Copyright Board Canada

Commission du droit d'auteur Canada

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Regime Collective Administration in Relation to Rights under Sections 3, 15, 18 and 21 *Copyright Act*, subsections 68(3) and 70.15(1)

Members The Honourable William J. Vancise
Mr. Claude Majeau
Mr. J. Nelson Landry

Proposed Tariff(s) Considered SOCAN (2011-2013)
Re:Sound (2012-2014)
CSI (2012-2013)
Connect/SOPROQ (2012-2017)
Artisti (2012-2014)

Statement of Royalties to be collected by SOCAN, Re:Sound, CSI, connect/SOPROQ and Artisti in respect of commercial radio stations

Reasons for decision

I. BACKGROUND

[1] The act of broadcasting music over the air requires the reproduction and the communication to the public of musical works, performers' performances, and sound recordings. A total of six rights or sets of rights, represented by several collectives as defined and identified herein, are involved in the activity of radio broadcasting[1]. They are all addressed in these proceedings.

[2] On March 31, 2010, March 31, 2011 and March 30, 2012, pursuant to subsection 67.1(1) of the *Copyright Act*[2] (the "*Act*"), the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed proposed statements of royalties for the communication to the public by telecommunication of musical and dramatico-musical works for the years 2011 to 2013. On March 31, 2011 and March 30, 2012, pursuant to the same subsection of the *Act*, Re:Sound Music Licensing Company (Re:Sound) filed proposed statements of royalties for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works for the years 2012 to 2014.

[3] Four other collectives filed proposed statements of royalties pursuant to subsection 70.13(1) of the *Act*. On March 31, 2011, Connect Music Licensing Service Inc. (Connect)[3] and the *Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec* (SOPROQ) (jointly Connect/ SOPROQ) filed a proposed statement of royalties for the reproduction of sound recordings for the years 2012 to 2017. On March 31, 2011, Artisti filed a proposed statement of royalties for the reproduction of performers' performances in its repertoire for the years 2012 to 2014. On March 30, 2012, CMRRA/SODRAC Inc. (CSI) filed a proposed statement of royalties for the reproduction of musical works for the year 2013. In March 2009, 2010, 2011 and 2012, ACTRA Performers' Rights Society and the Musicians' Rights Organization of Canada (ACTRA PRS/MROC) filed proposed statements of royalties for the reproduction of performers' performances for the years 2010 to 2013. On March 29, 2012, ACTRA PRS/MROC filed a request for intervenor status in respect of Connect/SOPROQ proposed statement of royalties for the years 2012 to 2017. Connect/SOPROQ's, CSI's, Artisti's and ACTRA PRS/MROC's tariffs are referred to as the "reproduction tariffs."

[4] All the proposed tariffs were published in the *Canada Gazette*; prospective users and their representatives were thereby advised of their right to object.

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[1] For a detailed explanation of the rights, see *Commercial Radio Tariff (SOCAN: 2008-2010; Re:Sound: 2008-2011; CSI: 2008-2012; AVLA/SOPROQ: 2008-2011; ArtistI: 2009-2011)* (9 July 2010) Copyright Board decision, at paras 9–13. [*Commercial Radio (2010)*]

[2] *Copyright Act*, R.S.C., 1985, c. C-42.

[3] On March 3, 2014, AVLA Audio-Video Licensing Agency (AVLA) changed its name to Connect Music Licensing Service Inc. In these reasons, all references are to "Connect," even when the events referred to took place before AVLA changed its name.

[5] Between June 26, 2009 and August 1, 2012, the Canadian Association of Broadcasters (CAB), representing the majority of Canadian private radio stations, filed timely objections to all of the above-proposed statements of royalties on behalf of its members.

[6] On July 12, 2012, the Supreme Court of Canada rendered its decision in *SOCAN v. Bell Canada*[4] in which it clarified the concept of fair dealing, which could have implications for some activities targeted in this proceeding.

[7] On November 7, 2012, certain provisions of the *Copyright Modernization Act*[5] came into force, including the enactment of section 29.24, which provided an exception for backup copies, and 30.71, which provided an exception for reproductions forming an essential part of a technological process, and the amendment of section 30.9, creating a limited exception for ephemeral reproductions made by broadcasters.

[8] On November 8, 2012, in response to *Bell* and the coming into force of certain provisions of the *CMA*, CAB filed an application[6] requesting that: 1) the Board issue an interim decision reducing by 90 per cent the royalties paid by commercial radio stations to CSI, Connect/SOPROQ and Artisti under the last certified commercial radio tariffs, from November 7, 2012 until the Board renders a decision on the merits; 2) declare that as of November 7, 2012, there is no legal basis for the commercial radio reproduction tariffs; and, 3) rescind the CSI tariff as of November 7, 2012.

[9] The Board ruled on this matter in its interim decision of December 21, 2012.[7] It found the application on the merits to be "untenable." First, the Board disagreed that there is no legal basis for a reproduction tariff, stating that radio stations could not currently show that they will be able to avail themselves of the exceptions in respect of future uses of musical sound recordings. The Board also found that, in order to decide the issues raised by CAB, including fair dealing, substantial evidence on the scope of the protected reproduction activities by radio stations was necessary and should be integrated into a single process that would also examine all of the proposed tariffs for commercial radio. Moreover, the Board concluded that CAB's arguments could not justify a royalty reduction for an entire industry, by reason that all stations do not operate in the same way.[8]

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[4] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326. [*Bell*]
[5] *Copyright Modernization Act*, S.C. 2012, c. 20 (assented to 29 June 2012). [*CMA*]
[6] Application by the Canadian Association of Broadcasters for interim and permanent relief, November 7, 2012: http://www.cb-cda.gc.ca/avis-notice/active/2012/commercialradio-12112012.pdf
[7] *Commercial Radio Tariff (SOCAN: 2008-2010; Re:Sound: 2008-2011; CSI: 2008-2012; AVLA/SOPROQ: 2008-2011; ArtistI: 2009-2011)* (21 December 2012) Copyright Board interim decision.
[8] *Ibid* at paras 6−13.

[10] The Board dealt with CAB's application to vary the CSI commercial radio tariff for the period of November 7, 2012 to December 31, 2012 by making the tariff certified in January 2011 an interim tariff in respect of CSI, effective November 7, 2012.[9]

[11] The Board rejected the application for an interim decision in all other respects. The application for an interim decision faced the same evidentiary problems and legal issues as the application on the merits.[10] The Board also stated that it would be easier for radio stations to deduct an overpayment from future royalties than it would be for collective societies to add an underpayment and that the balance of convenience favours collective societies.[11]

[12] On January 21, 2013, the Board invited any parties challenging the *status quo* (i.e., any aspects of the existing tariffs) to file their submissions setting out the reasons for doing so. On January 28, 2013, the following parties indicated to the Board their intention to challenge the *status quo* and provided their reasons for the challenge: CAB, SOCAN, Re:Sound, Connect/SOPROQ, Artisti and ACTRA PRS/MROC. The Board ruled on March 6, 2013 that none of the parties challenged the use of previously certified rates (including the amount of music use and the fundamental value of music) as starting points to set the royalties, although most proposed that adjustments be made to some of those rates.

[13] On March 6, 2013, ACTRA PRS/MROC withdrew their proposed tariffs and their request for intervenor status.

[14] In August 2013, CAB, Artisti and Connect/SOPROQ filed an agreement with the Board concerning the extent of Connect/ SOPROQ's repertoire of sound recordings and the allocation of royalties between Connect/SOPROQ and Artisti. As a result of the settlement, Artisti no longer challenged the *status quo*, as it did in its submission of January 28, 2013.

[15] The matter was heard over ten days from October 8, 2013 to October 22, 2013, and the closing arguments were heard on March 3 and March 4, 2014. The record was perfected on March 21, 2014, when Connect/SOPROQ filed its reply to CAB's response to a question asked by the Board.

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[9] As a result of the decision of the Board to make interim the CSI (2008-2012) Commercial Radio Tariff as of November 7, 2012, the period from November 7 to December 31, 2012 is also under consideration in this proceeding.
[10] *Supra* note 7 at para 17.
[11] *Supra* note 7 at para 19.

II. POSITION OF THE PARTIES

A. THE COLLECTIVES

[16] Connect/SOPROQ, CSI, Re:Sound, and SOCAN, together "the Collectives," jointly proposed four types of changes to their existing tariffs. First, in their proposed tariff for the years of 2012 to 2017, Connect/ SOPROQ suggested that royalty payments for radio stations that are part of a common ownership group be based on the combined gross income of that group rather than on individual stations. They justified this approach on the basis that the current structure was intended to alleviate the financial burden of small and independent stations rather than small stations part of a station group. The Collectives claimed that, under the current system, rights holders are subsidizing small stations as well as medium-large stations that are part of a station group. They also argued that, because of the current tariff's tiered structure, whereby the rate increases with revenues, the current approach results in an effective tariff rate smaller than what was initially intended by the Board.

[17] Second, SOCAN, with the support of Connect/SOPROQ, CSI, and Re:Sound, argued that specific wording be added to the tariff to provide that the definition of a radio station's gross income includes contra revenues as well as agency advertising revenues.

[18] SOCAN's proposed statements of royalties for the years 2011, 2012 and 2013 did not however include these proposed clarifications. The Collectives' statement of case of August 9, 2013, proposed including contra and barter revenues in the commercial radio tariff's definition of gross income as "the value of any goods and services provided by any person and received by stations in exchange for the use of those broadcasting services or facilities."[12] The Collectives stated that while the majority of radio stations indicated, in response to interrogatories, that they include contra and barter in their gross income calculation, some radio stations did not answer the question or provided an ambiguous answer.

[19] SOCAN later agreed, during its opening statement of the hearing,[13] with CAB's alternative suggestion to use the words "barter" and "contra" explicitly as follows in the definition of gross income:

> gross income means the gross amounts paid by any person for the use of one or more broadcasting services or facilities provided by a station's operator, including the value of any goods or services provided by any person in exchange for the use of such services or

[12] Exhibit Collectives-1 at para 63.
[13] Transcripts, Vol. 1 at p 26:2–11.

facilities, and the fair market value of non-monetary consideration (e.g. barter or "contra"), but excluding the following […][14]

[20] On January 28, 2013, SOCAN informed the Board in writing of an additional change from the *status quo*: "clarifications relating to the tariff definition of gross income and the exclusions from the rate base, including the treatment of agency advertising revenues (as it is SOCAN's position that some stations are inappropriately excluding such revenues from the royalty base)."

[21] Third, the Collectives proposed changes to the administrative and reporting provisions of Connect/SOPROQ's and Re:Sound's tariffs. These changes would require, among other things, 365-day sequential list reporting, electronic format reporting within 14 days after the end of the relevant monthly period, with a financial penalty for late music-use and financial reporting, providing additional music identifying information such as UPC and ISRC codes, cue sheets for syndicated programming, the duration of the sound recording as broadcast and listed on the album, track number, type of usage, catalogue number, and whether the recording is published. The Collectives also proposed broadened confidentiality provisions and a one-year limitation period on overpayment adjustments. These changes were said to be proposed to facilitate the accurate and timely distribution of royalties to members and meet international standards.

[22] In its written submissions of February 14, 2014, Re:Sound indicated that it was withdrawing its proposed changes to section 13 of its proposed tariffs on the one-year limitation period for broadcasters to submit claims of overpayment. Later, on February 28, 2014, Connect/SOPROQ indicated, in response to a question by the Board, that it was also withdrawing its corresponding proposed changes.

[23] Fourth, changes to the wording of Connect/SOPROQ's and Re:Sound's tariffs to clarify their scope and improve consistency among the various broadcast tariffs were also proposed by the Collectives.

B. RE:SOUND

[24] In addition to supporting the Collectives' challenge to the *status quo*, Re:Sound proposed that royalties be established for the public performance of published sound recordings by a radio receiving set under subsection 69(2) of the *Act*. Pursuant to this subsection, businesses playing over-the-air music via a radio receiving set are currently not required to pay royalties for their use of music. This is commonly referred to as the "radio exception." Subsection 69(2) states that the Copyright Board shall, in so far as possible, provide for the collection in advance of royalties in respect of the public performance of music in a business via a radio receiving set from radio broadcasters rather than by the owner or user of the radio receiving set.

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[14] Exhibit CAB-1A at para 44 (emphasis in original).

[25] In its proposed tariff published in June of 2011, Re:Sound initially proposed in relation to the radio exception, to set rates for the public performance of sound recordings at 0.26 per cent of gross income for low music-use radio stations and at 0.446 per cent of a station's first $1.25 million gross income and at 0.65 per cent of a station's remaining gross income for other stations. However, in its statement of case of August 9, 2013, Re:Sound proposed a lower rate of 0.06 per cent of gross income for all types of stations and all levels of income.

[26] Aside from proposing to set royalties under subsection 69(2), Re:Sound also proposed an amendment to the language of the confidentiality provision of its proposed tariffs. The change would allow Re:Sound to share confidential information with its member organizations and service providers.

C. CONNECT/SOPROQ

[27] Connect/SOPROQ initially proposed to continue using the same methodology and the same CSI starting rates used in the last commercial radio certified tariff but argued that all adjustments made in the last certified tariff were no longer necessary because of market changes.[15] In the last certified tariff, there were three such adjustments, all in the form of discounts. Discounts were applied to the rates to account for the fact that music distribution services (MDS) like DMDS authorized subscribers to make the initial copy of sound recordings they download from the services (the "MDS Discount"), that Connect/SOPROQ's repertoire covered 93.72 per cent of the sound recordings broadcast by commercial radio stations (the "repertoire discount"), and that some of the performances on Connect/SOPROQ recordings were owned by Artisti or other performers (the "performance discount").

[28] The tariff rates initially proposed by Connect/SOPROQ for stations with low music use, with all discounts removed, were 0.15 per cent of the station's first $625,000 gross income, 0.288 per cent of the station's next $625,000 gross income, and 0.482 per cent of the station's remaining gross income. The rates for all other stations were 0.338 per cent of the station's first $625,000 gross income, 0.663 per cent on the next $625,000 gross income, and 1.375 per cent on the remaining income.

[29] The August 2013 agreement between CAB, Connect/SOPROQ and Artisti addressed two of the three adjustments mentioned above. Pursuant to the agreement, of the 0.688 (1.375 ÷ 2) per cent starting rate, Artisti would get 0.028 percentage point for its performers' performances that are part of Connect/SOPROQ repertoire, and Connect/ SOPROQ would get the remaining 0.66. Furthermore, all parties have agreed that Connect/SOPROQ represents 93.72 per cent of the sound recordings aired by commercial radio stations. Artisti, Connect/SOPROQ and CAB have

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[15] *Commercial Radio (2010), supra* note 1 at paras 247–261; Exhibit AVLA/ SOPROQ-1 at paras 3, 8–25.

also agreed that they would no longer argue for an increase or a decrease of the measured repertoire in the current proceedings. In addition, Connect/SOPROQ agreed not to seek, for the remainder of the current tariff proceedings, a reduction of the discount applied to reflect performances in which the reproduction right is owned by the performer. Consequently, the repertoire discount and the performance discount would remain in place, valued as they had been in the last certified tariff.

[30] In its statement of case of August 9, 2013, Connect/SOPROQ proposed the elimination of the MDS Discount to account for the fact that MDS services are no longer authorizing the first downloaded copy from their server. Removing the MDS discount would lead to a rate of 1.23 per cent of gross revenues for commercial radio stations with revenues above $1.25 million, compared with the last certified rate of 1.192 per cent.

[31] In its written submissions of February 14, 2014, Connect/SOPROQ also identified a calculation error in *Commercial Radio (2010)* with respect to the AVLA/SOPROQ royalty rates. In a letter dated March 13, 2014, CAB indicated that, if the Board determines that a calculation error was made in the 2010 decision, it did not object to the correction of the error for the current proceedings.

[32] In addition to the elimination of the MDS Discount, Connect/SOPROQ supports all of the Collectives' proposals.

D. ARTISTI

[33] Artisti originally intended to seek higher tariff rates based on the grounds that its repertoire had increased since the last certified tariff and will continue to grow over the years. It also argued that the last certified tariff rates overestimated the proportion of Artisti instrumentalist members, subject to the collective agreement between the *Guilde des musiciens du Québec* and the *Association québécoise de l'industrie du disque, du spectacle et de la vidéo* (ADISQ), who do not own the right provided under subparagraph 15(1)(*b*)(ii) in all of their performances.[16]

[34] As a result of the agreement between Artisti, Connect/SOPROQ and CAB in August 2013, Artisti indicated that it was no longer challenging the *status quo*. Artisti relied on Connect/SOPROQ's and CSI's arguments and evidence with respect to the reproductions made by commercial radio stations, the scope of the reproduction rights following the changes to the *Act*, and the implications of the *Act's* exceptions on the scope and value of the right to reproduce. However, Artisti reserved its right to respond to any arguments on the royalty rate for performers' performances if they deviated from the August 2013 agreement. They did not.

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[16] *Commercial Radio (2010), supra* note 1 at paras 99, 241–242.

E. CAB

[35] CAB challenged the *status quo* with respect to the reproduction tariffs proposed by CSI, Artisti, and Connect/SOPROQ. Its position was essentially the same as in its application for an interim tariff of November 8, 2012. It argued that, as a result of the changes to the *Act* of November 2012 and of the *Bell* decision, there was no legal basis for the commercial radio reproduction tariffs.

[36] CAB initially proposed that each type of copy made during the process of broadcasting music over the air is exempt from copyright liability and that consequently, the rates of the reproduction tariffs be set at zero. In its application for an interim tariff, CAB had proposed that the rates of the reproduction tariffs be reduced by 90 per cent. Alternatively, in case the Board determined that some categories of reproduction are not covered by any exception, CAB proposed that only the values of those categories be included in the royalty rates.

[37] CAB based its case on the five following provisions of the *Act*. First, the technological process exception allows the making of a reproduction of a work if it is an essential part of a technological process, if its only purpose is to facilitate a non-infringing use of copyright, and if it exists only for the duration of the technological process (section 30.71 of the *Act*). Second, as its name indicates, the backup exception allows the making of a reproduction of a source copy if it is done solely for backup purposes in the case the non-infringing source copy is lost, damaged or no longer usable (section 29.24 of the *Act*). Third, the broadcast ephemeral exception allows the making of a reproduction of a sound recording, or a performer's performance or work in a sound recording, if the broadcaster owns the copy and is authorized by the owner of the copyright or is licensed to communicate it to the public (section 30.9 of the *Act*). Fourth, the fair-dealing exception allows the making of the reproduction of a work if it is for the purpose of research, private study, education, parody and satire (section 29 of the *Act*). Fifth, subsection 3(1) of the *Act* limits the application of a right of reproduction only to the reproduction of an entire work or a substantial part thereof.

[38] CAB claimed that different exceptions, or users' rights, applied to different types of copies. For instance, it argued that the Ingest, Main Automation System, Voice-Tracking, Live Performance and Internet and Mobile Streaming copies could benefit from the technological process and broadcaster ephemeral copy exceptions. Voice-Tracking copies and Internet and Mobile Streaming copies may be not substantial parts of the copied works. Music Evaluation/Selection copies could be exempted under the fair-dealing exception.

[39] As another alternative, CAB proposed that, if a category of copy falls only within a copyright exception that requires individual station compliance, like ephemeral copies under section 30.9 of the *Act*, then the rate applicable to the compliant stations should be reduced by

the relative value of that category. This alternative corresponds to a form of Modified Blanket Licence (MBL).

[40] In its written submissions of February 14, 2014, CAB modified its initial proposal by suggesting that the rates of the reproduction tariffs should be set at one per cent of their current rates instead of zero, to reflect the fact that a marginal number of copies might not be covered by exceptions.

