discounting.

A. RATE AND RATE BASE

[105] For game sites, we certify a rate equal to 0.8 per cent of revenues.

[106] We will allow game sites, as other users, to discount the rate base to account for the relative importance of audio content. Demonstrations at the hearing showed that certain pages of game sites, such as the ones containing company information or support information, have no audio content. However, ESA provided no further evidence on the prevalence of non-audio content. Furthermore, ESA's evidence shows that game sites are very much *sui generis*, thereby making comparisons with other types of sites very difficult. For these reasons, we will allow game sites to discount the rate base, but only if they monitor and report the information to SOCAN.

[107] ESA has suggested that only 5 per cent of the revenues should be subject to the tariff, to account for the fact that Canadian communications represent only that share of the overall traffic to the average game site. We agree with the approach but disagree with the percentage. Here as elsewhere, we do not wish to set so large a discount as to make it totally unnecessary for all websites to report their activity. Therefore, we set at 10 per cent the proportion of the revenues generated by the website that should be subject to the tariff. Users will have the possibility to monitor and report on visits originating in Canada in order to further discount the rate base.

VIII. ALL OTHER SITES

[108] There remains a number of disparate sites that use music in different ways but for which the main activity is not related to the use of music. This includes for instance restaurants, hotels, bars, or any other business websites that use music. It also includes amateur podcasts, social networking sites such as Facebook and MySpace and video sharing sites such as YouTube, as well as sites operated by individuals that use music. These sites might use music in different ways including audio webcasting as well as audiovisual webcasting and downloading.

[109] No analysis was conducted by Professor Liebowitz with respect to an appropriate tariff for these users. In response to a question from the Board, SOCAN provided a list of sites that would qualify for the "other sites" item that included sites for restaurants, hotels and car makers. From the limited evidence we received, it appears these sites are used primarily to publicize a brand or a store, and do not directly generate revenue.

[110] SOCAN submits it is appropriate for the Board to fix a tariff to target music uses of these sites even though there is little evidence of the amount of such uses. The examples provided by SOCAN involved uses of communications of music via the Internet that did not fall in any of the previous items of Tariff 22. SOCAN proposes a tariff of 7 per cent of the gross revenues or expenses, which is the average of the tariffs proposed by SOCAN for all of the other categories of uses.

[111] We disagree with the methodology used by SOCAN to derive this rate. Large users of music such as music and radio sites are by definition excluded. By contrast, looking at the examples given by SOCAN, most “other” sites, in all likelihood, use minute amounts of music. The rate for these users cannot be the average of all others, including music and radio sites. Moreover, other than a few examples of websites shown by Professor Hoffert, SOCAN presented no evidence on the role of music on these other sites.

[112] Even though we believe a tariff is justified for this category, we do not set a tariff for these users, for four reasons.

[113] First, we believe that it could be highly disruptive, and therefore *ipso facto* unfair, (a) to blindly set a tariff; (b) for an amount that is not symbolic; (c) for a period (1996 to 2006) that is long past; (d) targeting the hundreds of thousands of users who make uses of music that either are extremely modest or that attract little or no attention; and (e) in the absence of any reliable benchmark.

[114] Second, given the absence of any reliable evidence on which to base our decision, any tariff we would have set would have been *de minimis*, so as to avoid as much as possible the deleterious effects of seeking a plethora of minimum payments for a myriad of very modest uses. The effects could be all the more important if, because of joint and several liability in the communication of music, thousands of individuals who are active on the social networking or video sharing sites were deemed individually responsible for minimal payments. We refuse to certify a tariff that could potentially have such a broad scope without the proper evidence.

[115] Third, social networking and video sharing sites are a relatively new phenomenon. Most became popular only near the end of the period covered by this tariff (1996-2006). The amounts involved for the period would thus most probably be quite modest.