III. EVIDENCE

[41] During the proceedings, the parties addressed five main issues. The Collectives proposed a Group Rate Based Model (GRBM) for calculating royalties. The Collectives also proposed changes to the music-use reporting and other administrative provisions. Connect/SOPROQ proposed the elimination of the MDS Discount. Re:Sound proposed that royalties be set pursuant to subsection 69(2). CAB proposed reducing the rate of the reproduction tariffs to account for copyright exceptions. The following section describes the evidence submitted in relation to each issue.

A. THE GROUP RATE BASE MODEL

[42] The Collectives relied on the reports of three experts to support their proposal for group-based royalties: Dr. Marcel Boyer, Emeritus Professor, *Université de Montréal*, Ms. Lisa Pinheiro, Vice President, Analysis Group, and Dr. Michael Murphy, Full Professor, Ryerson University. Dr. Boyer and Ms. Pinheiro jointly prepared a quantitative report[17] demonstrating the impact of switching from the current approach to a group-based approach on the amount of royalties paid by stations while Dr. Murphy prepared a report[18] on the technology used by stations within a station group.

[43] The GRBM, as analyzed by Dr. Boyer and Ms. Pinheiro, consists of calculating royalties based on the aggregate income of all stations in the same ownership group rather than individually calculating the royalty payment of each radio station. Dr. Boyer and Ms. Pinheiro estimated the impact of switching from a Station Rate Base Model (SRBM) to a GRBM using two different datasets: Connect/SOPROQ's licensing data on radio stations, excluding low music-use stations, and Statistics Canada's data on commercial radio stations in Canada. From Connect/SOPROQ's data, they found that the impact of switching from the SRBM to the GRBM is a royalty increase of 21.8 per cent, from $13.9 million to $17.8 million. When Statistic

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[17] Exhibit Collectives-4: *Tiered Royalties: Comparison of the Group and Station Rate Base Models*, by Dr. Marcel Boyer and Ms. Lisa Pinheiro, August 9, 2013.
[18] Exhibit Collectives-3: *Report on Radio Technology by Station Groups and Networks*, by Michael J. Murphy, August 9, 2013.

Canada's data were used, they found a royalty increase of 24 per cent from $11.3 million to $15.0 million.

[44] Connect/SOPROQ had proposed the GRBM in the proceedings that led to the *Commercial Radio (2010)* decision. The Board rejected this proposal on the grounds that more evidence was needed to justify the change, that networks and radio companies were difficult to define, and that such a proposal requires a review of the impact on the total royalties paid by stations and of potential adjustments to the tariff rates.[19]

[45] Responding to the Board's objections raised in the *Commercial Radio (2010)* decision, Dr. Boyer and Ms. Pinheiro provided a rationale for the GRBM. According to them, the SRBM introduces double discounting for smaller radio stations as a result of the tiered structure of the commercial radio tariffs and the fact that the tariff rates are percentages of income. The double discounting can be interpreted as a subsidy granted by rights holders to smaller stations and as a form of risk sharing. However, contrary to risk-sharing theory, investors (rights holders in this case) do not receive higher rates of returns for riskier investments.

[46] Dr. Boyer and Ms. Pinheiro also pointed out that the SRBM fails to address certain economic realities of the commercial radio industry. In particular, it does not account for the fact that station groups are profit maximizers investing in smaller stations only if the investment is beneficial to them, nor does it account for the financial interdependence and pooling of resources within groups. Dr. Boyer and Ms. Pinheiro claimed that the GRBM would ensure that small and medium-sized stations of a station group are subsidized by their own group rather than by rights holders. They also argued that the actual commercial radio industry is characterized by a high concentration ratio[20] and no longer corresponds to the industry's situation that led to a tiered tariff.

[47] As per the Board's statement that stations networks and companies were difficult to define, Dr. Boyer and Ms. Pinheiro suggested that a station group be defined as stations under common ownership or control.

[48] To estimate the impact of a switch to the GRBM when the same tariff rate structure is kept, Dr. Boyer and Ms. Pinheiro calculated the aggregated gross income of station groups by summing the gross income of individual stations within each ownership group and applied AVLA/SOPROQ's tiered rates from the *Commercial Radio Tariff (2010)*[21] to the aggregate gross

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[19] *Commercial Radio (2010), supra* note 1 at paras 293−294.

[20] A concentration ratio is a measure of the total output produced in an industry by a given number of firms in the industry. Concentration ratios are usually used to show the extent of market control of the largest firms in the industry and to illustrate the degree to which an industry is oligopolistic.

[21] Statement of Royalties to Be Collected by SOCAN (2008-2010), Re:Sound (2008-2011), CSI (2008-2012),

income of station groups and to the gross income of independent radio stations. Switching to the GRBM resulted in an average royalty rate paid by all stations of 1.138 per cent, and a royalty increase of 21.8 per cent in comparison to the total royalty payments paid by all stations under the SRBM. Dr. Boyer and Ms. Pinheiro referred to this figure as a discount under the SRBM. As a result of this GRBM, small independent stations and small station groups would still pay a much lower rate than 1.138 per cent, but large groups would pay a rate closer to 1.192 per cent, the highest tier rate. This, according to the authors, corresponds to some form of subsidy from large to small stations.

[49] Dr. Boyer and Ms. Pinheiro also estimated the impact of switching to a GRBM where station groups do not subsidize small independent stations. They explained that this is equivalent to lowering the highest tier rate from 1.192 to 1.170 so that station groups pay, on average, a royalty rate of 1.138 per cent. In this scenario, all stations would pay an average rate of 1.117 per cent, which corresponds to a 1.8 per cent discount compared with the GRBM with subsidies.

[50] According to the Collectives, the technological structure of radio stations making possible the sharing of resources among radio stations is consistent with a group rate base approach to calculating royalties. Dr. Murphy's reply report[22] described the specificities of technology shared by commercial radio station groups and networks in Canada. The report is based on information provided by the stations in response to interrogatories addressed by Connect/SOPROQ and CSI and on publicly available information. The report indicates that there has been a shift to the use of more shared technological infrastructure for station groups. For example, computer networking and satellite technology allow the transfer of programs, additional operational efficiencies, and the use of centralized resources. Ingest functions, remote voice-tracking servers, network storage systems, and audio logging products can all be shared by stations in the same group.

[51] In his report,[23] CAB's expert, Dr. David Reitman, Vice President, Charles River Associates, advanced two critiques of Dr. Boyer and Ms. Pinheiro's proposed GRBM. First, Dr. Boyer and Ms. Pinheiro overestimated the tariff rates that would be appropriate for radio stations under a GRBM. According to Dr. Reitman, the overestimation is due to the inadequate application of SOCAN's tariff structure to Connect/ SOPROQ and CSI and the assumption that SOCAN's overall effective rate is the average rate to be paid by all stations.

AVLA/SOPROQ (2008-2011) and ArtistI (2009-2011) in Respect of Commercial Radio Stations, *Canada Gazette*, July 10, 2010. [*Commercial Radio Tariff (2010)*]

[22] Exhibit AVLA/SOPROQ-CSI-66: *Reply Report on Radio Technology used by Station Groups and Networks*, by Dr. Michael J. Murphy, October 3, 2013.

[23] Exhibit CAB-5: *Economic Perspectives on the Use of an Ownership Group Tariff Rate Base for Commercial Radio Stations*, by Dr. David Reitman, September 17, 2013.

[52] Second, Dr. Reitman indicated that the proposed GRBM would have an impact on station groups composed primarily of multiple small stations by drastically increasing their royalty payments.

[53] Dr. Reitman also observed that the tariff tiered rate design explains the difference between the SRBM and the GRBM. Royalties under both models would be the same if there were no tiered rates.

[54] Although he argued that there is no rationale for switching from the current SRBM tariff design to a GRBM design, Dr. Reitman proposed two alternatives to Dr. Boyer and Ms. Pinheiro's GRBM, which he believed are more equitable. His first alternative consists of finding the proper highest tier rate so that the royalty payments under a group rate base design are the same as under the current design. When the highest tier rate is 0.926 per cent, both designs yield the same amount of royalties. In his second alternative, Dr. Reitman proposed that station groups pay the same rates as they would have, had the lower tier rates been increased by 31.25 per cent in the 2005 decision to reflect the increased value of music. In this alternative, stations would end up paying a little more than in the current design but less than they would pay under the GRBM proposed by Dr. Boyer and Ms. Pinheiro.

[55] Dr. Boyer and Ms. Pinheiro's main disagreement with Dr. Reitman's review of their report concerns the discussion of what were the effective rates the Board intended to set in the *Commercial Radio (2010)* decision. Dr. Boyer and Ms. Pinheiro argued the rate for AVLA/SOPROQ was about 1.138 per cent while Dr. Reitman argued it should be 0.97 per cent.

[56] In their response to Dr. Reitman's reply, Dr. Boyer and Ms. Pinheiro discussed once more the rate issue and provided a few examples to show that variability in royalty payments across radio station groups would be reduced under the GRBM among station groups with similar revenues. They also proposed that the Board cap the royalty increase at 20 per cent if it wishes to limit the extent of the change to a group rate base design.

[57] Two CAB witness, Mr. Kirk Nesbitt, Vice President of Corporate and Radio Engineering, Rogers Broadcasting Limited, and Mr. Rod Schween, President, Jim Pattison Broadcast Group and General Manager of CFJC-TV, CIFM-FM and CKBZ-FM, disagreed with Dr. Murphy's assertion that stations under common ownership have been using shared technological infrastructure more intensively since 2008. They stated that the evidence shows that some radio groups have been sharing technologies since the early 2000s while other groups refrain from sharing resources between markets, limiting sharing to news and to a common streaming provider.

[58] Mr. Nesbitt testified that Dr. Murphy's report gives an inaccurate representation of the functions shared by the Rogers' stations and explained that Rogers stations share the cost of services according to their share of revenues.[24]

[59] Mr. Schween also explained that for his specific station group, revenue allocations between stations were limited to when group advertising buys are made.[25]

B. MUSIC-USE REPORTING AND OTHER ADMINISTRATIVE PROVISIONS

[60] Ms. Doris Tay, Director of Distribution, Re:Sound, Ms. Victoria Shepherd, Executive Director, Connect, and Mr. Sébastien Sangollo, Assistant Executive Director, SOPROQ, explained how royalties are distributed by their respective collective societies and how the proposed administrative and reporting provisions would improve and facilitate the administration of the tariff and the distribution of royalties to rights holders.

[61] In its reply statement of September 17, 2013, CAB submitted that all stations that have the necessary technology to comply with the music-use reporting proposed by the Collectives should do so, but that stations should not be required to acquire new technology. It also submitted that it is incorrect to assume that all versions of all programming software can produce the sequential lists required by the Collectives.

[62] In reply to CAB's statement with respect to the software's capability of generating sequential lists, Ms. Tay explained that it is her understanding that all versions of MusicMaster, Selector and GSelector can generate 365-day sequential lists. She also stated that stations receive the same MDS feeds as she does, which often include UPC and ISRC codes, track, and catalogue numbers.

[63] Ms. Tay also discussed why certain changes to existing confidentiality provisions of the tariff, which would allow Re:Sound to share confidential information of radio stations with Re:Sound's members, service providers[26] and royalty claimants, (12(2)(*a*) and *d*)), and allow Re:Sound to share aggregated information (12(3)), are necessary.

[64] To deal with these issues, the Board ordered the parties to provide information on music-use reporting.[27] It required Re:Sound to provide information on the stations providing 365-day sequential lists and using programming software like Selector or MusicMaster to determine

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[24] Exhibit CAB-4A at para 7.
[25] Exhibit CAB-6 at para 18.
[26] As used in the witness' testimony, this refers to consultants or external service providers who are used by Re:Sound to assist in the carrying out of their mandate, such as Erin Research. See Exhibit Re:Sound-1A at para 66; Exhibit Re:Sound-3 at para 9.
[27] Notice of the Board (18 February 2014).

whether stations with smaller revenues are more likely not to provide sequential lists or more likely to have systems that are less technologically advanced than those used by bigger stations.

[65] Re:Sound's response to the Board's questions indicated that stations with revenues smaller than $1.25 million are as likely as stations with larger revenues to provide 365-day sequential lists. A total of 51.5 per cent of the stations providing 365-day reporting have revenues smaller than 1.25 million. However, a greater proportion of stations with smaller revenues tend to provide their reports in a format other than the format generated by software like Selector or MusicMaster. A total of 82.5 per cent of the 663 commercial radio stations reporting to Re:Sound use software like Selector or MusicMaster. Stations with smaller revenues represent 54.3 per cent of the 116 stations not using these software programs.

[66] No experts were required to deal with the issue of the definition of gross income.

C. Music Distribution Service Discount

[67] Connect/SOPROQ did not rely on experts to support its proposal of totally removing the MDS Discount that was applied to AVLA/SOPROQ's rate in the *Commercial Radio (2010)* decision. However, it filed a copy of the current end-user licence agreement in force between the digital media distribution company Yangaroo Inc., radio stations, and makers of sound recordings, and underlined the new changes in the end-user licence agreement that confirm that radio stations are not authorized to make copies of sound recordings, including the initial copy that was subject to the MDS Discount.

D. Radio Receiving Set Exception (subsection 69(2))

[68] Mr. Martin Gangnier, Director, Licensing, Re:Sound, provided information on the radio exception pursuant to subsection 69(2) of the *Act*. He described how the licensing department derived the proposed royalty rate of 0.06 per cent. The royalty rate was calculated by estimating what royalties would be otherwise payable by businesses were they not subject to the radio exception. Three main determinants were taken into account. The first is the amount of royalties that would be payable to Re:Sound if there were no radio exception. This amount was derived from the product of Re:Sound's estimate of businesses in Canada subject to the radio exception and the weighted average royalty payment of similar businesses under Re:Sound Tariff 3 (Use and Supply of Background Music). The second determinant, the potential savings in collection expenses to Re:Sound as a result of the radio exception, is the product of estimated administrative costs savings per business from postage, printing, supply, and collection and the

number of businesses subject to the radio exception. The third determinant is the total gross income of all commercial radio in 2012, as reported to Re:Sound.[28]

[69] In CAB's opinion, the number of listeners that advertisers consider when they purchase airtime from radio stations includes the number of employees as well as the number of customers of businesses playing radios in their establishments. As such, CAB suggested that the structure of the current commercial radio tariff[29] already takes into account the public performance in businesses in a way that was not possible in 1938 when a radio tariff pursuant to subsection 69(2) of the *Act* was first established. At that time, CAB stressed, the radio tariff was calculated as a specified sum per radio set in Canada and was not a function of a station's revenues.

[70] Therefore, CAB argued that the public performance is already included in the royalties of the *Commercial Radio Tariff (2010)* since radio revenues mainly come from advertising revenues and those are a function of audiences. To support its claim, CAB relied on the testimony of Mr. Rod Schween, which explained how advertising is usually sold at the Jim Patterson Broadcast Group. National and regional advertising is sold according to audience levels. The Bureau of Broadcast Measurement (BBM) tracks the number of listeners in any environment (home, car, work, etc.).

[71] CAB also argued that there is no reliable evidence on the use of commercial radio as background music by businesses and that using Re:Sound's Tariff 3 as a proxy is inappropriate. Unlike background music, commercial radio does not have a music content of 100 per cent, is not tailored to a specific environment, and does not offer a specific music genre. According to CAB, there would be no market for background music suppliers if commercial radio were a perfect substitute for background music.

[72] CAB's position is that no tariff should be certified pursuant to subsection 69(2) of the *Act*. Alternatively, if the Board determines that a tariff ought to be certified, CAB suggests that it be a nominal tariff like the ones certified in the past from 1939 to 1952.

[73] According to Re:Sound, the commercial radio tariff applicable to SOCAN and Re:Sound (Tariff 1.A) applies to the communication of sound recordings but not the public performance of sound recordings and as such, royalties payable under subsection 69(2) of the *Act* are not included in that tariff. Re:Sound also argued that a nominal tariff is not appropriate. Evidence shows that a significant number of businesses play the radio, which implies that the public performance of music via radio by businesses has significant value for them.

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[28] Exhibit Re:Sound-1 at p 12; Exhibit Re:Sound-2 at para 27, citing Re:Sound's Director of Finance.
[29] *Commercial Radio Tariff (2010), supra* note 21.

[74] Mr. Gangnier disagreed with CAB's claim that there would be no market for background music suppliers if commercial radio was a substitute for background music. Re:Sound's records indicate that both background music services and radio services are used by businesses as sources of background music. To his knowledge, some corporate chains even have policies requiring that their stores play AM/FM radio as background music. He also commented that Re:Sound has a clear picture of the businesses playing commercial radio as background music. Re:Sound also indicated that radio is an established source of background music and that Tariff 3 is the best proxy for royalties payable under subsection 69(2) of the *Act*.

E. COPYRIGHT EXCEPTIONS

i. Relative value of each type of copy

[75] In his report,[30] Dr. Reitman provided evidence on his calculation of the relative value of all the different types of copies made by radio stations. Dr. Reitman used two datasets to estimate the relative values: (a) responses from 99 radio stations to Connect/ SOPROQ and CSI interrogatories; and, (b) data from 212 radio stations, obtained from a commercial radio station survey undertaken by the Collectives in the spring of 2013.

[76] He derived six measures, each one being a combination of usage and usefulness measures from the survey, interrogatory responses, or both, and converted them to relative values. "Usage" measures how often a type of copy is used by a radio station whereas "usefulness" measures how important a type of copy is for a radio station.[31] The six measures yielded values similar to one another. In each case, Ingest copies, Main Automation System copies and Backup copies were assigned a higher relative value, together representing between 70 per cent and 83 per cent of the total value, with Main Automation System copies being the most valued type.

[77] Dr. Reitman's preferred measure combined usefulness information from the survey data with usage information from the interrogatories. He argued that such a hybrid measure may provide a better estimation of the average value of each type of copy for all commercial radio stations. Combining usage and usefulness provided a more complete estimate of the entire industry and using the interrogatory responses, together with data from the survey, allowed to collect additional information about the number and types of copies made.

[78] According to Dr. Reitman's calculations, 35.2 per cent of the value from making reproductions in order to broadcast over-the-air music should be attributed to Main Automation System copies, 25.2 per cent to Ingest copies, 22.3 per cent to Backup copies, 7 per cent to

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[30] Exhibit CAB-2: *Report on the Economic Value of Reproductions of Music to Commercial Radio Stations*, by Dr. David Reitman, August 9, 2013.
[31] See Part IV below for the various types of copies considered.

Voice-Tracking copies, 6.5 per cent to Live Performance copies, 2.8 per cent to Music Evaluation/Selection copies, 0.6 per cent to Internet and Mobile Streaming copies, and 0.4 per cent to extra copies.

[79] Dr. Marcel Boyer and Dr. Pierre Cremieux, Managing Principal of Analysis Group Inc. and Adjunct Professor at the Economics Department at the *Université du Québec à Montréal* and the Yale School of Management, reviewed Dr. Reitman's analysis on the relative value of different types of copies. In their opinion, Dr. Reitman's approach of summing up the values of different types of copies is not consistent with the current blanket licence model in which stations pay a percentage of their revenues for the option to make as many copies, of any types, as they wish. In addition, they identified the following issues with Dr. Reitman's approach: it did not provide proper economic justification, it did not account for the interdependencies between copies or for the option to copy, it ignored the proportion of stations that qualify for an exception, and it did not provide an explanation for using the interrogatory responses instead of the survey responses.

[80] Drs. Boyer and Cremieux also provided an alternative approach, using cooperative game theory, to calculate royalties when copyright exceptions apply to certain types of reproductions made by radio stations. Cooperative game theory examines a fair allocation of joint value or costs across multiple contributing goods and services, referred to as players. In Drs. Boyer and Cremieux's opinion, the most appropriate solution in the context of the copyright exceptions is the Shapley value. The Shapley value is the value that each player can expect to derive by cooperating with the other players. In their game, the players correspond to the types of copies made by radio stations. Because of the interdependencies between the different types of copies, the value of making several types of copies is larger than the value of making them separately in a non-cooperative way.

[81] To calculate the relative value of the different types of reproductions, Drs. Boyer and Cremieux used Dr. Reitman's relative values based on usefulness ratings adjusted for required copies and assumed, based on stations' responses to the interrogatories, that Backup, Voice-Tracking and Ingest copies are all dependent on the main automated system copies and have no value when not teamed with a main automation system reproduction and with the option to copy. The Shapley value is the average of the incremental values computed for all possible sequences of participants and the relative values calculated by Drs. Boyer and Cremieux are simply the relative Shapley values for each type of copy.

[82] With this alternative approach, they concluded that of the total value from making reproductions, 39 per cent is attributed to Main Automation System copies, 7.1 per cent to Backup copies, 6.9 per cent to Ingest copies, 3.0 per cent to Voice-Tracking copies, 2.3 per cent to Live Performance copies, 2.2 per cent to Music Evaluation/Selection copies, 0.3 per cent to extra copies and 0.2 per cent to Internet and Mobile Streaming copies. In addition, Drs. Boyer

and Cremieux stressed that their approach would need to be adjusted to account for the number of stations who actually qualify for the exceptions, as with Dr. Reitman's approach.

[83] Dr. Reitman disagreed with Drs. Boyer and Cremieux's critique that his model does not account for interdependencies. In his opinion, the "absolutely required" characteristic of certain types of copies obtained via the survey of radio stations accounts for interdependencies. As such, the Shapley model used by Drs. Boyer and Cremieux double counts the incremental value of Main Automation System copies. He also pointed out that not all stations referred to the Main Automation System copy as being absolutely required.

[84] Dr. Reitman also argued that Drs. Boyer and Cremieux have no information on the values generated by combining types of copies and that using the relative values he derived might not be accurate to compute a Shapley value. Furthermore, Dr. Reitman is of the view that Drs. Boyer and Cremieux's Shapley value accounting for an option to copy ignores additional players that should be included in the analysis.

ii. Modified blanket licence

[85] In Connect/SOPROQ and CSI's opinion, there are at least three issues with CAB's MBL proposal. First, it would not be consistent with existing industry practices, as the evidence showed that radio stations do not currently qualify for the copyright exceptions in the *Act*. Second, there is no evidence that stations will make the necessary changes to comply with the exceptions in the future. Third, changing to a modified blanket licence would represent an administrative burden for the Collectives.

[86] Ms. Caroline Rioux, Executive Vice President of the Canadian Musical Reproduction Rights Agency (CMRRA), examined CAB's third alternative of a modified blanket licence. She described the administration of a modified blanket licence and explained why CMRRA, SODRAC and CSI are not equipped to administer such a licence. For the modified blanket licence to work, radio stations seeking to qualify for a copyright exception would need to demonstrate to CSI their compliance with the exceptions, which would require additional reporting from the stations and additional administration functions for CSI. She estimated the cost of implementing a new tariff structure under a modified blanket licence to be between $115,000 and $1,250,000 per year for the first two years and between $45,000 and $900,000 afterwards.[32]

[87] Drs. Boyer and Cremieux also examined CAB's alternative proposal of a modified blanket licence. They argued that a modified blanket licence would result in counterproductive

[32] These are approximate figures. For exact calculations, see Exhibit Collectives-38 at pp 9–10.

incentives and administrative inefficiencies. They added that it would be incorrect that relative values, calculated as average values across all stations, be applied on a station-by-station basis. They claimed that an individual allocation should be performed for each station, with the potential disadvantage of inciting stations to make certain types of copies more than others to get reduced royalties. They also proposed that a system of administrative fees or surcharges as in SOCAN Tariff 2.A (Commercial Television) be put in place in the case of a modified blanket licence tariff to share the administrative burden between the Collectives and the licensees.

[88] In CAB's opinion, administrative complexity cannot be an excuse for certifying simplistic and unresponsive tariffs. With respect to the compliance of stations with the requirements of certain exceptions, CAB explained that broadcasters are waiting for the Board's decision to see the adjustments they will need to do to qualify for the exceptions and the impact of those adjustments.[33] Mr. Schween supported CAB's explanation.

iii. International context of temporary copies for technological processes

[89] Connect/SOPROQ and CSI also relied on a report[34] by Dr. Silke von Lewinski examining the different exceptions from copyright infringement for temporary reproductions for technological processes in various countries. Dr. von Lewinski participated actively in many World Intellectual Property Organization (WIPO) committee meetings on copyright and related rights. She explained how it became clear during these meetings that only temporary copies occurring automatically as part of a technological process in the digital environment should be covered by a reproduction exception for technological processes under certain conditions. She stressed that copies made by radio stations for broadcasting music were never considered in informal negotiation sessions to be subject to these exceptions and that this is in fact the case in the copyright legislations of France, Spain, the United Kingdom, Australia, New Zealand and Japan. In addition, Dr. von Lewinski pointed out that the exception for ephemeral copies would be more relevant in the context of copies made by radio stations for broadcasting music.[35] Dr. von Lewinski did not testify during the hearing, although her report was filed as evidence.

iv. Stations' behaviour and eligibility

[90] Mr. Nesbitt and Mr. Youngs both described the process of broadcasting music and the types of copies made at Rogers radio stations and LiVE 88.5, respectively. In addition, Mr. Nesbitt

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[33] Exhibit CAB-11 at para 63.
[34] Exhibit AVLA/SOPROQ-CSI-2: *Exceptions in Respect of Temporary Reproductions for Technological Process in Selected Countries*, by Dr. Silke von Lewinski, filed on September 20, 2013.
[35] Dr. von Lewinski refers to the exception for ephemeral copies under Article 11bis (3) Berne Convention and Article 1(4) WIPO Copyright Treaty (WCT), see Exhibit AVLA/SOPROQ/ CSI-2 at para 22.

testified that the technology and music workflow process has not evolved significantly since Rogers started using digital audio music automation systems in the early 1990s.

[91] Mr. Nesbitt also explained that the process in talk/news stations is considerably different than the process in music stations. The types of copies made by the two types of stations are not the same. For example, talk/news radio stations hardly ever make Music Evaluation/Selection, Voice-Tracking, and Live Performance copies. The ingestion process also differs in the two types of stations. Talk/ news stations only use portions of music tracks, [*CONFIDENTIAL*].[36]

[92] Connect/SOPROQ and CSI contend that CAB's proposal with respect to categories of reproduction being subject to copyright exceptions were not supported by the evidence and did not account for the varying behaviour of individual radio stations.

[93] Dr. Murphy's report on Radio Technology and Workflow[37] provides a description of the process of program assembly done by commercial radio stations, examines copying activities of these stations, and indicates the process changes that have occurred since 2008. He reached the conclusion that there is not one, single, technological process for all radio stations, but rather a number of different combinations of discrete processes. In another report,[38] Dr. Murphy indicated that there has been an increasing trend to use additional servers ("redundant servers") that can be put into service in case the main automation servers or workstations fail. In his view, these redundant servers blur the concept of what would traditionally be thought of as a backup copy as they can be used for purposes other than just backup.

[94] With respect to the deletion of copies by radio stations, Dr. Murphy pointed out that stations do not currently use an automated system tracking the deletion of reproductions or to carry out their deletion. Deletion is usually done manually by stations and is not triggered as a function of the date of creation of the copy.

IV. TYPES OF COPIES MADE

[95] Given that different reproductions may have different values, and may qualify for exceptions with different frequencies (including not at all), it is useful to survey the nomenclature used in the proceedings.

[96] In general, CAB relies on the categories of music reproduction identified and defined by the reproduction collectives for the purposes of their survey of 212 radio stations conducted for this

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[36] Transcripts (confidential), Vol. 7 at pp 479:12–481:14.
[37] Exhibit AVLA/SOPROQ-CSI-3: *Report on Radio Technology and Workflow*, by Dr. Michael J. Murphy, September 20, 2013.
[38] *Supra* note 18.

proceeding (the "Survey"). As noted in the hearing, there is no dispute as to these categories or their definitions.[39] The Survey categories are as follows (from the Survey questionnaire):

a. *Ingest copy*: a copy made from the MDS server or other source;
b. *Music Evaluation/Selection copy*: a copy made for the purpose of evaluating a track to determine whether to add the track to the station's rotation; ["Music Evaluation copy"]
c. *Main Automation System copy*: a copy made for the purpose of being directly broadcast;
d. *Voice-Tracking copy*: a copy made to facilitate the making of voice-track recordings;
e. *Live Performance copy*: a copy of live performances of musical works that occur either at your station or at a remote location;
f. *Internet and Mobile Streaming copy*: a copy made to facilitate Internet and/or mobile streaming; ["Streaming copy"]
g. *Backup copy*: a copy to be used in case a particular source copy is lost, damaged or otherwise rendered unusable; and,
h. *Other copy*: any other type of copy, including but not limited to copies of tracks contained on system workstations, redundant copies of tracks contained on servers and hard drives, copies of tracks contained in a radio station music library, archival copies of tracks, proxy copies, and any other copies created in the course of your station's operations.[40]

[97] We note, however, that while there is no real dispute as to the definitions, the evidence demonstrates that certain reproductions may be used for multiple purposes,[41] which can affect their compensability.

V. WHICH SOUND RECORDINGS RECEIVE A RIGHT TO REMUNERATION?

[98] The right for which Re:Sound seeks a tariff is set out in section 19 of the *Act*. Section 19 provides that if a sound recording has been published, the performer and maker are entitled to be paid equitable remuneration for the sound recording's performance in public or its communication to the public by telecommunication—except for communications stemming from an act of "making-available" and any retransmissions.[42]

[99] Prior to the coming into force of the *CMA*, the *Act* granted the right of remuneration to sound recordings that had a point of attachment to Canada or a country that was a member of the Rome Convention:

> (*a*) the maker was, at the date of the first fixation, a Canadian citizen or permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, or a

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[39] Transcripts, Vol. 7 at pp 813:15– 814:22.
[40] Exhibit CAB-11 at para 9.
[41] Exhibit AVLA/SOPROQ-CSI-3 at paras 45, 116 and 126; Exhibit AVLA/ SOPROQ-CSI-71 at slide 10; Transcripts, Vol. 9 at pp 1223:22– 1224:13.
[42] *Copyright Act*, *supra* note 2, ss. 19(1), 19(1.1), 19(1.2).

citizen or permanent resident of a Rome Convention country, or, if a corporation, had its headquarters in one of the foregoing countries; or

(*b*) all the fixations done for the sound recording occurred in Canada or in a Rome Convention country.[43] [emphasis added]

[100] Sound recordings from countries that were not Rome Convention countries, such as the United States, did not benefit from the remuneration right at all.

[101] Furthermore, even if a sound recording had a necessary point of attachment to qualify for the remuneration right, the scope of this right, or its duration, could be restricted. Subsection 20(2) of the *Act* provided that the Minister of Industry may limit the right of remuneration in relation to sound recordings from countries that do not grant a right of remuneration to sound recordings from Canada similar in scope and duration to that provided by Canada.

[102] This was done by the *Limitation of the Right to Equitable Remuneration of Certain Rome Convention Countries Statement*,[44] which limited the scope of the remuneration right in relation to sound recordings from 20 listed countries. For example, sound recordings from Bolivia only received the remuneration right for a period of 20 years, sound recordings from Norway only received the remuneration right for their communication by telecommunication (not for their performance), and sound recordings from Monaco did not benefit from the remuneration right at all.

[103] Since sound recordings from countries that were not Rome Convention countries did not benefit from the remuneration right at all, those countries were not listed in the *1999 Statement* even if they did not provide a remuneration right to sound recordings from Canada similar to that provided by Canada.

A. THE *COPYRIGHT MODERNIZATION ACT*

[104] One important effect of the *CMA* was to extend the right of remuneration to those sound recordings that had a point of attachment to a country that is a party to the WPPT. Subsection 15(2) of the *CMA* provided that:

(1.2) The right to remuneration conferred by subsection 19(1.2) applies only if

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[43] *Copyright Act*, R.S., 1985, c. C-42, s. 20(*b*) (as amended by 1994, c. 47, s. 59; 1997, c. 24, s. 14; 2001, c. 27, s. 238), as it read on November 6, 2012.
[44] *Limitation of the Right to Equitable Remuneration of Certain Rome Convention Countries Statement*, SOR/99-143 (23 March 1999): http://www.cb-cda.gc.ca/act-loi/regulations-reglements/99143-e.pdf (repealed 13 August 2014 by SOR/2014-181, s. 8). [*1999 Statement*]

(*a*) the maker was, at the date of the first fixation, a citizen or permanent resident of a WPPT country or, if a corporation, had its headquarters in a WPPT country; or

(*b*) all the fixations done for the sound recording occurred in a WPPT country. [emphasis added][45]

[105] The *Order Fixing Various Dates as the Dates on whichs Certain Provisions of the Act Come into Force*[46] provided that subsection 15(2) of the *CMA* would come into force on the day on which the WPPT came into force for Canada.

[106] The Government of Canada deposited instruments of ratification of the WPPT on May 13, 2014, and the treaty came into force for Canada on August 13, 2014. In this manner, the remuneration right was extended to sound recordings from countries that are not members of the Rome Convention, but are parties to the WPPT.

[107] The *1999 Statement* had not dealt with these countries, and some of these countries do not provide a remuneration right to sound recordings from Canada similar to that provided by Canada. As such, on the same day as the WPPT came into force in Canada, the Minister of Industry issued, pursuant to the new subsection 20(2.1) of the Act, the *Statement Limiting the Right to Equitable Remuneration of Certain Rome Convention or WPPT Countries*.[47] Since one of the effects of the *2014 Statement* was to repeal the *1999 Statement*, it entirely replaced the latter.

[108] The *2014 Statement* added countries to the list that were previously not on the *1999 Statement* (e.g., the United States), modified the limitations for some that were (e.g., Japan), removed the limitation entirely for some (e.g., Ireland), and left some as they were (e.g., Lesotho).

B. Effect on Royalties Payable to Re:Sound

[109] Re:Sound administers the right of remuneration of performers and makers of sound recordings. However, in order for Re:Sound to be able to collect royalties for the use of a sound

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[45] *Copyright Act*, *supra* note 2, s. 20(1.2); *CMA*, *supra* note 5, s. 20(2) (emphasis added). For a definition of "WPPT country," see *Copyright Act*, *supra* note 2, s. 2 (" "WPPT country" means a country that is a party to the WIPO Performances and Phonograms Treaty, adopted in Geneva on December 20, 1996").
[46] *Order Fixing Various Dates as the Dates on which Certain Provisions of the Act Come into Force,* SI/2012-85 (7 November 2012): http://canadagazette.gc.ca/rp-pr/p2/2012/2012-11-07/html/si-tr85-eng.html.
[47] *Statement Limiting the Right to Equitable Remuneration of Certain Rome Convention or WPPT Countries*, SOR/2014-181 (14 July 2014), http://www.gazette.gc.ca/rp-pr/p2/2014/2014-07-30/pdf/g2-14816.pdf. [*2014 Statement*]

recording, the sound recording must qualify for a remuneration right in relation to that use, and Re:Sound must be authorized to collect royalties for that remuneration right.[48]

[110] Notably, prior to the coming into force of the WPPT in Canada, sound recordings from the United States did not qualify for a remuneration right and, as such, Re:Sound could not collect royalties for their communication to the public by telecommunication. Since sound recordings from the United States constitute a significant portion of the sound recordings that are performed or communicated by telecommunication to the public in Canada, previous tariffs have made adjustments to take this into account.

[111] For example, in *NRCC – Tariff 1.A (1998-2002),*[49] the Board accepted that 49.3 per cent of all uses of sound recordings by commercial radio stations qualified for the remuneration right. It then found that NRCC, Re:Sound's predecessor, represents the makers' share of at least 95 per cent of these recordings. It therefore concluded that NRCC's eligible repertoire accounted for 45 per cent of all uses of sound recordings by commercial radio stations.[50] In this manner, the Board took into account whether the sound recordings that were communicated to the public by telecommunication benefited from the remuneration right in relation to the use in question, and whether Re:Sound was authorized to collect royalties in relation to those sound recordings.

[112] In this instance, Re:Sound argues that the extension of the remuneration right to sound recordings from WPPT countries has the effect of increasing the number of sound recordings in relation to which it is entitled to collect royalties for their communication to the public by telecommunication.

[113] Any potential increase in the repertoire as a result of the coming into force of the WPPT is dependent on the use of such sound recordings by radio stations, on those uses not being excluded by virtue of the *2014 Statement*, and on Re:Sound being authorized to collect the equitable remuneration for those sound recordings. Notably, the largest source of a potential increase—sound recordings from the United States—are excluded from remuneration for their

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[48] This was recently reaffirmed by the Federal Court of Appeal in *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, Evans J.A ("[I]n most […] regimes under the Act a collective society can only collect royalties in respect of the recordings in its repertoire […] [A]collective society collects royalties on behalf of those who in any manner have authorized it to act for them in connection with the collective administration of their rights […] [S]ection 67 of the Act imposes a duty on a collective society, when requested by a member of the public, to provide information about its repertoire of performers' performances and sound recordings that are in current use. It is difficult to see how this obligation could be discharged if, as Re:Sound argues, its repertoire includes all performances and recordings eligible for equitable remuneration […] [Lastly,] it would be anomalous if a collective society were able to collect royalties for all eligible recordings used in a particular context, but distributed them only to the performers and makers of recordings in its repertoire, and to those whom it was able to discover.") at paras 92–111.

[49] *NRCC – Tariff 1.A 1998-2002* (13 August 1999) Copyright Board decision.

[50] *Ibid* at p 21.

communication to the public by telecommunication by virtue of subsection 2(2) of the *2014 Statement*, which provides that:

> (2) In the case of a sound recording whose maker, at the date of its first fixation, was a citizen or permanent resident of Singapore or the United States or was a corporation that had its headquarters in either of those countries, a right to equitable remuneration does not apply to
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> (*a*) a broadcast that is lawful under the *Broadcasting Act*, by a terrestrial radio station, of a signal that carries the sound recording for reception that is free and does not require a subscription; or
>
> (*b*) the communication to the public by telecommunication of the sound recording to a business for performance as background music on its premises in the ordinary course of its business.[51]

[114] Therefore, it would be the use by radio stations of sound recordings from non-Rome, non-US, WPPT countries that would serve as a potential basis for the adjustment of royalty rates. Even these sound recordings would have to be evaluated to ensure that they are not excluded by virtue of the *2014 Statement*. As an example, and as mentioned above, while sound recordings from Bolivia may generally qualify for remuneration for the communication to the public by telecommunication, this is only true for the first 20 years after their fixation. Thus, sound recordings from Bolivia older than 20 years would be excluded.

[115] Beyond the estimations that the Board has used in relation to United States sound recordings in previous tariffs, we do not have evidence that shows how frequently sound recordings from (non-Rome Convention) WPPT countries are played by Canadian radio stations, or what portion these sound recordings represent in relation to all sound recordings played. Nor do we have evidence that shows for which sound recordings from (non-Rome Convention) WPPT countries Re:Sound is authorized to collect royalties.