[116] Fourth, the Board cannot in the absence of evidence discharge its obligation, as mandated by the Federal Court of Appeal in *CAB v. SOCAN and NRCC*,¹⁴ to provide adequate reasons explaining how it arrived at the rate of the tariff.

[117] The Board has repeatedly stated that SOCAN is entitled to compensation for any use of its repertoire and that users cannot be exempted from paying royalties. These statements are correct as a matter of principle. In this instance, however, no evidence whatsoever was produced that would seek to establish the value of the repertoire or even the degree or the nature of its uses. In addition there are no reliable benchmarks on which to base a tariff. Indeed, even SOCAN’s intention with respect to the application of this part of the tariff is not clear. The Internet is such a

¹⁴ *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada and Neighbouring Rights Collective of Canada*, 2006 FCA 337.

fluid, yet omnipresent phenomenon that it would be foolhardy to attempt to set a tariff when we fear that the consequences might be overwhelming and, we repeat, socially unfair. In any event, SOCAN has filed for 2007 and beyond, proposed tariffs that target again “all other sites”. When the Board hears such tariffs in the future, parties will be expected to provide the necessary evidence to allow the Board to properly assess the situation.

IX. MINIMUM FEES

[118] SOCAN proposes a minimum fee of \$200 per month for audio webcasting sites and commercial radio sites. It has reduced its proposed monthly minimum fee to \$90 for non-commercial radio sites. Once again SOCAN did not provide any economic analysis to support these proposed rates.

[119] The CAB does not oppose in principle the imposition of minimum fees, but points out that other non-event based SOCAN tariffs have minimum fees below, or just over \$100 per year. The CAB proposes a minimum fee of \$60 per year. NCRA opposes the minimum fees proposed by SOCAN.

[120] We agree with the CAB that in general, the minimum fees should be consistent with SOCAN’s other tariffs. The fees proposed by SOCAN are inconsistent with any of its other existing tariffs. The CAB filed a table showing the minima in other SOCAN tariffs. We intend to use this table as a guideline to establish the minimum fees subject to the following comments. First, because many minima are expressed as dollars per year, and others are in dollars per event or per premises and we do not have the evidence to translate the minimum rates into dollars per year, we will only consider fees expressed in dollars per year. Second, SOCAN Tariff 21 for recreational facilities does not have a minimum fee: it has a fixed fee and therefore will be excluded from the analysis.

[121] The CAB’s table then indicates that SOCAN’s yearly minimum fees are roughly in the scale of \$60 to \$110.¹⁵ Although SOCAN’s tariffs are not necessarily all consistent relative to each other, one would expect that as the value (or importance) of music rises, the level of the minimum fees also increases, everything else being equal. This is the rule we intend to apply here, with one exception. We see no need to set a minimum fee for users who already pay royalties pursuant to any of SOCAN Tariffs 1 or 2. The Internet activities of these licensees are clearly ancillary. Furthermore, as can be seen from these reasons, our intention for the time being is to dovetail as

¹⁵ SOCAN Tariff 3.B (Recorded Music Accompanying Live Entertainment), Tariff 11.A (Circuses, Ice Shows, Fireworks Displays, etc.), Tariff 13.B (Passenger Ships), Tariff 13.C (Railroad Trains, Buses, etc.) and Tariff 19 (Fitness Activities and Dance Instruction) all have a minimum fee of about \$62. The highest is \$111 for Tariff 6 (Motion Picture Theatres).

much as possible these users' Internet royalties into the main tariffs. As none of these tariffs includes a minimum, none should be set here.

[122] Among all the sites examined in this decision, music is most important and valuable for an audio webcasting site. Indeed, the rate we set for these sites are the highest. Hence, in our opinion, the minimum fee for these sites should be closer to the top rather than the bottom of the \$60-\$110 scale. Therefore, we set a minimum fee of \$100 per year for audio webcasting sites.