[116] Without such evidence, it is not possible to make adjustments in an informed way. As such, the repertoire adjustment for the period under consideration will remain the same as the previous commercial radio tariff.

VI. SUBSECTION 3(1) – "ANY SUBSTANTIAL PART THEREOF"

[117] The *Act* defines "copyright" in relation to a work as "the sole right to produce or reproduce the work or any substantial part thereof."[52] Thus, the reproduction of a part of a work that does not constitute a substantial part of that work is not covered by the "sole right." For this reason,

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[51] *2014 Statement*, *supra* note 47, s. 2(2) (emphasis added).
[52] *Copyright Act*, *supra* note 2, s. 3(1).

the reproduction of non-substantial parts of protected works or other subject-matter is not compensable under any tariff.

[118] CAB argues that certain reproductions made by radio stations, particularly "Internet and Mobile Streaming copies" and some "Voice-Tracking copies," are not substantial reproductions of the musical works or sound recordings.[53]

[119] In its statement of case, CAB says that "Internet and Mobile Streaming copies" refers to temporary buffering copies made in the course of streaming radio station content to computers, mobile devices and other digital terminals. CAB maintains that it is unlikely that these "Internet and Mobile Streaming copies" would result in copyright infringement since they are not substantial parts of the works. CAB also argues that given the recent amendments, this type of copies may also properly fall within the ambit of section 30.71 of the Act as defined above.

[120] In the case of Voice-Tracking copies, CAB argues that some of those copies do not meet the substantial part requirement and as such should be excluded from the tariff. The issue here is largely an evidentiary one, as CAB's own supporting evidence shows inconsistencies in how radio stations operate with respect to Voice-Tracking copies. Regardless of the evidence of different radio stations' practices with respect to this type of copies, a more fundamental issue arises. The "substantial part" threshold in subsection 3(1) of the *Act* is not a new one and, in theory, those copies that do not represent a substantial part of works[54] were never included in the tariff and therefore never part of the total royalties paid under past tariffs for commercial radio. We consequently see no reason to make any adjustment to the royalty rates for Voice-Tracking copies. Our analysis may have been different had we been presented with reliable evidence that radio stations' practices have changed significantly with the effect that considerably more voice-tracking copies are now "non-substantial" in nature compared to 2010 when the reproduction rates were last established. There was no such evidence on record in the present proceeding.

VII. MDS DISCOUNT

[121] On January 28, 2013, Connect/ SOPROQ advised the Board that it intended to propose the elimination of three discounts applied by the Board to the 0.688 per cent starting rates that were established in 2010 for the reproduction of sound recordings and of performers' performances.

[122] Specifically, Connect/SOPROQ indicated that it would ask the Board to revisit the discounts applied to reflect the extent of its repertoire (the repertoire discount), the presumed value of performances in which the reproduction right was still owned by the performer (the

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[53] Exhibit CAB-11 at para 29.
[54] With respect to performers' performances and sound recordings, s. 15 and 18 of the *Act* contain equivalent "substantial part" thresholds.

performance discount), and the presumed value of copies authorized by music distribution service providers on behalf of makers of sound recordings (the MDS discount).

[123] In a letter to the Board dated August 6, 2013, Connect/SOPROQ advised the Board that, as a result of agreements reached with CAB and Artisti, it would no longer be pursuing the proposed reductions to the repertoire discount and the performance discount. The Board confirmed by notice dated August 7, 2013 that those issues would not be examined as part of the current proceeding.

[124] Therefore, the only issue left to decide is the MDS Discount. This is a discount introduced by the Board for the first time in the *Commercial Radio (2010)* decision. The Board had relied largely upon the language of the end-user licence agreement that was then in force between Yangaroo Inc. (Yangaroo), commercial radio stations, and makers of sound recordings, pertaining to the use of Yangaroo's Digital Media Distribution System (DMDS).[55] It concluded that

> the wording of agreements between labels, DMDS and broadcasters make it clear that DMDS is an agent of the labels. Labels grant DMDS a no-charge, non-exclusive licence throughout Canada authorizing it to allow third parties to download and/or stream their music solely for the purpose of providing the Service, defined "as delivering music [...] via uploading and downloading to authorized users." DMDS authorizes broadcasters to audition music and to download tracks for the purpose of adding them to their playlist.[56]

[125] However, DMDS changed its end-user licence agreement to clearly state that it does not authorize any reproduction.

[126] The operative language of the current licence provides as follows:

> NO RIGHTS GRANTED
>
> [...] The Materials contained on the DMDS website are protected by copyright and trademark laws. DMDS is not authorized to and does not license or transfer any rights or ownership in the Materials or copies thereof or to the trademarks or copyrights therein to you. You may not modify, reproduce, republish, post, transmit or distribute the Materials without the consent of the copyright owners. You may print the promotional materials for promotional purposes only, but you must include any copyright notice originally included with such materials on all copies. Notwithstanding anything to the contrary in this Agreement, the only license or permission granted to any commercial radio station or other broadcasting undertaking (a "broadcasting undertaking") with respect to Media (as defined below) under this Agreement is to access the DMDS website in order to download Media as permitted

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[55] Exhibit AVLA/SOPROQ-2.
[56] *Commercial Radio (2010)*, *supra* note 1 at para 156.

> under and in accordance with a separate written license from the copyright holder or as permitted in accordance with the terms of a valid and subsisting tariff certified by the Copyright Board of Canada. No ownership or license to any Media or to copies of Media is granted to the said entities hereunder for any purpose including to download or stream it, make or use any copies, add copies to a play list, or to communicate Media to the public by telecommunication, or for any other broadcast purpose.[57] [emphasis added]

[127] Given the changes to the terms of the current end-user licence agreement above, we cannot conclude that an implied authorization through agency for the makers of sound recordings exists, and consequently DMDS copies cannot be deemed to be authorized by the licence as the Board found in 2010.[58] Therefore, we find that the adjustment the Board applied previously to reproductions to reflect the DMDS Discount is no longer justified.

VIII. APPLICATION OF EXCEPTIONS TO REPRODUCTIONS MADE BY RADIO STATIONS

[128] The application of exceptions to the reproductions made by radio stations requires that we decide the following. We need first to determine which, if any, of the types of reproductions made by commercial radio stations can benefit from an exception under the *Act*. If we find that at least one type of reproduction does indeed qualify for an exception, we will then need to do the following: (a) determine the prevalence of these types of reproductions made within the broadcasting industry; (b) determine the percentage of such reproductions that can benefit from an exception; and, (c) apply the appropriate discount to the royalty rate that would otherwise be payable.

[129] In what follows, we determine which types of reproductions qualify for an exception. We will determine later in this decision, in the economic analysis section, the relative value of each type of reproduction as well as the corresponding relative discount.

A. Evidence on Exceptions and Burden of Proof

[130] CSI argues that since the prospect of future compliance is speculative, no blanket discounts should be applied because "to reduce the tariffs by the relative value of a particular category of copy, as CAB now wishes to do, it must prove that every station in Canada is, and will remain, entitled to an exception in relation to each copy in that category."[59]

[131] CAB disagrees and argues that

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[57] Exhibit AVLA/SOPROQ-1 at para 14; Exhibit AVLA/SOPROQ-3.
[58] *Commercial Radio (2010), supra* note 1 at para 252.
[59] Exhibit AVLA/SOPROQ-CSI-75 at para 14.

> [b]usiness entities cannot reasonably be expected to make operational shifts in anticipation of unknown outcomes that may or may not arise. Indeed, CSI operates on the same basis. CSI President Caroline Rioux explained in great detail the shifts that would be required to be made to the CSI reporting and distribution systems if the Board were to certify a MBL-like reproduction tariff, but clearly stated that CSI had not begun and would not begin to make such changes unless and until the Board changed the tariff.
>
> Past practice is only a reasonable basis to predict future behaviour if there is no reason to expect material structural change. In this case, that change occurred with the amendments to the *Act* just over one year ago. Changed behaviour by broadcasters is both technologically possible and predictable.[60]

[132] CAB's argument fails to distinguish the source of the obligations on each party. CSI's administrative obligations in relation to a tariff only begin with the certification of that tariff by the Board. By contrast, broadcasters' obligations in relation to a copy stem from the *Act*, and thus are already applicable when a copy of protected subject-matter is made. The Board does not create these latter obligations, they already exist; the Board merely applies the law that establishes them. To the extent they wish to benefit from exceptions, it is the broadcasters' obligation to adduce evidence that they meet any requirements of those exceptions.

[133] That being said, we acknowledge that we cannot set an evidentiary burden on the broadcasters that is so high that demonstrating future compliance with exceptions would not be possible. In tariff proceedings, the number of works or other subject-matter involved is numerous, and the quality and detail of evidence in relation to a particular copy are unlikely to be the same as the evidence adduced in civil infringement proceedings. Requiring an overly high threshold to demonstrate the compliance of future uses with exceptions would render moot, for all practical purposes, the exceptions created by the legislator. This would be unfair and contrary to the intent of the *Act*.

[134] Because proposed tariffs are prospective in nature, it is never possible to establish the compliance of specific future acts with exceptions. However, in the case of a blanket licence, it is reasonable for the Board to look at the evidence adduced to satisfy itself whether or not, and to which extent, the requirements of an exception will likely be met. Past practices will usually be a good indicator of this compliance.

[135] As explained below, in our opinion, the evidence in this proceeding is sufficient for us to conclude that certain reproductions made by radio stations should benefit from one or more of the following exceptions:

- Fair dealing for the purpose of research (section 29);

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[60] Exhibit CAB-11 at paras 64–65 (footnotes omitted).

- Backup reproductions (section 29.24); and,
- Reproductions that are part of a technological process (section 30.71).

[136] There is however insufficient evidence for us to conclude that some or all of the types of reproductions qualify for the broadcast ephemeral copies exception (section 30.9). Indeed, CAB admits that, at the time of the hearing, radio broadcasters "have not yet begun to take the steps required to either comply, or demonstrate compliance, with the exemptions' various requirements."[61]

[137] CAB argues, however, that "broadcasters are simply awaiting guidance as to what changes will be required of them, and with what effect."[62] It states that the fact that radio broadcasters have not yet been complying with some of the requirements is not a reasonable basis to conclude that they will not do so. CAB claims that once the Board provides its interpretation of what steps are required to benefit from those exceptions, radio stations will comply with those requirements—provided that the tariff reduction resulting from compliance will outweigh the costs of meeting those requirements.[63] Later in this decision, we deal with the possible future compliance of radio stations with the ephemeral exception requirements.

B. SECTION 29 – FAIR DEALING FOR THE PURPOSE OF RESEARCH

[138] CAB argues that, based on the reasoning in *Bell*, radio stations' making of Music Evaluation copies fall within the ambit of fair dealing for the purpose of research pursuant to section 29 of the *Act*.[64]

[139] CSI, on the other hand, argues that CAB failed to adduce evidence that any of the copies in issue are created for the purpose of research. It also argues that CAB failed to establish that any of the six factors under the second step of the test pointed to a finding of fairness.[65]

[140] The test for fair dealing as articulated by the Supreme Court of Canada in *CCH v. Law Society of Upper Canada*[66] has two steps. The first is to determine whether the dealing is for an allowable purpose enumerated in the *Act*. The second is to assess whether the dealing is "fair."[67] *CCH* set out six factors which "could help determine whether or not a dealing is fair. These factors may be more or less relevant for assessing the fairness of a dealing depending on the

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[61] *Ibid* at para 63.
[62] *Ibid*.
[63] *Ibid* at paras 63–65.
[64] Exhibit CAB-11 at paras 27–28.
[65] Exhibit AVLA/SOPROQ-CSI-75 at para 59.
[66] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339. [*CCH*]
[67] See *Bell*, *supra* note 4 at para 13.

factual context of the allegedly infringing dealing."[68] These factors are not prerequisite conditions that have to be met individually for a dealing to be fair.

i. Was the dealing done for an enumerated purpose?

[141] As the Supreme Court of Canada explained in *Bell*, in a fair-dealing analysis there is a "relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair."[69]

[142] We accept that Music Evaluation copies are made for the purpose of evaluating a track to determine whether a radio station wishes to add that track to the station's rotation. This is sufficient to qualify as research under the first step of the test.

[143] We now must determine whether the dealing is fair having regard to the six factors enumerated in *CCH*, namely: the purpose of the dealing; the amount of the dealing; the character of the dealing; the alternatives to the dealing; the nature of the work; and, the effect of the dealing.

ii. Fair-dealing factors

a. The goal of the dealing

[144] The first factor from *CCH* is the purpose of the dealing, where an objective assessment is made of the 'real purpose or motive' behind using the copyrighted work.[70] As the Board recently noted in another decision,[71] some confusion may exist due to the fact that the English text of the *CCH* decision refers to two distinct parts of the fair-dealing test as the "purpose" of the dealing: the purpose considered in the first step of the test, and the purpose factor considered in the second step of the test. For clarity and inspired by the phrase "*le but de l'utilisation*" used in paragraph 54 of the French version of the *CCH* decision, we find it preferable to use the expression "goal of the dealing" when referring to the first factor of the second step in English.

[145] In this matter, the goal is to make a decision on whether to broadcast a particular musical track. This is no different than the fact situation in *Bell* and *CCH*, where research was being performed to further a commercial activity. In the former, it was to determine whether to purchase a musical track, in the latter it was to assist in the provision of legal advice, usually in a for-profit context.

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[68] *CCH*, *supra* note 60 at para 60.
[69] *Bell*, *supra* note 4 at para 27.
[70] *CCH*, *supra* note 66 at para 54.
[71] *Access Copyright – Provincial and Territorial Governments (2005-2014)* (22 May 2015) Copyright Board decision at paras 258–259.

[146] There is some evidence that suggests that the Music Evaluation copies may, on occasion, serve other functions such as for backups, with no impact on the fairness of the dealing. However, when used as copies for the Main Automation System (a hypothesis for which there is no clear evidence in this matter), this could make the dealing less fair.

[147] However, given the manner in which we calculate the royalty rates for this tariff, if a copy made with the goal of evaluating the musical track was used for other goals, its compensability and value will be also separately assessed as if another copy was made for those additional goals. Therefore, we are able to evaluate the Music Evaluation copy as if there were no additional goals of the dealing, and conclude that this factor tends to make the dealing fair.

b. The amount of the dealing

[148] It is our understanding that, generally, the entirety of the work and sound recording is copied when making the Music Evaluation copy. This can tend to make the dealing unfair. However, as the Supreme Court of Canada described in *CCH*, the purpose of the dealing may sometimes require that the entire work be copied.[72] In this case, listening to the entirety of the work to make an informed decision does not appear to us to be unreasonable and may in fact be necessary or preferable in some cases.

[149] The fact that Music Evaluation copies are not made of all music sound recordings owned by, or licensed for, radio stations, but are limited to a selection of recordings that a program director wishes to consider for a specific program, as raised by CAB,[73] does not tend to make the dealing more or less fair under the amount of the dealing factor. The issue will be addressed when we look at the prevalence of this type of reproduction. In the analysis at hand, we must apply the *CCH* factors to the reproductions that are in fact made.

[150] Therefore, while the amount of the dealing tends towards unfairness for these copies, it does not do so strongly.

c. The character of the dealing

[151] The evidence of the Objectors shows that, where Music Evaluation copies are made, one functional (unencrypted) copy is generally made of a music sound recording, and would only be used internally by persons working in the radio stations.[74] This evidence was not seriously

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[72] *CCH*, *supra* note 66, McLachlin C.J. ("It may be possible to deal fairly with a whole work. As Vaver points out, there might be no other way to criticize or review certain types of works such as photographs […] The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision." at para 56).
[73] Exhibit CAB-11 at para. 44.
[74] See *e.g.*, Transcripts, Vol. 9 at pp 1207:18–1208:13; 1218:15–1222:3 (Dr. Murphy's testimony on the use of

challenged, and we have no reason to conclude that Music Evaluation copies are not used in this limited fashion.

[152] In *CCH*, the Supreme Court of Canada stated that

> In assessing the character of a dealing, courts must examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing. If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness. It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair.[75]

[153] Applying those principles to our findings above, we conclude that this limited use and distribution of the work tend to make the dealing fair.

d. Alternatives to the dealing

[154] CAB refers to *Bell* in support of its argument that "the existence of alternatives is limited to a consideration of whether 'there is a non-copyrighted equivalent of the work that could have been used, or if the dealing was not reasonably necessary to achieve the ultimate purpose.' "[76]

[155] While the Supreme Court of Canada referred to these considerations in *CCH*,[77] the decision in *Bell* confirms that other alternatives could be considered.[78] As explained in that decision, other suggested alternatives were considered by the court as part of the evaluation of this factor but discarded as not being reasonable,[79] or not achieving the purpose of the dealing.[80] Thus, the availability of non-copyrighted equivalents and the non-necessity of the dealing are merely examples of possible alternatives to be considered. If there are other reasonable alternatives available, they can be considered under this factor.

[156] CSI argues that CAB's evidence confirms that the vast majority of stations do not copy music for the purpose of music evaluation and selection. They state that this implies that alternatives were available to radio stations: "The fact that the alternatives in this case are

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Music Evaluation copies).
[75] *CCH*, *supra* note 66 at para 55.
[76] Exhibit CAB-11 at para 44.
[77] *CCH*, *supra* note 66 at para 57.
[78] *Bell*, *supra* note 4 at paras 44–46.
[79] *Ibid*, Abella J. ("[A]llowing returns is an expensive, technologically complicated, and market-inhibiting alternative for helping consumers identify the right music.") at para 46.
[80] *Ibid*, Abella J. ("[N]one of the other suggested alternatives can demonstrate to a consumer what previews can, namely, what a musical work *sounds* like.") at para 46.

already widely used – and, indeed, are more common than the impugned dealings – justifies the inference that they are in fact entirely viable."[81]

[157] Mr. Nesbitt testified that the DMDS permits downloading as well as streaming of music. He further testified that while radio stations may have various means of evaluating tracks, streaming from the DMDS appears to be very common. Furthermore, streaming from the system is available for free.

[158] The evidence shows that approximately one-quarter of all radio stations make Music Evaluation copies.[82] While it is possible that these stations had particular requirements or technical limitations that would make alternatives, such as streaming the track, not practicable, we do not have sufficient evidence to find that such obstacles or other issues actually existed.

[159] We therefore conclude that reasonable alternatives do, in fact, exist to the making of Music Evaluation copies. Therefore, this factor tends towards unfairness.

e. The nature of the work

[160] The fifth factor is the nature of the work, which examines whether the work is one which should be widely disseminated. While a musical work may not entail the same policy considerations as those related to legal texts, it is not a type of work where restricting dissemination would be considered to be a positive outcome, such as could be the case with private writings, for example.

[161] We also note that the impact of the dealing on dissemination is similar to that discussed in *Bell*: unless a radio station can preview a musical track, it is unlikely that it will be disseminated by that radio station.[83] Moreover, in the precise context we are considering here, it is reasonable to assume that the musical works at issue are often relatively new ones which may further benefit from dissemination.

[162] We therefore conclude that this factor tends neither towards fairness, nor towards unfairness.

f. The effect of the dealing

[163] In *Bell*, precautions were taken by online music services to reduce the likelihood of the preview replacing the purchase of a copy, such as by using streaming (as opposed to permitting a download), using an excerpt (as opposed to the whole track), and using a lower bit-rate.

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[81] Exhibit AVLA/SOPROQ-CSI-75 at para 60.
[82] Exhibit CAB-2 at para 33, Table 1 (24.5 per cent of stations make use of Music Evaluation copies).
[83] *Bell*, *supra* note 4 at para 47.

[164] No evidence before the Board supports the proposition that the making of Music Evaluation copies has a negative effect on the musical work or sound recording.

[165] The evidence also shows that historically, record labels would send free musical tracks on vinyl records or CDs to radio stations, and even, sometimes, multiple copies of those.[84] There was therefore an interest from the labels to provide such copies to radio stations with the hope that, once they heard the tracks, the stations would include them on their respective playlists. Even today, some persons may send music tracks by CD.[85] This is akin to the situation in *Bell*, where previews tended to benefit the rights holders by promoting the subsequent purchase or use of the protected work.

[166] It is therefore very unlikely that such copies have a negative effect on the work. In this case, they are simply made by the radio stations instead of the rights holders but are used for the same purpose. As such, we conclude that this factor tends towards fairness.

iii. Conclusion

[167] The evidence shows that practices linked to the evaluation process by radio stations vary, sometimes even within the same radio station group.[86] As discussed above in relation to alternatives to the dealing, sometimes no reproductions are made, and the musical tracks are streamed directly from the MDS system.

[168] While we are mindful that there are alternatives available to radio stations, on the whole, we conclude that dealings with musical tracks for the purpose of determining whether to broadcast those music tracks, in the manner described in the evidence in this matter, are for a purpose enumerated in section 29 of the *Act* and are fair.

C. SECTION 29.24 – BACKUP COPIES

[169] The recently enacted exception for backup copies in the *Act* reads as follows:

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

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[84] See *e.g.*, Exhibit CAB-3 at paras 9–12 ("In the late 1980s, [some] stations […] used the vinyl itself and as a result constantly had to replace worn out copies with less scratchy sounding fresh albums. The record labels would usually send multiple copies for this purpose. […] At the advent of the DMDS era, CDs were usually still sent in addition to the DMDS track […]").
[85] *Ibid.*
[86] *Ibid* at paras 20–24.

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

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

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

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

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

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

[170] From a practical standpoint, the exception for backup copies under section 29.24 of the *Act* could be one that finds widespread application within the broadcasting industry. Every backup copy must nevertheless meet the requirements of the provision to be non-infringing and thus, non-compensable in the context of a tariff-setting exercise.

[171] While compliance with the requirements of paragraphs 29.24(1)(*a*) to (*c*) of the *Act* is relatively easy to establish, potential issues may arise with respect to paragraph 29.24(1)(*d*) and subsection 29.24(3) in the context of station groups that share backup copies. However, there is nothing to suggest that copies are being given away. Furthermore, given that reproductions made by radio stations have historically been covered by a licence (usually in the form of a tariff), it does not appear to us that the situation referred to in subsection 29.24(3) arises with any frequency.

[172] Therefore, we conclude that, on a balance of probabilities, the backups radio stations create almost always meet the requirements of section 29.24 of the *Act*, and therefore should benefit from its exception.

[173] However, we hope that radio stations' policies and practices regarding the use, sharing, and possible destruction of backup copies will be addressed more fully by the parties in future tariff proceedings.

[174] We note that copies that are not used solely for backup purposes are implicitly accounted for in our royalty-rate calculation as if they were copies made for other non-backup purposes.

D. SECTION 30.71 – TEMPORARY REPRODUCTIONS FOR TECHNOLOGICAL PROCESSES

[175] Section 30.71 of the *Act* allows the making of reproductions of a musical work or a sound recording which are essential to a technological process, provided that the only purpose for the reproduction is to facilitate a non-infringing use and the reproduction exists only for as long as the duration of the technological process. The provision reads as follows:

> 30.71 It is not an infringement of copyright to make a reproduction of a work or other subject-matter if
>
> (*a*) the reproduction forms an essential part of a technological process;
>
> (*b*) the reproduction's only purpose is to facilitate a use that is not an infringement of copyright; and
>
> (*c*) the reproduction exists only for the duration of the technological process.

[176] We note at the outset that the report provided by Dr. von Lewinski, although informative, is of limited use for our interpretation of section 30.71 of the *Act*. First, that provision was not enacted by Parliament to fulfill any treaty obligations. Second, her analysis focused on international law and foreign statutory provisions, which are irrelevant for the statutory interpretation the domestic provision in this case.

i. "forms an essential part of a technological process"

[177] CAB argues that the entire process of program assembly performed by commercial radio stations, from the gathering and creation of content to the communication of a radio signal to the public, is a technological process.[87]

[178] We note, however, that section 30.71 of the *Act* refers to a technological process, not a business process or economic activity. To interpret this provision in the manner advanced by CAB could have the effect of deeming any business operation which consists of one or more steps involving technology as a "technological process." Any reproduction of protected works or other subject-matter in carrying out this process would be exempted from copyright liability. There is nothing to suggest that the legislator's intent was to provide such a wide-ranging exception. While components of a business process may indeed consist of, or involve various technological processes, this does not make all of them one large "technological process," within the meaning of section 30.71.

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[87] Exhibit CAB-11 at para 37.

[179] The Government of Canada, in one of its explanatory documents for the *CMA*, stated that: "The bill clarifies that the making of temporary, technical and incidental reproductions of copyrighted material as part of a technological process is allowed."[88] While we are mindful of the limited reliability and weight of such statement, we believe it is a useful guidepost to the kind of activities the provision sought to capture.

[180] While we do not go so far as to state that a technological process may not have human input—for it often will—it appears to us that this provision was intended to capture copies that happen automatically, or without the direct control of the user. This relates to the requirement that the reproduction forms an essential part of the technological process. A "technological process" contemplated by section 30.71 of the *Act* will generally not be able to function correctly or efficiently without the making of the reproduction. It will, therefore, generally not be up to the user to determine whether the copy is made or not.

ii. "exists only for the duration of the technological process"

[181] The "automatic" nature of the reproduction is also captured in the temporal limitation in paragraph 30.71(*c*) of the *Act*, which states that "the reproduction exists only for the duration of the technological process." This suggests that the destruction of such reproduction is likely to be automatic, as a result of the technology used. In contrast, in other provisions of the Act where reproductions may only be retained for a period of time, and where a positive act must be done by a person to destroy the reproduction beyond such period of time, language such as "must be destroyed" is used.[89] [emphasis added]

[182] CAB argues that

> [t]he term "technological process" as defined in section 30.71 can be used to describe any process which continues over a period of time; there is no requirement that the process need be instantaneous or otherwise of short duration. The only temporal requirement set out in section 30.71 is that the reproduction in question "exists only for the duration of the technological process," and therefore the reproduction must necessarily be temporary or non-permanent in the sense that it must be destroyed once the technological process is complete.[90]

[183] Given that we disagree with CAB regarding the extent of a "technological process," we also disagree with its submission that a reproduction made and stored while needed for business purposes (e.g., a Main Automation System) meets the requirement that it exists "only for the duration of the technological process."

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[88] Industry Canada, "*The Copyright Modernization Act*" (29 September 2011) *Backgrounder*: https://www.ic.gc.ca/eic/site/064.nsf/eng/06803.html.
[89] See e.g., Copyright *Act*, *supra* note 2, ss. 29.22(4), 29.24(3), 29.7(2), 30.01(5), 30.01(6) and 30.1(3).
[90] Exhibit CAB-11 at para 36.

[184] We also disagree with CAB's contention[91] that Parliament's refusal to make an amendment to expressly state that a qualifying process must be transitory or otherwise of a short duration clearly indicates that Parliament did not intend to restrict this user's right to technological processes which are only transitory in nature. We find no basis for this argument.

[185] Rather, by linking the duration of the existence of the reproduction to the technological process it is related to, the exception can apply without discriminating against technological processes which may be of longer duration (for example, a copy of a facsimile transmission that remains in the facsimile device's memory for a day because of a paper jam or lack of ink).

[186] Given the above findings, we exclude the following copies as benefiting from this exception: Ingest, Music Evaluation, Main Automation System, Voice-Tracking, Backup and Live Performance copies. These copies are either not an essential part of a technological process, do not exist only for the duration of a technological process, or both.

iii. "only purpose is to facilitate a use that is not an infringement of copyright"

[187] Given the above finding, we continue our analysis only in respect of Streaming copies.

[188] The requirement that the reproduction's only purpose is to facilitate a non-infringing use means that reproductions that fall under section 30.71 of the *Act* are those that are useless or non-usable, but for the technology that causes them to be created in the first place. They have no other independent purpose or use than to allow the technological process to run its course.

[189] Examples of reproductions which would seem to fall within the scope of section 30.71 of the *Act* are the buffer copies in a photocopier or printer, or the reproductions made in volatile memory of a computer. Those types of reproductions result from the technology used to achieve a non-infringing use and cease to functionally exist when the process is over.

[190] Similarly, Streaming copies are made as part of a technological process (e.g., the actual broadcast or stream of a program) and don't have an existence outside of the technological process. These "buffer"-like copies appear to us to be the product of the digital technology being used which inherently makes copies while using the musical track. Furthermore, in the present matter, for both kinds of copies, the resulting use (broadcasting or streaming of a radio program) will not be an infringement of copyright. Therefore, we can conclude that the sole purpose of these copies is to facilitate a non-infringing use.

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[91] *Ibid* ("Some of the reproduction collectives specifically asked during the debate leading to the amendments to the Copyright Act that section 30.71 be amended to expressly state that a qualifying process must be transitory or otherwise of short duration. Parliament refused to make such an amendment, which clearly indicates that Parliament did not intend to restrict this user right to technological processes which are only transitory in nature.").

[191] We note that while both CAB and CSI made references to submissions filed during the development of the *CMA*, there is little to be learned from such submissions. The fact that one legal theory or interpretation is put forward by a party for the purpose of influencing a political decision while an opposite theory or interpretation is put forward by the same party during legal proceedings is irrelevant for the purpose of our decision.

iv. Application

[192] In conclusion, we reject the argument that the entire process of program assembly performed by commercial radio stations is a single technological process. However, we conclude that Streaming copies do meet the requirements of section 30.71 of the *Act*.

E. SECTION 30.9 – BROADCASTER EPHEMERAL COPIES

i. Introduction

[193] After the passage of the *CMA*, section 30.9 of the *Act* now reads as follows:

> **Ephemeral recordings—broadcasting undertaking**
> 30.9 (1) It is not an infringement of copyright for a broadcasting undertaking to reproduce in accordance with this section a sound recording, or a performer's performance or work that is embodied in a sound recording, solely for the purpose of their broadcasting, if the undertaking
>
> (*a*) owns the copy of the sound recording, performer's performance or work and that copy is authorized by the owner of the copyright, or has a licence to use the copy;
>
> (*b*) is authorized to communicate the sound recording, performer's performance or work to the public by telecommunication;
>
> (*c*) makes the reproduction itself, for its own broadcasts;
>
> (*d*) does not synchronize the reproduction with all or part of another recording, performer's performance or work; and
>
> (*e*) does not cause the reproduction to be used in an advertisement intended to sell or promote, as the case may be, a product, service, cause or institution.
>
> **Record keeping**
> (2) The broadcasting undertaking must record the dates of the making and destruction of all reproductions and any other prescribed information about the reproduction, and keep the record current.
>
> **Right of access by copyright owners**

(3) The broadcasting undertaking must make the record referred to in subsection (2) available to owners of copyright in the sound recordings, performer's performances or works, or their representatives, within twenty-four hours after receiving a request.

Destruction
(4) The broadcasting undertaking must destroy the reproduction when it no longer possesses the sound recording, or performer's performance or work embodied in the sound recording, or its licence to use the sound recording, performer's performance or work expires, or at the latest within 30 days after making the reproduction, unless the copyright owner authorizes the reproduction to be retained.

Royalty
(5) If the copyright owner authorizes the reproduction to be retained, the broadcasting undertaking must pay any applicable royalty.

(6) [Repealed, 2012, c. 20, s. 34]

Definition of "broadcasting undertaking"
(7) In this section, "broadcasting undertaking" means a broadcasting undertaking as defined in subsection 2(1) of the Broadcasting Act that holds a broadcasting licence issued by the Canadian Radio-television and Telecommunications Commission under that Act.

[194] Section 30.9 of the *Act* was amended in three ways by the coming into force of the *CMA*.

[195] First, the introductory wording of 30.9(1) of the Act was amended to replace the phrase "solely for the purpose of transferring it to a format appropriate for broadcasting" by "solely for the purpose of their broadcasting." This expands the types of reproductions that are subject to section 30.9. The exception is no longer limited to reproductions done for "format-shifting" purposes but is now applicable to any reproductions done by a broadcasting undertaking for the sole purpose of making its broadcast.

[196] Second, the phrase "or has a licence to use the copy" were added to paragraph 30.9(1)(*a*) of the *Act* to capture situations where a radio station does not own the copy of the sound recording, performer's performance or work involved, but rather has a licence to use it.

[197] Third, and most importantly for this proceedings' purpose, is the repeal of subsection 30.9(6) of the *Act*, which, before the coming into force of the *CMA*, stated that

> [t]his section does not apply if a licence is available from a collective society to reproduce the sound recording, performer's performance or work.

[198] This amendment is the reason CAB is relying on section 30.9 of the *Act* for the first time, since, in the past, there was a licence available from a collective society for the reproductions that could otherwise have been subject to the section 30.9 exception.

[199] As with any exception, a user wishing to benefit from 30.9 of the *Act* has to be compliant with all the requirements of the provision.

ii. Compliance

[200] The 30-day retention limit for the reproductions targeted by section 30.9 of the Act found in subsection (4) is an important component of the analysis in determining what reproductions meet the requirements of 30.9. Assuming that all other requirements are met, only those copies that are retained for 30 days or less can be non-infringing by the operation of 30.9.

[201] CAB argues that Ingest, Main Automation System, Voice-Tracking, Live Performance, and Streaming copies all meet the requirements of section 30.9 of the *Act*. However, a review of the evidence tends to support potential compliance of only *some* copies in *some* of those categories. In particular, there is no evidence as to which copies are kept for 30 days or less, as required under subsection 30.9(4), and how frequently this occurs. Furthermore, there is no evidence that CAB radio stations meet the record-keeping requirements of subsection 30.9(2).

[202] Therefore, we cannot make any blanket adjustments to rates on the basis of section 30.9 of the *Act*.

F. IS A MODIFIED BLANKET LICENCE APPROPRIATE?

[203] CAB submits that any tariff certified should be responsive, that is, if a broadcaster starts complying with the requirements of one or more exceptions, the tariff should provide that the royalties such broadcaster pays would be adjusted accordingly, "so as to be subject to reductions in respect of any station that shows compliance with the requirements for the exemption of that type of copy."[92]

[204] CAB points to SOCAN Tariff 2.A for commercial television and Tariff 17 for pay and specialty television services to demonstrate that such a Modified Blanket Licence (MBL) can be certified even where there is insufficient evidence of compliance at the time of certification. It argues that "without an arrangement whereby changing operational practices will result in a reduction to the tariffs, there is no reason for a station to change its behaviour."[93]

[205] According to CSI, a system that would permit individual stations to claim individual discounts with respect to various categories of copies would be "costly and onerous"[94] and

[92] Exhibit CAB-11 at para 5.
[93] Exhibit CAB-12 at para 28.
[94] Exhibit AVLA/SOPROQ-CSI-75 at para 3.

"impose considerable actual costs and inconvenience on the collectives."[95] As between a blanket licence discount and individual discounts under an MBL, CSI prefers the former, stating that

> [e]ven if future compliance were reasonably foreseeable, a departure from the current [blanket licence] model, which is efficient and economically sound, would be neither necessary nor appropriate.Instead, any discounts that might apply in the future to a particular type of copy should be applied on a blanket basis, reflecting the relative value of that type of copy multiplied by the proportion of stations who actually qualify for the discount at the time of the hearing.[96]

[206] At the time of the hearing, broadcasters have made it clear that they have not been compliant with the requirements of section 30.9 of the *Act*. This is mainly why we cannot set a blanket discount pursuant to section 30.9, as we did for other exceptions. However, broadcasters that do gradually begin to comply with such requirements for some of their reproductions should be able to benefit from the exception without having to wait for the next hearing on the issue.

[207] We are mindful that implementing an MBL may represent some challenges. The main issues raised by Connect/SOPROQ are not sufficient, however, to justify not implementing a form of MBL.

[208] The fact that the industry does not currently qualify for the exception provided under section 30.9 of the *Act* or that there is currently no evidence before the Board that stations will make the necessary changes to comply with that exception does not present a problem *per se*, as the benefit of an MBL would only accrue proportionally to stations able to establish their compliance with the requirements of section 30.9. As for the argument that changing to a modified blanket licence would represent an administrative burden for the Collectives, we are aware that it may likely be the case. However, the greatest part of such burden would stem from the statutory provision itself, over which the Board has no control. Furthermore, the increased administrative burden created would be shared among Collectives and stations wishing to benefit from the exception, the latter group bearing the initial burden of demonstrating their respective compliance.

[209] In our opinion, however, an MBL in the tariff we certify should not be applicable to Main Automation System copies for a few reasons.

[210] CAB referred to the possibility that the 30-day limit could be circumvented by purposefully destroying the copies of sound recordings, and works and performances fixed

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[95] *Ibid* at para 16.
[96] *Ibid* at para 5.

therein, and making new copies of same at 30-day intervals. Such an interpretation would run afoul the spirit of the provision.[97]

[211] If the possibility of having a rolling 30-day mechanism to benefit from section 30.9 of the *Act* was intended by Parliament for the reproductions targeted therein, that provision would be drafted differently, namely as a general exception with no time limit. In 2012, section 30.9 was amended to, *inter alia*, ensure that broadcasting undertakings could benefit from a limited exception for 30 days. Any other interpretation would render the part of subsection 30.9(4) reference to the 30-day limitation meaningless, in particular when considered in the scheme of the *Act* and with other exceptions provided therein.

[212] When considering section 30.9 of the *Act* in its entirety, particularly subsection 30.9(4), it becomes clear that the provision is intended to find application in the case of temporary or ephemeral reproductions that are made by radio stations as part of their broadcasting activities. In our opinion, other reproductions that are more durable in nature and that are preserved and used by radio stations for a longer period of time as a result of their role or function in the broadcasting process were never intended to be covered by the exception provided under section 30.9.

[213] The retention of the Main Automation System copies, as defined herein, for less than the 30 days required by subsection 30.9(4) of the *Act* is, in our opinion, incompatible with the defined purpose of such copies within the normal operations of a radio station. This finding is supported by the testimony provided by Dr. Murphy on the manner in which radio stations operate, as well as the answers provided by radio stations during the interrogatory process.[98] It is also consistent with the Board's knowledge of the industry. We are aware that CAB reiterated several times that radio stations, although not currently complying with some of the exceptions of the *Act*, intended to modify their practices to bring them into compliance once the Board would indicate what was required.

[214] We thus conclude that CAB's proposal that broadcasters demonstrate their compliance in respect of section 30.9 of the *Act* only finds application in relation to Ingest copies, Voice-Tracking copies and Live Performance copies.

[215] Hopefully, information relating to the application of the MBL will be presented during the next hearing on commercial radio, as well as updated evidence on industry practices. It could be relevant for the Board to know what types of reproductions made by broadcasters comply with section 30.9, and in what proportions. This evidence would allow the Board to re-evaluate how

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[97] Transcripts, Vol. 7 at pp 499–500
[98] Exhibit AVLA/SOPROQ-CSI-3 at pp 48–49.

the effect of complying with section 30.9 would be best applied to a tariff in the future, whether it be through an overall blanket discount, an MBL, or another approach altogether.