[123] The minimum fees for the other items are set as a function of the ratio of their rates to the rate for high music use audio webcasting sites. Thus, the annual minimum fee is set at \$79 for other audio sites that use music 20 to 80 per cent of their broadcast time, \$28 for low music use sites and \$15 for game sites.¹⁶

[124] For all other sites, SOCAN is proposing the same minimum fee of \$200 per month. In the case of amateur podcasters, SOCAN has proposed that where the music content used is less than 20 per cent of the programming time, and if such podcasts generate no revenues, an annual licence fee of \$60 applies. We have already decided not to certify a tariff for these sites. For the same reasons, we will not establish a minimum fee for them.

X. OTHER ISSUES

A. ABILITY TO PAY

[125] For items B to G of the tariff, we do not believe that a discount similar to the one applied to online music services (SOCAN Tariff 22.A) is justified or necessary for several reasons. First, for most users, this tariff does not introduce a new tariff; it is simply the extension to the Internet environment of an existing tariff for conventional activities. Second, the rate base over which the rates apply is significantly reduced, thereby restricting the potential for the tariff to have too strong of a detrimental impact on revenues. Third, some of the items being certified are implicitly or explicitly already being paid by users. Certifying them only confirms the level of payment these users should be making.

B. RATE BASE: COSTS VS. EXPENSES

[126] SOCAN has asked that the tariff apply to the greater of gross revenues earned by the site or service, or gross operating expenses. The CAB, among others, opposed this changing rate base, objecting that SOCAN should not be assured of a specific amount of royalties regardless of the amount of revenues the site is able to generate. Professor Liebowitz also disagreed with this

¹⁶ $(4.2 / 5.3) \times \$100 = \79 ; $(1.5 / 5.3) \times \$100 = \28 ; $(0.8 / 5.3) \times \$100 = \15 .

approach, stating however that a single switch, from expenses to revenues, might be justified in the case of a start-up company.

[127] We do not believe that such a variable rate base, even if only a single change is allowed, is justified for this tariff. In all other tariffs certified by the Board, a user unable to generate a sufficient amount of revenues pays the minimum fee, when such a fee is certified in the tariff. The same is done here. All rates apply to a revenue base (or cost base in the case of non-commercial radio), and a sufficiently low base will trigger the payment of the minimum fee, where it exists. It is entirely justified for a start-up company unable to generate enough revenues to pay the minimum fee until it is profitable enough to begin paying the full rate.

XI. TARIFF WORDING

[128] The following comments may help the reader to better understand the wording of the tariff. As is now the rule with any tariff of first impression, we consulted the parties on this matter before reaching a final decision.

[129] The tariff is user-based, to the extent possible. The interface between user-based and use-based tariffs may raise some difficulties. For example, subsection 1(2) states that Tariff 22 does not apply to uses covered by other tariffs, including Tariff 24 (Ringtones). That being said, a ringtone supplier that uses music on the Internet in a way that is not targeted in Tariff 24 may end up paying royalties pursuant to Tariff 22. In some cases, it may not be easy or possible to segregate revenues between the two. In that scenario, we believe that revenues should be allocated according to the relative economic importance of each activity. We do not think it would be appropriate, at least this time, to dictate precisely how this should be done in each instance. We are confident that SOCAN and users will use common sense to resolve those issues.

[130] For the reasons set out in paragraphs 32 to 38 of this decision, we have opted for a broad rate base. The definition of “Internet-related revenues” excludes certain revenues, fees and expenses, such as the fair market value of advertising production services. That value is the subject of a continuing dispute between SOCAN and some commercial radio stations. SOCAN fears that some users may attempt to overvalue production services. It proposed instead to exclude only the amount by which the total compensation received for the creation and placement of an advertisement exceeds the fair market value of its placement. We agree with the objectors that while the determination of any fair market value raises issues, the language we have chosen to use is sufficiently clear.

[131] In section 7 as elsewhere, the reference to *audio* content is deliberate. The tariff does not target only music-dominated sites; if that were so, there would be no point in setting a rate for sites that use music less than 20 per cent of the time. Furthermore, section 7 will apply to any site that is “ordinarily” visited to listen to audio-only content. We expect SOCAN and users to determine what that term means using the principles set out in the Board’s first private copying decision.