G. CONCLUSION

[216] We have found the following in respect of the application of exceptions to the types of reproductions that radio stations are making. First, there are three types of copies made by radio stations that qualify for an exception and for which no royalties will need to be paid. These are:

- The Music Evaluation copies (pursuant to section 29);
- The Backup copies (pursuant to section 29.24); and,
- The Streaming copies (pursuant to section 30.71).

[217] We also found that since we do not have any evidence showing that stations comply with the requirements of section 30.9 of the *Act*, we cannot apply a blanket discount to the royalty rates without speculating on the anticipated level of compliance. A potential discount however, through the application of a limited MBL, will be implemented and will be available to the stations that are able to show compliance with section 30.9.

[218] Finally, because of their very nature, the Main Automation System copies are removed from the ambit of the limited MBL. Any other conclusion would go against the scheme of the *Act*.

[219] We will deal, later in the economic section, with the value to be attributed to each type of reproduction and the resulting discounts applicable to the royalty rates.

IX. ROYALTIES UNDER SUBSECTION 69(2) – PUBLIC PERFORMANCES BY MEANS OF A RADIO RECEIVING SET

[220] Re:Sound asks the Board to establish royalties for public performances of sound recordings by means of a radio receiving set, pursuant to subsection 69(2) of the *Act* for the years 2012-2014.[99] This is the first time that Re:Sound has asked the Board to fix royalties under this provision.

[221] Subsection 69(2) of the *Act* states that

> [i]n respect of public performances by means of any radio receiving set in any place other than a theatre that is ordinarily and regularly used for entertainments to which an admission charge is made, no royalties shall be collectable from the owner or user of the radio receiving set, but the Board shall, in so far as possible, provide for the collection in advance from radio

[99] Exhibit Re:Sound-1 at para 4.

> broadcasting stations of royalties appropriate to the conditions produced by the provisions of this subsection and shall fix the amount of the same.

[222] Furthermore, the *Act* provides in subsection 69(3) that

> [i]n fixing royalties pursuant to subsection (2), the Board shall take into account all expenses of collection and other outlays, if any, saved or savable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of subsection (2).

[223] Re:Sound argues that the current commercial radio tariff and all previous tariffs applicable to Re:Sound and SOCAN have only applied to communications to the public by telecommunication by commercial radio stations for private or domestic use.[100] In its view, previous tariffs did not cover the acts contemplated in subsection 69(2) of the *Act*, and therefore additional royalties should therefore be payable for those acts.

[224] SOCAN has not asked for royalties under this provision. However, because the Board's decision will potentially affect SOCAN as well, the Board requested SOCAN to provide its position on the applicability of subsection 69(2) of the *Act*. In its response, SOCAN states that it shares the same interpretation of the scope of subsection 69(2) as Re:Sound.

[225] CAB submits that no tariff should be certified as Re:Sound has failed to provide evidence to support the tariff, that there is no reliable evidence of the extent of business use of commercial radio as background music, that Re:Sound has not deducted actual saved costs, and that the public performance of radio in many businesses is in fact already paid for under Tariff 1.A. In the alternative, if any tariff is certified at all, it should only be in a nominal amount consistent with past tariffs certified under this provision.[101]

A. HISTORY OF SUBSECTION 69(2)

[226] As Re:Sound details in its submissions, the question as to whether or not the use of radios by hotels so that guests could hear broadcasts of musical works was an infringement of copyright was litigated in the 1920s and 30s. In Canada, as well as the US and the UK, courts held that this use constituted a performance and that the performance was in public.[102] Following such a decision in Canada in 1935, Parliament amended the *Act* in 1938 to include the following provision:

> 10B.(6)(*a*) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre which is ordinarily and regularly used for

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[100] *Ibid* at para 6.
[101] Exhibit CAB-11 at paras 133–134.
[102] *Canadian Performing Society v. Ford Hotel*, [1935] 2 D.L.R. 391; *Buck v. Jewell-La Salle Realty Co.* (1931), 283 U.S. 191*; Performing Rights Society Ltd. v. Hammond's Bradford Brewery Co.,* [1934] Ch. 121.

> entertainments to which an admission charge is made, no fees, charges, or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same. In so doing the Board shall take into account all expenses of collection and other outlays, if any, saved or saveable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection.[103]

[227] In 1943, in a decision of the Supreme Court of Canada,[104] Chief Duff stated that

> [i]t was considered […] that under the plan as originally devised, the purchasers of gramophone records and the possessors of wireless receiving sets were […] placed in a position in which they ought not to be placed. The decisions as to the meaning of "public performance" had made it unsafe for the owner of a gramophone, or of gramophone records who carried on, for example, a tea shop to use the gramophone for playing the records in her shop, or to permit her customers to use it. She might be entitled to do so, or she might not. The answer to the question would depend upon a variety of considerations, whether for example, the gramophone manufacturer possessed authority to authorize the public performance of the records, whether she had derived such authority through the purchase of records, and so on: and these considerations, of course, she would be quite incapable herself of passing upon.The Legislature no doubt thought that a law which made it necessary for the purchasers of gramophone records to consult a lawyer to ascertain whether or not they could safely play their records in such circumstances was not satisfactory and was not in harmony with the general spirit of the copyright law.[105]

[228] From the year 1939 through to 1956, the Copyright Appeal Board set a nominal rate of $1,000 in respect of all uses captured by the precursor of subsection 69(2) of the *Act*, "to be apportioned amongst all of the radio broadcasting stations in Canada."[106] No royalty was set thereafter.

[229] Subsection 69(2) was amended in 1994 to remove the reference to gramophones, but the exception for radio receiving sets remained.[107]

B. Applicability of Subsection 69(2) in the Present Case

[230] We must consider whether subsection 69(2) of the *Act* is applicable in the present matter. In order to do so, we must first consider whether subsection 69(2) applies in relation to sound

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[103] *An Act to amend The Copyright Amendment Act, 1931 and the Copyright Act*, S.C. 1938, c. 27, 2 George VI, s. 4.
[104] *Vigneux v. Canadian Performing Right Society Ltd.*, [1943] S.C.R. 348.
[105] *Ibid* at p. 354.
[106] Exhibit CAB-11 at para 145.
[107] *North American Free Trade Agreement Implementation Act,* SC 1993, c. 44.

recordings (as opposed to only musical works). We must then consider whether persons who perform a sound recording by means of a multi-functional device are captured under subsection 69(2). Lastly, we must consider whether the use of a radio actually constitutes "performing a sound recording."

C. Does Subsection 69(2) Apply in Relation to the Performance of Sound Recordings?

[231] As explained by Dr. Fox in his authoritative text on copyright, the provision now contained in subsection 69(2) of the *Act* was initially intended "to protect small restaurant keepers and business owners from constantly infringing in ignorance."[108] At the time of its initial enactment, Canada did not confer copyright protection on sound recordings, nor on performers' performances. Furthermore, even now, the unauthorized public performance of a copyright-protected sound recording is not an infringement of copyright as long as the user pays the required payment of royalties.

[232] The language of the provision is however neutral in its effect and does not limit itself to the performance of a particular kind of subject-matter. It is silent on this last element, just as—for example—section 29 of the *Act* does not limit itself to a particular subject-matter. While the legal effects of performing a musical work and those of performing a sound recording are not identical, both can create liability towards the owner of copyright.

[233] Thus, while the precursor of subsection 69(2) of the *Act* was originally intended to apply in relation to the performance of musical works, we conclude that subsection 69(2) applies equally in relation to the performance of sound recordings and of performers' performances.

D. What is a "Radio Receiving Set"?

[234] CAB argues that the expression "radio receiving sets" in subsection 69(2) of the *Act* should be interpreted narrowly.[109] In support of its argument, CAB points to a 2005 letter from SOCAN to the Board.[110] In this letter, SOCAN stated that, in its view, subsection 69(2) "does not exempt users who perform music by means of multifunctional devices such as CD players, cable TV or satellite TV receivers, Internet radio or television receiving sets that are also capable of receiving radio broadcast signals."[111] [emphasis omitted] In the same letter, SOCAN stated that its

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[108] Harold G. Fox, *Canadian Law of Copyright and Industrial Designs*, 2nd ed. (Toronto: Carswell, 1967) at pp 407–408.
[109] Exhibit CAB-11 at para 142.
[110] Exhibit CAB-Compendia, Tab 35: Letter from Paul Spurgeon, Vice President Legal Services & General Counsel, SOCAN to Claude Majeau, Secretary General, Copyright Board of Canada (4 February 2005).
[111] *Ibid* at p 4.

> experience has shown that many small businesses that perform music in their premises do so by means of devices that, while including a radio receiving set, also include cable or satellite connections that can be used to receive cable and satellite radio and television programming, retransmitted radio and television signals, a CD (or tape) player and in some cases, a DVD player.[112] [emphasis omitted]

[235] SOCAN concluded by stating that "there are very few, if any, simple 'radio receiving sets' as there were in the days when the subsection 69(2) of the *Act* was first enacted (1938). The result is that subsection 69(2) will rarely come into play in this day and age."[113] CAB s upports and asks the Board to adopt this conclusion.[114]

[236] Of note is that in SOCAN's November 8, 2013 response to the Board's Order of October 10, 2013, SOCAN stated that its previous position that subsection 69(2) of the *Act* "is not available to users who perform music in public by way of radio broadcast signals received by multifunctional devices […] has become questionable."[115]

[237] We generally agree with the position that a "radio receiving set" is a device capable of receiving unguided electromagnetic signals in the radio spectrum (i.e., "Hertzian waves"). Presumably, for a device to be able to perform the functions contemplated in subsection 69(2) of the *Act*, it must not only be able to receive such signals, but also demodulate them into a sound signal.

[238] However, we do not accept the argument that any device that has more functions than simply being a "radio receiving set" is thereby disqualified from subsection 69(2) of the *Act*. According to such an interpretation, the use of a multi-functional device which is capable of playing CDs, for example, in addition to its capabilities as a radio receiving set, would not be covered.

[239] As described above, in creating the predecessor to subsection 69(2) of the *Act*, the Legislature was clearly attempting to reverse a situation it saw as unsalutary. Furthermore, "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation to best ensure the attainment of its objects."[116] We therefore see no reason to adopt an interpretation that would exclude performances carried out by the use of a device that can receive radio waves, but not—for example—those performances carried out by the use of a device that can receive radio waves as well as play CDs. Such a distinction would not best ensure the attainment of the object of this provision, namely, to permit business owners

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[112] *Ibid.*
[113] *Ibid.*
[114] Exhibit CAB-11 at paras 142–143.
[115] SOCAN, Response to the Notice of the Board (10 October 2013) Re. s. 69(2) (8 November 2013).
[116] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

to play radio without having to determine what the legal consequence of such an act is. We further note that the restrictive interpretation suggested here is not supported by the language of the provision itself.

[240] We note that subsection 69(2) is not the only instance in which the *Act* refers to one capability of a device without excluding those devices that have other capabilities in addition to the identified one.

[241] For example, subsection 30.3(1) of the *Act* applies in relation to a machine for the making, by reprographic reproduction, of copies of works in printed form. It is common for such machines to have additional capabilities, including the sending of scanned images by fax. This additional capability does not deprive the machine of its characteristic of being "a machine for the making, by reprographic reproduction, of copies of works in printed form." It therefore appears to us that subsection 30.3(1) applies equally to photocopy machines with fax capabilities as it does to those without.

[242] Similarly, subsection 41.18(1) of the Act states that the general prohibition against the circumvention of "access" control technological protection measures "does not apply to a person who circumvents a technological protection measure on a radio apparatus for the sole purpose of gaining access to a telecommunications service by means of the radio apparatus."

[243] Debates in Parliament,[117] discussions in Committees,[118] as well as Government communications[119] make clear that this provision is intended to apply in relation to mobile phones. Clearly, a modern mobile phone is much more than a mere radio apparatus; subsection 41.18(1) nevertheless continues to apply to such a device.

[244] We therefore conclude that subsection 69(2) of the *Act* applies to devices that are a "radio receiving set," even if such devices are capable of performing additional functions or permit the performance of sound recordings by other means.

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[117] See *e.g.*, "The carve out for network locks on cell phones is bound to be popular with people. Canadians will have the right to unlock their phones if they want to switch carriers as long as they abide by their provider's contract terms." (http://openparliament.ca/debates/2010/11/3/jim-maloway-3/).

[118] As then Assistant Deputy Minister, Cultural Affairs, Department of Canadian Heritage, Jean-Pierre Blais, testified before the Bill C-32 (40th Parliament, 3rd Session) Committee on Nov. 25, 2010, this provision was intended to create a carve-out to the prohibition for cell phones (at 9:55).

[119] The Government of Canada claimed that the *Copyright Modernization Act* would permit the "hacking" of digital locks for the purpose of unlocking a wireless device. See Government of Canada, "What the *Copyright Modernization Act* Says About Digital Locks" (28 September 2011) ("Consumers will be able to unlock their wireless devices, such as cell phones, in order to connect to another wireless network — to switch service providers, for example. However, this will not override any contractual or other agreement that may exist between consumers and their service providers.").

[245] This conclusion is consistent with the concept of technological neutrality, as applied by the Supreme Court of Canada in *ESA v. SOCAN*.[120] In short, it is the interpretive principle that, absent evidence of a contrary Parliamentary intention, an interpretation of legislation that does not limit its application to a particular technology is to be preferred. Here, we find no intention to limit the application of subsection 69(2) of the *Act* only to those devices that can function *uniquely* as a radio.

[246] Lastly, even if we are wrong in our interpretation, and a device that includes a radio receiving set as well as other capabilities is—as a whole—not called a radio receiving set, we find that it is only the "radio receiving set" portion of that device that is engaged in the public performance of a sound recording by capturing a broadcast radio signal and demodulating it into an audio signal.

[247] That being said, we agree that subsection 69(2) of the Act applies only in relation to a conventional broadcast signal. When a device is receiving non-radio signals, such as via the Internet, it is not acting as a "radio receiving set."

[248] Thus, we conclude that subsection 69(2) of the Act applies whether or not a device is capable of performing other functions in addition to that of a "radio receiving set," but that the provision applies only to the extent a performance results from the reception and demodulation of radio frequencies, and not of signals received by other means, such as by cable or the internet.

E. Are the Uses in Subsection 69(2) Already Compensated?

[249] The 2008-2010 SOCAN tariff and the 2008-2011 Re:Sound tariff for Commercial Radio permit a radio station to "communicate to the public by telecommunication in Canada, for private or domestic use, musical or dramatico-musical works in the repertoire of SOCAN and published sound recordings embodying musical works and performers' performances of such works in the repertoire of Re:Sound." Both tariffs fix the royalties payable as a percentage of the radio stations' gross revenues.

[250] CAB argues that "Re:Sound is already being compensated for the public performance of sound recordings by businesses using radio receiving sets"[121] since "radio generates advertising revenues as a function of audience share and listenership."[122] More specifically, it argues that

> [s]ince radio revenues are, broadly speaking, a function of audiences, and since audiences are measured to include the employees and customers of businesses that play radios in their

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[120] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231. [*ESA*]
[121] Exhibit CAB-1A at paras 29–30, Exhibit CAB-11 at para 133.
[122] Exhibit CAB-11 at paras 168–169.

> establishments, it means that Re:Sound's Tariff 1.A royalties currently include a component referable to business performances in a way that was not available in 1938. To extract an additional payment for these listeners under section 69(2) would amount to double dipping. To prevent this double dipping in the event the Board decides to certify a tariff under section 69(2), the Tariff 1.A royalties currently attributable to in-store listening would somehow have to be backed out of the new tariff.[123]

[251] Re:Sound replies that "[t]he current commercial radio tariff and all previous tariffs applicable to Re:Sound and SOCAN have only applied to communications to the public by telecommunication by commercial radio stations for private or domestic use."[124] Therefore, the wording of the tariff does not authorize the performance of the musical works and sound recordings contained in the signal broadcast by the radio station.

[252] Re:Sound further argues that "[t]he royalties payable under the Current Tariff 1.A only capture the value to commercial radio stations of the ability to communicate sound recordings. They do not capture the value to businesses of the ability to publicly perform those sound recordings."[125]

[253] We agree that the royalties that both Re:Sound and SOCAN receive for commercial radio are essentially based on the advertising revenues of the radio stations, that is revenues for the playing of advertisements on the radio station's broadcasts.

[254] The amount an advertiser is willing to pay a radio station is linked to the number of people, and their demographics, that the advertiser expects will hear the advertisement.[126] In order to receive an approximation of this number, the advertisers and radio stations rely on data provided by third parties, such as BBM Analytics.[127] As described by Mr. Schween,

> BBM is the audience measurement service in Canada that provides stations with ratings information that therefore can be extrapolated to determine the stations listenership amongst various demographics within a market, and that information is used by advertisers to then determine if that's the station that they want to place advertising on.[128]

[255] While it appears that services like BBM can measure whether someone is listening at home, or in a car, or in another location,[129] advertisers pay on the basis of the size of the listenership without regard to the location where the listening occurs.[130]

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[123] *Ibid* at para 170.
[124] Exhibit Re:Sound-1 at para 6.
[125] Exhibit Re:Sound-7 at para 17.
[126] Transcripts, Vol. 4 at pp 310–319.
[127] *Ibid* at p 314.
[128] *Ibid* at p 311.
[129] *Ibid* at p 317:2–12.

[256] The commercial radio tariff permits radio stations to carry out a specific form of performance to the public, namely the "communications to the public by telecommunication by commercial radio stations for private or domestic use." However, the royalty rate for this tariff is based on all revenues, including those revenues that could be notionally attributed to listeners in business establishments. Thus, Collectives already receive royalties based on advertising revenues related to the listening of performances of radio broadcasts in all contexts—including those envisaged in subsection 69(2) of the *Act*.

[257] Re:Sound argues that since the notion of advertising revenues is based on market-share, "[t]he fact that out of home listeners might be included in BBM data has no impact on relative market share and therefore, no impact on advertising revenues or the royalties payable to Re:Sound under Tariff 1.A."[131]

[258] This appears to be an oversimplification. The market-share is important insofar as it can be used to determine listenership. The number of listeners to a radio station is simply the product of the market-size and the market-share of that radio station. While the relationship need not be strictly linear, it is clear that a radio station in a market of 5,000 will command lower advertising rates than a radio station with the same market-share serving a market of 500,000.

[259] We note that the understanding behind the commercial radio tariff is that it is the listening by the end-user that is important. While the tariff only permits "communications to the public by telecommunication by commercial radio stations," the mere broadcasting of a musical work or sound recording without a resulting performance to a person is of no value to advertisers, and therefore to the radio broadcasters. Without a consumptive use at the end, the advertisement-driven business model of most radio stations would not function.

[260] We therefore disagree with Re:Sound's claim that the existing tariffs "only capture the value to commercial radio stations of the ability to communicate sound recordings." No value to radio stations is realized if the broadcast signal is not heard. In such a case, the radio station would not receive advertising revenues, and royalty payments would be minimal, if any. The consumption by a person of the broadcast sound recording, by hearing it, emitted from a radio receiver, is crucial. Without this final step taking place, there is no value in the activity for the radio station.

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[130] *Ibid* at pp 317:19–318:5.
[131] Exhibit Re:Sound-7 at para 18.

F. How a Rate under Subsection 69(2) Could Be Established

[261] Subsection 69(2) of the *Act* states that the Board "shall, in so far as possible, provide for the collection in advance from radio broadcasting stations of royalties appropriate to the conditions produced by the provisions of this subsection and shall fix the amount of the same."

[262] Re:Sound submits that the total amount of royalties that should be paid under subsection 69(2) of the *Act* is equal to the royalties that would be payable by businesses that, in its estimation, would be subject to Re:Sound Tariff 3 (Use and Supply of Background Music) were it not for the radio exception in that tariff.[132]

[263] Re:Sound states that it has derived an estimate of this number, based on musical use information it has on businesses in its database. Re:Sound goes on to state that since the activities undertaken by Re:Sound's Licensing Department must be done regardless of whether a business is subject to the Radio Exemption, the actual savings realized by the operation of subsection 69(2) of the *Act* would be relatively small.[133]

[264] CAB submits that Re:Sound's methodology for deriving their estimates does not distinguish between the use of a radio in a business and the use of a radio in a business in a way that constitutes a performance to the public. It points to Mr. Gangnier's testimony in support of its argument that "[*CONFIDENTIAL*]."[134]

[265] CAB also submits that Tariff 3 does not represent an appropriate proxy, given "the differences between using commercial radio as background music and using a background music supplier."[135] It enumerates further issues that it believes are present in Re:Sound's methodology. First, it is based on the assumption that commercial radio consists of 100 per cent music.[136] Second, commercial radio does not provide as personalized a musical experience as that associated with background music.[137] Third, there is no economically valid reason to use paid music services as a proxy for a free alternative, such as radio.[138] Fourth, it fails to account for the low compliance rate with Tariff 3. Lastly, contrary to Re:Sound's assumption, it is more likely that businesses using background music suppliers are of a different type than businesses using free over-the-air commercial radio.[139]

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[132] *Ibid* at paras 6–7.
[133] *Ibid* at para 10.
[134] Exhibit CAB-11 at para 141.
[135] *Ibid* at para 158.
[136] *Ibid* at para 159.
[137] *Ibid* at para 160.
[138] *Ibid* at para 161.
[139] *Ibid* at para 163.

[266] Finally, CAB argues that Re:Sound fails to correctly evaluate the total savings that it would realize by "not having to pursue all [*CONFIDENTIAL*] establishments, and the administrative savings in having 'guaranteed' payments from broadcasters [*CONFIDENTIAL*]."[140] In particular, it points to the fact that Re:Sound [*CONFIDENTIAL*], but that under subsection 69(2) of the Act, it would receive royalties in respect of these businesses—without any additional costs or effort.[141]

[267] Were we to proceed in setting a royalty under subsection 69(2) of the *Act*, it is very likely that we would proceed as follows. First, in order to prevent a double compensation, we would deduct from the existing commercial radio royalties the amount derived from advertising revenues attributable to radio broadcasts listened to outside of private and domestic uses. If the current tariff is to be read strictly and does not therefore capture such activities, the broadcasters should not be required to pay in relation to activities that the tariff does not permit. In the present matter, the evidence does not permit us to determine the actual amount of royalties attributable to such uses. Nevertheless, this notional amount is important, as is discussed below.

[268] We would then establish the royalties appropriate according to the conditions provided in subsection 69(2) of the *Act*, namely, a situation where it is the radio stations paying the tariff. While Re:Sound argues that the establishments that play radio derive some value from doing so, a quantification of the amount of this value based on an appropriate economic analysis was not provided. We therefore do not know the net value of the music to those establishments.

[269] Re:Sound submitted that its figures, derived from the royalty rates set out in Tariff 3, can be used to establish this amount. However, from the evidence—and in particular the testimony of Mr. Gangnier—it is apparent that these figures do not distinguish between those situations where a performance to the public by the business actually occurs and instances where the performances that occur are not to the public (and possibly not even being carried out by the business). While we appreciate that it is not possible for Re:Sound to carry out a perfect census, and that Re:Sound cannot use unlimited resources to conduct a survey, it would have been useful to get information on the proportion of performances that are to the public in those situations.

[270] We do know, without quantifying the amount, what radio stations currently pay to reach the sets of ears that are presently under consideration: it is the royalties calculated from the revenues attributable to listeners outside of private and domestic uses. This is exactly the amount that would have been initially removed to prevent double-counting in relation to the same sets of ears.

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[140] *Ibid* at para 166.
[141] *Ibid.*

[271] We would then make a further deduction, as required by subsection 69(3) of the *Act*, based on the savings realized by Re:Sound in having to collect only from one source as opposed to a multitude of businesses. It is not necessary for us to establish the exact amount of such savings to conclude that, by the end of the calculation, the total royalties payable may not be higher than what they are now.

[272] However, given that

i. we do not have enough evidence on which to determine the advertising revenues that are attributable to the performances captured by subsection 69(2) of the *Act* to allow us to remove royalties associated with such activities,
ii. we do not have a reliable basis on which to establish an equitable remuneration for the performance of sound recordings in businesses,
iii. royalties in relation to those performances are already being paid under commercial radio tariffs as a result of the tariff structure,
iv. the application of subsection 69(2) of the *Act* would require a further determination of a discount in accordance with subsection 69(3),

in our opinion, it is not reasonably possible to provide for the collection of the appropriate royalties contemplated in subsection 69(2) of the *Act* and we are therefore not setting a royalty under this subsection.

[273] During the closing arguments of the parties, on March 4, 2014, Vice-Chairman Majeau asked counsel for Re:Sound to provide his interpretation of the phrase "in so far as possible" found in the wording of subsection 69(2) of the *Act*. The answer offered by counsel was that the phrase meant "insofar as the Board has the information upon which it can set the rate."[142] Counsel for CAB then submitted that the phrase in question should be read narrowly so as to constrain the Board's obligation to set royalties under subsection 69(2) insofar as is possible.

[274] Later on, after further reflection, counsel for Re:Sound advised the Board that he didn't think, after all, that "in so far as possible" was a reference to evidence, but rather that it referred to the duty of the Board to provide for collection in advance.[143] In support of his revised position, counsel for Re:Sound made reference to Normand Tamaro, in *Annotated Copyright Act*, where the author states that "the use of the expression 'so far as possible' refers only to the duty to make provisio for the collection in advance."[144] This interpretation seems to find support in a decision from 1945 where the Privy Council interpreted the predecessor of the current subsection 69(2) of the *Act*:

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[142] Transcripts, Vol. 12 at pp 2050–2051.
[143] *Ibid* at p 2189.
[144] Normand Tamaro, *Annotated Copyright Act,* Thompson Canada, Toronto, 2014, at p 1001.

> […] as already indicated, their Lordships do not, as at present advised, share his view that the words "so far as possible" qualify that duty in any respect except as regards making provision for collection in advance.[145]

[275] After comparing the grammatical structures and wording of subsection 69(2) of the *Act* and its predecessor,[146] the interpretation of the Privy Council comports with this interpretation and does not affect our conclusion that no royalties should be set pursuant to subsection 69(2) in this proceeding.

[276] The expression "in so far as possible" was inserted in that provision by Parliament to qualify solely the timing of the collection of royalties in question, arguably imposing a duty on the Board (or its predecessor) to fix an amount to be paid by broadcasters. But as with every tariff the Board certifies, we must be satisfied that such tariff is fair and equitable. For reasons explained above, we find it neither reasonable nor possible in this instance.

[277] Of note, Lord Russell of Killowen stated, in respect to the precursor of subsection 69(2) of the *Act*, that "[t]he amount so to be fixed is apparently an amount to be fixed by the Board on its own initiative, not, as in other cases, a sum proposed in a filed statement for the Board's consideration and approval."[147] If we accept this interpretation as correct, the request submitted by Re:Sound in respect of subsection 69(2) would be inadmissible and the Board should set it from its own initiative. In the end, the result is the same since the reasons set out above for refusing to set royalties pursuant to that provision are equally applicable to an assessment initiated by a request from a collective or by the Board on its own.

X. ECONOMIC ANALYSIS

A. GROUP RATE BASE MODEL

[278] Connect/SOPROQ, supported by the other Collectives in this proceeding, requested that the Board certify a tariff using a group rate base model (GRBM) rather than an individual station rate base model. Their proposal is based on the report of Dr. Boyer and Ms. Pinheiro, who examined the impact of switching from the current station rate base tariff to a group rate base tariff. Dr. Boyer and Ms. Pinheiro estimated the royalties under the GRBM by summing the gross income of each station in all groups of stations and applying the current tariff rates to the total gross income of such groups. According to the report, radio stations would end up paying to Connect/SOPROQ additional royalties of approximately $4 million, an increase of about 22 per cent. This, they claim, is the amount of the subsidy rights holders provide to commercial radio stations as a result of the tiered rates as currently applied to individual stations.

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[145] *Vigneux v. Canadian Performing Right Society, Ltd*. [1945] J.C.J. No. 2 at para 16.
[146] *Supra* note 108.
[147] *Supra* note 145 at para 7.

[279] CAB's position on the GRBM proposal is that it amounts to a substantial royalty increase of about 30 per cent (as opposed to 22 per cent as claimed by Connect/SOPROQ), disguised as a change of rate base. It would also effectively eliminate the income-based tiers of the tariff, leading to unjustified increased royalty payments, since it is not linked to a change in the use or the value of music.

[280] Fundamentally—and for the specific reasons set out below—we agree with CAB and reject the group rate base model. The switch to the GBRM model would result in dramatic increases in royalty payments from commercial radio stations. In our opinion, important increases in royalties such as proposed by Connect/SOPROQ can only be examined in conjunction with the use and value of music issues. However, as agreed by all parties and as ruled by the Board, this matter does not deal with the use and value of music.

[281] The Collectives' GRBM proposal is essentially based on two premises: the lower royalties paid by small stations that are part of a station group should be increased and the effective rate to be paid by these groups should be set at target rates equivalent to a SOCAN rate of 4.2 per cent of gross revenues. These equivalent target rates are 1.138 per cent for Connect/ SOPROQ and 1.181 per cent for CSI.

[282] We agree with CAB that the GRBM proposal effectively eliminates the income-based tiers of the tariff. While the Board might have expressed reservations in past decisions about the need for some small stations to benefit from a lower royalty rate, we are not convinced that the income-based tiers should be abandoned. On many occasions in past decisions, the Board has concluded that the income-based tier rates were fair and equitable.

[283] In its 2003 decision regarding CMRRA/ SODRAC Inc. Commercial Radio Tariff,[148] the Board established for the first time the income-based tiered structure. This was done at the request of both CSI and CAB. In the Board's opinion, adjusting the tariff by creating three royalty-rate tiers, as proposed by CSI, took into account the specific circumstances of smaller stations. It allowed small stations, whose financial health is often more precarious, to pay less for their licence. The Board has always acknowledged that a fair tariff must take into account the ability of users to pay. The Board stated at that time that the 2003 CSI Commercial Radio Tariff established royalty payments that were fair.

[284] In its 2005 decision regarding SOCAN-NRCC Commercial Radio Tariff[149] and later, in its 2008 Re-determination of this decision,[150] the Board concluded, for reasons that need not be

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[148] *CMRRA/SODRAC Inc. (Commercial Radio Stations) for the Years 2001 to 2004* (28 March 2003) Copyright Board decision.

[149] *SOCAN-NRCC Tariff 1.A (Commercial Radio) for the Years 2003 to 2007* (14 October 2005) Copyright Board decision. [*SOCAN-NRCC, 2003-2007*]

repeated here, that the value of music to commercial radio had increased by about 32 per cent. This resulted in a rate of 4.2 per cent, 32 per cent higher than the rate of 3.2 per cent that had applied to stations of all sizes up to then.

[285] Because of the importance of the rate increase however, and to account for smaller stations' financial situation and ability to pay, the Board capped the rate of smaller stations at 3.2 per cent. The Board set this cap to isolate the smallest stations from some of the effects of the large rate increase. The Board found at that time that those rates were fair.

[286] In the *Commercial Radio (2010)* decision, the Board adjusted CSI's rates to reflect the 32 per cent increase it had applied to SOCAN rates and certified rates for Artisti and Connect/SOPROQ for the first time. As in the *SOCAN-NRCC, 2003-2007* decision, only the top rate was increased. This was accomplished by applying a 1 to 3.2 ratio[151] to SOCAN's top rate of 4.4 per cent and then adjusting for CSI's repertoire of 90 per cent. The rates of the smaller tiers were capped, in consideration of the smaller stations' financial situation.

[287] As noted, the Board had the opportunity on many occasions to examine the issue of the income-based tiered rates and each time, it concluded that such tiered rates were fair and reasonable. We have no evidence in this proceeding that would lead us to conclude otherwise. We also have no convincing evidence that the rate structure should be based on groups, for the following reasons.

[288] First, even though the Collectives presented evidence of technology and resource sharing among stations in the same group, they failed to demonstrate that choices relating to music use are made on a group basis. In fact, on the contrary, the evidence indicates that technology and resource sharing are not widespread across the commercial radio industry.

[289] Second, the rate base proposed in Dr. Boyer and Ms. Pinheiro's model is the sum of the gross income of all stations in the same station group. The gross income of commercial radio stations mainly comes from advertising. However, most of the advertising is regional and is sold on a station-by-station basis and not for a group of stations. During his testimony, Mr. Schween explained that allocation of advertising revenues among stations happens very rarely, and when it does, the revenues would be allocated based on the schedule and advertising rate of the particular stations. Given that the rate base comes mainly from advertising revenues, setting a group rate base model does not seem to be the most reasonable approach.[152]

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[150] *SOCAN-NRCC Tariff 1.A (Commercial Radio) for the Years 2003 to 2007 [Re-determination]* (22 February 2008) Copyright Board decision.
[151] For a discussion of the source of this ratio, see *supra* note 1 at paras 217– 223.
[152] Transcripts, Vol. 4 at pp 299–303.

[290] Third, Dr. Boyer and Ms. Pinheiro contended that the tier structure was initially put in place to alleviate the burden of small stations and that the CAB had provided no evidence to demonstrate the hardship of small stations. The Collectives however have provided no evidence on the financial implications of their proposal on smaller stations.

[291] As a result, in our opinion, the premise that royalties paid by smaller stations that are part of a group should be increased is not supported by the evidence and cannot be accepted.

[292] Dr. Boyer and Ms. Pinheiro's second premise of the GRBM proposal is that the Connect/SOPROQ and CSI target rates the Board intended for radio stations is the equivalent of the SOCAN rate of 4.2 per cent. There is no evidence that would permit us to determine such target rate. Furthermore, in our opinion, none of the past decisions are particularly useful in that respect.

[293] In its 2005 decision, when the Board decided to cap the SOCAN rate at 3.2 per cent on the first revenue tranche of $1.25 million, it did so to claw back the benefits for larger stations by setting a rate on revenues exceeding the first $1.25 million at a level higher than 4.2 per cent. The Board evaluated that a rate of 4.6 per cent was necessary to maintain on average an effective rate of 4.2 per cent for these stations. However, the Board decided that a top rate of 4.6 per cent was too high, and as a result certified a rate of 4.4 per cent for the revenues greater than $1.25 million. It is clear that the Board was conscious of the fact that the resulting effective, or target rate, would be lower than 4.2 per cent.

[294] As a result, we find that the second premise is also unsupported by the evidence. This target/effective rate issue clearly cannot be examined in isolation and must be included in a more comprehensive and broader analysis where, in particular, issues related to music use and value will be included.

B. THE IMPACT OF THE REPRODUCTION EXCEPTIONS

i. Should the reproduction rates be allocated to different types of copies?

[295] CAB proposed that the CSI rate be allocated to different types of copies. In CAB's submission, "[…] the fact that there are fewer compensable reproductions leads inexorably to lower royalties under the relevant tariffs."[153] CAB's expert, Dr. Reitman, proposed an allocation methodology. He argued that if some fraction of the CSI rate could be allocated to types of copies that are no longer compensable, the relative value of these copies should be deducted from the CSI rate.

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[153] Transcripts, Vol. 11 at pp 1750–1751.

[296] Connect/SOPROQ and CSI disagreed with CAB's proposal. First, they did not accept that there are fewer compensable reproductions. Second, they argued that a reduction of royalty rates, even if there are fewer compensable reproductions, would not correspond to a competitive market response. Finally, while not conceding the first two points, Connect/SOPROQ and CSI's experts, Drs. Boyer and Cremieux, proposed an alternative allocation methodology.

[297] The question of whether or not there are fewer compensable reproductions is a mixed question of fact and law. First, it requires determination, as a matter of law, that certain types of reproductions are no longer compensable. Such determination was done earlier in this decision. Second, it requires finding, as a matter of fact, of the frequency and value of these reproductions. In other words, once the questions of law have been determined, answering the question of the value of these reproductions requires us to use an allocation methodology.

[298] Before discussing the allocation methodology however, it is necessary to address the issue of efficient pricing. Drs. Boyer and Cremieux's arguments on this issue can be summarized as follows. First, the existing CSI rate was not designed by summing up the values of each type of reproduction. As such, it would be inappropriate to allocate the rate to each individual type of reproduction being currently made. Rather, the CSI rate corresponds to the price of an option to copy for commercial radio stations.[154] Second, in competitive markets, the profit margin of a firm is constrained by competitive forces. In the presence of some form of price controls that cap some prices below competitive levels, firms will either decrease their supply of recorded music or increase the price of something else they sell. The final result will not imply a reduction in the current royalties for the right to reproduce recorded music.[155]

[299] We agree with Drs. Boyer and Cremieux that the existing rate was not specifically based on an adding-up of component parts. However, it becomes clear from a reading of the various decisions in respect to the CSI rate that the Board was conscious of the types of reproductions being authorized, or not, by the tariff.

[300] In its first decision establishing rates for reproductions made by commercial radio stations,[156] even though the evidence did not allow the Board to identify each individual type of reproduction, the Board nevertheless agreed to provide for a lower rate for stations that did not use hard drive copies, one of the types of reproductions. In the following CSI decision covering the years 2005 and 2006,[157] the Board addressed the issue of authorized uses, and explained that some specific types of reproductions were covered by the tariff while some others were not.

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[154] Exhibit AVLA/SOPROQ-CSI-4 at para 39
[155] *Ibid* at paras 50–58.
[156] *CSI Tariff – Commercial Radio Stations (2001-2004)* (28 March 2003) Copyright Board decision.
[157] *CSI Tariff – Commercial Radio Stations (2005-2010)* (31 March 2006) Copyright Board decision.

[301] In the fourth CSI decision, which also dealt with the commercial radio tariffs for SOCAN, Re:Sound, Connect/SOPROQ and Artisti,[158] the Board also dealt with the issue of the types of reproductions in relation with the operations of broadcasters.

[302] Contrary to Drs. Boyer and Cremieux's assertions, the Board never intended to establish a value for the *option to copy* without regard to the nature and importance of the reproduction activities. It is only the lack of evidence that prevented the analysis of the value of individual types of copies from being done. The evidence in the present case now allows for such analysis. There is nothing about the fact that the CSI rate was initially set as a unique value that would prevent us from unbundling the individual types of copies, given that we now have evidence allowing it.

[303] Drs. Boyer and Cremieux also argue that royalties for the reproduction of recorded music should remain the same when some types of reproductions become non-compensable. We do not agree.

[304] As Dr. Reitman stated, the abstract competitive market under consideration must not only consider a multitude of buyers but also a multitude of suppliers. In that context, competitive forces in the "market for reproductions" would also lead suppliers to offer different bundles of types of copies at different prices to commercial radio. Because customers all have different needs and can use different bundles of types of copies, the producers would necessarily try to take advantage of this situation by offering different types of bundling at different prices. In an attempt to attract new customers, suppliers would sell licences with fewer rights at a lower price.

[305] In this decision, we find that there are a number of exceptions that apply to the reproduction activities of radio stations. This means that the bundle of types of copies stations now need necessarily contains fewer rights. In the competitive environment described above, this should lead to a lower price.