Sites that are ordinarily but not mostly used to listen to audio content will be allowed to lower their royalties as most others, based on the ratio of audio page impressions. Finally, to the extent possible, audio web sites that offer more than one channel will be required to track revenues for each channel and to pay royalties according to the music use on that channel. Revenues that cannot be so tracked will attract royalties according to the overall music use of the web site.

[132] As noted earlier, most licensees will be allowed to lower their royalties by monitoring their ratio of audio page impressions and ratio of Canadian page impressions. Canadian radio, television, digital pay audio and satellite radio services will not be allowed to discount non-Canadian visits, for the reasons set out in paragraph 98 of this decision. Audio web sites will be allowed to discount *audio-visual* page impressions from the calculation of the tariff since what we wish to target for these users is solely the delivery of audio-only content; users subject to sections 3 to 6 and 8 of the tariff will however be expected to include audio-visual page impressions in the calculation of the tariff.

[133] Section 12 allows SOCAN to request music use information for up to 14 days per year. The objectors pointed out that subsection (2) seems to allow the collective to request information sufficiently late to make it impossible to provide the information within the prescribed time limit. That being said, the provision mirrors SOCAN-NRCC Tariff 1.A, which has not given rise to any problems. We agree with SOCAN that it should not be required to give users prior notice and are confident that the collective will not attempt to make it difficult or impossible for users to comply with the tariff.

[134] Section 13 sets out the manner in which audio web sites will be required to report their music use in order to benefit from lower rates. The monitoring requirement we adopt is different from what is expected of low-use radio stations, for three reasons. First, audio web sites are not currently regulated by the CRTC; as a result, we cannot rely on CRTC-imposed requirements as monitoring tools. Second, we do not wish to impose that same requirement, since we do not know what that would entail in practice. Instead, we ask that the users keep some form of information that allows SOCAN to ascertain repertoire use, and rely on the parties to work out what is both practical and helpful. Third, we only wish that the user who fails to keep that information will face a rebuttable presumption that it is an all-music channel. The user will be allowed to convince SOCAN (or a court), through other means, that it is not an all-music channel.

[135] The tariff contains transitional provisions made necessary because the tariff takes effect on January 1, 1996, while it is being certified much later. Drafting these provisions proved especially challenging.

[136] The tariff makes a number of assumptions, for example about Internet music use patterns, that may or may not be correct going back as far as 1996. Some objectors stated that music use has greatly increased over time. That is possible but not certain. Moreover, what is important is not so

much the amount of music as the ratio of music to overall content. Still, we have attempted to alleviate some of the objectors' fears in this respect.

[137] It was also important not to design the tariff so as to make collection illusory. It is through no fault of SOCAN (or the users) that the matter took as long as it did to reach a conclusion. For these reasons, the transitional provisions are designed as follows.

[138] First, there will be a single ratio per year for each of the factors that licensees can use to lower their royalties. This will alleviate the burden of monthly or quarterly calculations.

[139] Second, the ratios will be determined using what we consider to be the best available information, according to a set formula that mandates the use of the relevant information that is closest in time to the period for which the calculation is being made.

[140] Third, as has become our common practice in those situations, a table sets out multiplying factors to be used on sums owed, derived using the previous month-end Bank Rate. 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. In this instance, and in order to further simplify calculations, we have set a single factor per year; the factor will apply to all users, whether they would otherwise make monthly, quarterly or yearly payments. The factor is based on the assumption that payments would have been made quarterly, 30 days after the end of the quarter, as is provided in sections 10 and 11 of the tariff.



Claude Majeau
Secretary General

XII. APPENDIX – CERTIFIED RATES

	RATE AND RATE BASE (Except for C, the Rate Base is always Internet-Related Revenues)	RATE BASE DISCOUNT ("At least" means the discount can be increased by reporting to SOCAN)	
		Discount for Non-Audio Page Impressions	Discount for Non-Canadian Page Visits
B. Commercial Radio	1.5% if low music use 4.2% otherwise	At least 50%	0
C. Non-Commercial Radio	1.9% of gross Internet operating costs	At least 50%	0
D. Commercial Television, Non-Broadcast Television,	Applicable rate pursuant to main tariffs (2.A, 17, Pay Audio Services, Satellite	At least 50% for music video, pay audio and satellite radio services	0 for Canadian service At least 90% for any other service

Pay Audio Services, Satellite Radio Services	Radio Services)	At least 90% for any other service	
E. CBC, TVO, Télé-Québec	10% of the total amount payable pursuant to Tariffs 1.C, 2.B, 2.C or 2.D	At least 85%	0
F. Audio Websites	1.5% if music use is 20% or less, subject to an annual minimum fee of \$28 4.2% if music use is more than 20% and less than 80%, subject to an annual minimum fee of \$79 5.3% if music use is 80% or more, subject to an annual minimum fee of \$100	At least 50%	<u>Canadian Site</u> 95% of non-Canadian visits, if a report is made to SOCAN 0 otherwise <u>Non-Canadian Site</u> At least 90% (all non-Canadian visits count)
G. Game Sites	0.8%, subject to an annual minimum fee of \$15	0, unless a report is made to SOCAN	<u>Canadian Site</u> 95% of non-Canadian visits, if a report is made to SOCAN 0 otherwise <u>Non-Canadian Site</u> At least 90% (all non-Canadian visits count)

XIII. DISSENTING OPINION BY MEMBER CHARRON

[1] I agree with the reasons of my colleagues in all respects but one. I would allow free access to SOCAN’s repertoire only to the smallest of users.

[2] I do not know whether I would set a tariff at zero or decline to set a tariff altogether for all the “other sites”. Both options present problems. Whether a price of zero is a “price” is open to debate. It may be that setting a price of zero in effect prohibits SOCAN from exercising any form of control over its repertoire. On the other hand, declining to certify a tariff when the *Act* appears to require us to do so may constitute an illegal refusal to exercise our discretion. In the end, however, the *Act* always requires the Board, expressly or implicitly, to set fair tariffs. As a result, I would have to resort to one of these approaches to avoid reaching a result that I find inherently unfair, under the very limited circumstances described at paragraph 113 of my colleagues’ reasons, at certain conditions.

[3] First, I would attempt to identify, and set a tariff for, most of the uses that are likely to generate significant royalties. Once the most important “other” uses (MySpace, Facebook, Google, Yahoo) had been added to the tariff, what remained would probably generate only symbolic amounts. This is what my colleagues fail to do, and where I disagree with them. Their decision allows websites

whose use of music is not insignificant and whose revenues are impressive, free access to the SOCAN repertoire, when SOCAN clearly intended to target them.

[4] Second, I would not want this awkward situation to be permanent. I would expect users or their representatives to participate in the next proceedings to provide the Board with the information it requires in order to properly assess the situation.

[5] The fact that SOCAN offered no evidence that would allow us to set a tariff for MySpace, as an example, is not of itself a reason to refuse to set a tariff. We had no evidence with respect to TVO or Télé-Québec and yet, my colleagues and I did not hesitate to set a tariff based on the formula we used for CBC. I would have done the same for other websites. For example, I would have applied the web game tariff to social networking sites, based on the assumption that they are closest in music use patterns to game sites.

[6] More importantly, SOCAN's proposed approach was to target uses, not users. Under that approach, a large number of "other" users would have been captured by the uses SOCAN proposed to target, which were set by analogizing the targeted uses with the main uses of those users who are already subject to a SOCAN tariff. I find it difficult, and inherently unfair, to blame SOCAN for not providing sufficient evidence, when its only fault was not to read the panel's mind.