[306] This result is also consistent with how the Board has usually dealt with new rights. The Board has always taken the position that if Parliament creates a right, it must mean something; this tends to favour more than a nominal royalty. The same reasoning applies in the context of exceptions. If exceptions are created by Parliament, and if the Board finds that they apply to the case at hand, this should then have more than nominal consequences.

ii. The Data

[307] The present file contains a survey of 212 commercial radio stations in Canada. These stations are *not* representative of the three types of radio stations in Canada— national, regional,

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[158] *Supra* note 1.

and local ownership. The former type was deliberately under-sampled and the latter two types were deliberately oversampled in order to get a good indication of the different copying practices and financial results of stations of different types.[159]

[308] Broadly speaking, the survey consisted of three parts. In the first, stations were asked which of ten copy types they made. In the second, they were asked to rate the usefulness of the copy on a scale from 1 to 8. In the third, they were asked to rate the importance of the copy on a scale of 1 to the number of types of copies they made. In the second part, ties were permitted. In the third part, ties were not permitted. Furthermore, the scales were in reverse order. In the second part, an 8 indicated the most useful copy. In the third part, a 1 indicated the most important copy.[160]

[309] As mentioned above, the usefulness dataset consists of 212 records. Of these, 6 records were blank in the spreadsheet filed with the Board.[161] A further 86 records exhibited no variation; all copies made were equally useful. While this is a possible answer, it may also indicate straightlining.[162] We note that those who seem to have straightlined the survey took very little time to complete it, often less than 30 seconds. We conclude that these answers are likely straightliners and remove them from the dataset.

[310] We consider the dataset filed to have 120 usable records: the use dataset is properly completed for these 120 records and does not require any further deletions.

[311] Finally, we note that there were two additional datasets filed with the Board: the importance dataset and the interrogatories dataset. The importance dataset had only seven blank records and, because no ties were allowed, there were no records without variation. In some respects, this was the ideal dataset to use. However, the coding could have led to contradictory responses (a "1" indicated most important and an "8" indicated least important). Furthermore, neither of the parties used the importance dataset. For these two reasons, we did not give substantial consideration to using the importance dataset.

[312] Dr. Reitman used the interrogatory dataset only as a validation of the usefulness dataset. His preferred measure was based on the usefulness dataset; as such, it is not necessary to discuss the interrogatory dataset further here.

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[159] Letter of CSI to the Board, May 1, 2013, Memo of Mr. Gauthier at p 2.
[160] Exhibit CAB-2 at para 37.
[161] Exhibit CAB-2, "Exhibit 4."
[162] Straightlining is the term in survey research to indicate when a set of responses would, if shown on a piece of paper, make a straight line. In general, straightlined data are not useful and are typically discarded.

iii. The proposal by Dr. Reitman

[313] The survey listed seven specific types of copies (Ingest, Music Evaluation, Main Automation System, Voice-Tracking, Live Performance, Streaming, and Backup) as well as three additional types of copies to be specified by the respondent. Thus, the usefulness portion of each record consisted of ten data.

[314] For each of the ten copy types, Dr. Reitman averaged the usefulness ratings, record by record. This generated ten average ratings, one for each copy type.[163] He then converted these ratings into a measure of relative value of each type of copy. This was done by first computing the total measure of ratings across all copy type, and dividing the individual rating by that total. Normalizing the ratings in such a way ensures that the sum of all relative values is equal to 100 per cent.

[315] Dr. Reitman computed his usefulness ratings in two ways. First, he used the data as they were. Second, he modified each record where an "8" was coded (most useful) and recoded that copy as a "10" if the station indicated that the copy was absolutely necessary.

[316] As part of the category "other copy," stations indicated mainly three types of copies in the course of the survey: logger copies to fulfill CRTC requirements, extra copies (a catch-all category) and replay copies, reported by only one station. Dr. Reitman later decided to drop logger copies from the analysis on the basis that these are not compensable. He also decided to consider as a single category, the extra and the replay copies.

[317] Finally, Dr. Reitman combined the usefulness data with the use data in the following way. He multiplied the normalized average usefulness data by the percentage of stations that make each type of copy, and then renormalized the data. Once again, he did this for both the unrecoded data and the recoded data.[164]

[318] Ultimately, Dr. Reitman obtained the results shown in Table 1 of Appendix A.

iv. The proposal by Drs. Boyer and Cremieux

[319] The proposal by Drs. Boyer and Cremieux is based on cooperative game theory. In a cooperative game, parties negotiate and a mutually agreeable solution exists. One such solution is the Shapley value. Drs. Boyer and Cremieux cite Roth and Verrechia (1979) who characterize

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[163] Dr. Reitman calculated the average two ways: including a zero for the copies that a station did not make and not including a zero for these copies. His preferred method did not include extraneous zeroes.

[164] In addition, Dr. Reitman did calculations with the interrogatory data, both on their own, and in combination with the usefulness survey data. He did not find these measures to be very usable, but presented them for the purpose of comparison.

the Shapley value as "a fair, equitable, neutral, and costless surrogate to letting participants in a cost allocation setting bargain with each other over how costs or value will be allocated between them." It is particularly useful when parties have unequal bargaining power, asymmetric positions, and the game exhibits economies of scope (the whole is greater than the sum of the parts).

[320] The solution concept is somewhat cumbersome to display visually, as it is non-linear in the number of players. The concept can be summarized as follows. Each player enters into coalitions with other players. For example, if the players are A, B, and C, the following are the possible coalitions: {A}, {B}, {C}, {A,B}, {A,C}, {B,C}, and {A,B,C}. For each coalition, there is a value that corresponds to the sum of marginal values for each individual player in the coalition. The Shapley value assigns to each player the average of the marginal values across all the coalitions in which the player participates.

[321] The insight of Drs. Boyer and Cremieux was to treat each type of copy as a player. This implies that the various types of copies are "bargaining with each other." For analytical tractability, Drs. Boyer and Cremieux collapse the set of possible copies into a set of five copies: Main Automation System, Ingest, Backup, Voice-Tracking, and Other.

[322] The starting point for Drs. Boyer and Cremieux is the data produced by Dr. Reitman. In particular, they use the data with the recoding, without the extra zeroes, and without the second normalizing to the use data.[165] This is found in Dr. Reitman's Table 4, Column 3.

[323] Drs. Boyer and Cremieux then make several assumptions to determine the marginal values required to populate the Shapley-value analysis. First, they assume that the Main Automation System (MAS) copy is an *essential player*. This means that any coalition that does not contain the MAS copy has a total value of zero and every member of such coalition receives a zero marginal value for those coalitions. Second, they assume that the marginal value of each non essential player is constant across all coalitions in which it is contained. This means, for example, the value of the Backup copy is the same whether the coalition contains the MAS copy and the Ingest copy or just the MAS copy. Finally, to make their model comparable with that of Dr. Reitman, they normalized the Shapley values so that they sum to one.

[324] Drs. Boyer and Cremieux offered an additional variant of their main model in which the "option to copy" is also an essential player. They then calculated the Shapley value again and renormalized the values. This additional variant is their preferred measure of value allocation; it is shown in Table 2 of Appendix A.

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[165] Exhibit AVLA/SOPROQ-CSI-4 at para 110.

[325] Royalty allocation is presented separately for Connect/SOPROQ and CSI because, according to the experts, the Connect/SOPROQ tariff does not cover Live Performance copies and Streaming copies.

v. Why we reject the proposal by Drs. Boyer and Cremieux

[326] The Board has encountered the Shapley value in evidence before it in the past. In its 2009 decision on Satellite Radio Services, the Board wrote:

> In our opinion, the Shapley approach is interesting by reason that it provides information on the fundamental value of music for Satellite Services. However, it relies heavily on data from a survey where respondents were questioned on hypothetical scenarios. Unfortunately, we do not have enough information to be able to test the variations and the stability of this model. Under these circumstances, we cannot use this approach. The parties could eventually further develop and better utilize it if they agreed on the model and the data collection methodology. This would permit the Board to analyse and validate the numbers.[166]

[327] The present matter can be readily distinguished from satellite radio. In the survey in the present matter, radio stations were questioned not about hypothetical scenarios but rather about copies they make. Furthermore, given the data filed with the Board, it was possible to test the variations and stability of the Shapley model.

[328] However, we reject the proposal by Drs. Boyer and Cremieux for the following reasons.

[329] First, Drs. Boyer and Cremieux assume that the MAS copy is an essential player and is the only essential player. While it is probably true that the MAS copy is essential, the evidence suggests that it is probably also true of the Ingest copy, at least part of the time. But the Shapley method, at least as presented by Drs. Boyer and Cremieux, cannot accommodate partial essentiality.

[330] Second, Drs. Boyer and Cremieux assume that the marginal contribution of each non essential type of copies is the same across all coalitions of which it (and the MAS copy) is a member. But this is unlikely to be true. Had the Collectives wanted to use the Shapley value all along, they could have asked coalitional questions. The assumption of constant marginal contribution is difficult to rationalize, even if it makes the calculations easier.

[331] Third, Drs. Boyer and Cremieux assume that the MAS copy is an essential player. The information content of this assumption is already embodied, to some extent, in the data that says

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[166] *Statement of Royalties to be Collected by SOCAN, NRCC and CSI in Respect of Multi-Channel Subscription Satellite Radio Services, SOCAN (2005-2009), NRCC (2007-2010), CSI (2006-2009)* (6 May 2009, Corrected Version) Copyright Board decision at para 146.

that most stations use the MAS copy and value it highly. Imposing this assumption in the Shapley game is a form of double counting.

[332] Fourth, the data show that many respondents did not understand the questions. For example, there are two radio stations in Quebec that said they do not use the MAS copy. One of them is probably broadcasting using the Music Evaluation copy and the other is probably broadcasting using the Ingest copy. In these two cases, the Music Evaluation copy and the Ingest copy have functionally become the MAS copy, since these are the copies from which broadcasting is taking place. The problem with misidentifying the copies in the Shapley context is that the measurement error "bleeds" from the non essential player to the essential player. It thus affects the allocation in two ways, as opposed to in one way.

[333] Fifth, Drs. Boyer and Cremieux use a 5-player game, representing five types of copies. However, there are seven principal types of copies and a number of non-principal types of copies marked as "other" in the survey. Drs. Boyer and Cremieux had to compress all the other copies into a single type of copy. This implies that these other copies would need to have a second negotiation game after negotiating with the most common types of copies; however, this second negotiation game is unmodeled.

[334] Sixth, the "additional" step of including the option to copy as a player is in contradiction with the rule that states that all players must be of the same type. In the additional step, there are five players that are types of copies and one player that is a right. This leads to an overly confusing interpretation of the results of the game.

vi. How we modify the proposal by Dr. Reitman

[335] Having rejected the proposal by Drs. Boyer and Cremieux, we turn now to the proposal of Dr. Reitman.

[336] First, and as already mentioned above, we have removed a number of records from the dataset of 212 records, mostly on account of straightliners. This leaves us with 120 usable records.

[337] Second, we reject the recoding option, for three reasons. To begin with, recoding an "8" to a "10" is wholly arbitrary; there is no reason not to choose a "9" or a "15," for that matter. Furthermore, it is a form of double counting. Since the respondent coded the copy as an "8," it is clearly already highly valued. Recoding this as a "10" is reflecting this high valuation twice. Finally, in our opinion, the usefulness of a copy and the necessity of that copy are not directly comparable, yet the recoding version of the model proposes to do just that.

[338] Third, we reject the extraneous zero option since it arbitrarily reduces the averages prior to normalizing.

[339] The calculations are shown in Table 3 of Appendix A. Columns A and B are obtained from our calculations after having made the changes as just described. Column C is the product of the first two and corresponds to a measure of usefulness weighted by the use data. Column D is Column C divided by the sum of all elements of Column C. This also corresponds to the relative value of each type of copy.

C. THE CSI RATES

[340] The starting point is the rate of 1.375 per cent, equal to the SOCAN rate of 4.4 per cent multiplied by the ratio of 1 to 3.2. This starting point, as well as the corresponding rates for lower revenue tranches and for low music-use stations,[167] are what the Board used in its *Commercial Radio (2010)* decision. In that decision, the Board applied a 10 per cent repertoire discount to these rates, and certified a rate structure as shown in the first Column of Table 4 of Appendix A, with a rate of 1.238 per cent for the highest revenue tranche.[168] Given that no one objected to the use of this repertoire adjustment, we are also applying it. Consequently, the rates certified in 2010 are now used as starting rates, to which we will apply further discounts.

[341] As discussed in Section VIII above, there are three types of copies for which a blanket discount can be applied to the CSI rate for the period under consideration:

- Music Evaluation copies;
- Streaming copies; and,
- Backup copies.

[342] Together, these three types of copies currently account for 23.42 per cent of relative value of the copies made by radio stations. We apply the 23.42 per cent discount to the starting rates, obtaining the new CSI base rates shown in Table 4 of Appendix A. These new base rates are however subject to an additional potential discount.

[343] We decided earlier in this decision that broadcasters that can demonstrate compliance with section 30.9 of the *Act* should be able to benefit from an additional reduction in royalties in respect of the reproduction right through a "limited MBL." This reduction will be proportionate to the amount of copies that broadcasters can demonstrate are ephemeral, as contemplated by that section. Since we also decided that section 30.9 would not be applied to the Main Automation System copy, the reduction will only be in respect of the following three types of copies:

- Ingest copies;
- Voice-Tracking copies; and,

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[167] *Supra* note 1 at para 223.
[168] *Ibid* at para 226.

- Live Performance copies.

[344] By adding up the relative values of these three types of copies, we obtain a total relative value of 27.80 (16.90 + 9.46 + 1.44) per cent. As a proportion of the total value of all types of copies that did not benefit from the blanket discount (i.e., 76.58 per cent), this corresponds to a proportion of 36.3 per cent. Thus, the potential, additional limited MBL discount to the rates shown above will be calculated as the following:

$$0.363 \times (A \div B)$$

where denominator of the ratio, B, is the total number of copies of the three types (Ingest, Voice-Tracking, and Live Performance) that are being made by radio stations. The numerator of the ratio, A, is the actual number of these copies for which the broadcaster can demonstrate that they are compliant with the requirements of section 30.9 of the *Act*.

[345] We are aware that the relative value of the Ingest copies is much higher than that of the Voice-Tracking copies, which is higher than Live Performance copies. We could have constructed a discount formula that takes into account these different values. However, for the sake of simplicity and ease of administration, we believe that it is appropriate to assume that each of the three types of copies have the same, average value.

[346] In order to qualify for this additional discount in respect of ephemeral reproductions, a particular broadcaster will need to demonstrate that each of the copies for which it is claiming a discount meet all the requirements of section 30.9 of the *Act*. This will be achieved by the broadcaster completing and submitting a report to CSI, the details of which are set out later in this decision, in the section on tariff wording.

[347] In an interim decision dated December 21, 2012, the Board made the *Commercial Radio Tariff (SOCAN:2008-2010; Re:Sound: 2008-2011; CSI: 2008-2012; AVLA/ SOPROQ: 2008-2011; ArtistI:2009-2011)* applicable on an interim basis to the extent it concerns CSI, effective as of November 7, 2012. The rate we set here therefore applies to CSI for the period spanning from November 7, 2012 to December 31, 2013.

D. THE TRIPARTITE AGREEMENT

[348] Artisti signed an agreement with Connect/SOPROQ and CAB and it was jointly filed with the Board on August 6, 2013 (the "Tripartite Agreement"). In the Tripartite Agreement, the parties agreed as follows:

> Of the starting rate for performers' performances, 0.028 per cent should be payable to ArtistI for the use of performances in its repertoire during the term of its proposed tariff, with the remaining 0.66 per cent payable to AVLA/SOPROQ. Unless otherwise required by the Board, the increase is not to be attributed specifically either to an increase in ArtistI's repertoire or to a reallocation of value between vocal and instrumental performances. Further,

> this settlement is without any admission as to those issues (or others) and without prejudice to the entitlement of AVLA/ SOPROQ and ArtistI to raise them in future proceedings. […] To the extent that the Board determines that the starting rate for performers' performances should be reduced to reflect the application of exceptions in the *Copyright Act* (or other factors), such reductions should apply to AVLA/SOPROQ and ArtistI pro-rata.[169]

[349] The Board took note of the agreement, issuing a notice the next day, which reads as follows:

> The Board takes note of the agreement between AVLA/SOPROQ, Artisti and CAB as described in the attached request. In accordance with this agreement, the Board confirms that the issues on which there is an agreement need not be examined as part of the proceedings and will not require submission from any of the parties.[170]

[350] The agreement has the following implications for our decision. First, the methodology used in the *Commercial Radio (2010)* decision to set the Artisti rate will not be used in the present matter. Second, the top Artisti rate will be set as a ratio of 4.07 (0.028 ÷ 0.688) per cent of the starting rate for performers' performances. Third, all the subsidiary Artisti rates will be set in proportion to the top rate, using the proportions found in the 2010 decision.

E. THE CONNECT/SOPROQ RATES

[351] In the *Commercial Radio (2010)* decision, the starting point for the makers' portion of the Connect/SOPROQ rate was 0.688 per cent (half of the CSI highest rate). We use the same starting point and apply a blanket discount, as we did for CSI. However, we need to modify the value of this blanket discount by making some changes to the relative values of the types of copies, as shown in Table 1 of Appendix A.

[352] The Live Performance copies, listed in Table 3, do not involve the reproduction of sound recordings or of performers' performances. A second type of copies, Streaming copies, is also not covered by the tariff because, except for CSI, the tariff only covers over-the-air broadcasting operations of a station. Consequently, these two types of copies must be removed from the calculation of the discount applicable to Connect/ SOPROQ rate. Table 5 shows the calculation of the relative value of the remaining types of copies.

[353] The blanket discount as calculated for CSI applies to three types of reproductions: Music Evaluation, Streaming, and Backup. The blanket discount we are now calculating for Connect/SOPROQ applies to only two types of reproductions: Music Evaluation and Backup. The relative values of these two types of reproductions are 0.07 per cent and 23.66 per cent,

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[169] Letter of Connect/SOPROQ to the Board, August 6, 2013 at p 2.
[170] Notice of the Board (7 August 2013).

respectively. However, while the discount for the Music Evaluation copies starts to apply as of January 1, 2012, the discount for Backup copies only starts applying on November 7, 2012. Consequently, the Connect/SOPROQ rates need to be calculated for each of the following periods.

i. ***From January 1, 2012 to November 6, 2012***

[354] The application of the Music Evaluation discount of 0.07 per cent to the starting point of 0.688 leads to a rate of 0.687.

[355] The repertoire adjustment of 93.72 per cent is based on the *Commercial Radio (2010)* decision and the Tripartite Agreement. Applying this repertoire adjustment, the makers of sound recordings' share (for the highest rate) becomes 0.644 per cent of revenues.

[356] The performers' share of 0.688 per cent of revenues is adjusted as follows. We first apply a 5 per cent reduction to account for those performances for which the copyright is still owned by the performers. This adjustment was done in the 2010 decision, and there are no reasons not to apply it again. We also apply the blanket discount of 0.07 per cent and the repertoire adjustment (93.72 per cent).

[357] These three adjustments result in a rate of 0.612 per cent. However, this rate is to be split between Connect/SOPROQ and Artisti in a ratio of 0.660 to 0.028, or 95.93 per cent for Connect/SOPROQ and 4.07 per cent for Artisti. The performers' share for Connect/ SOPROQ is 0.5872 (0.612 × 0.9593) per cent. As a result, the Connect/SOPROQ highest rate is 1.231 (0.644 + 0.587) per cent.

[358] The rates for the other revenue categories are determined as follows. The rates certified in 2010 are found in Table 6 of Appendix A. However, these rates cannot be readily used. Connect/SOPROQ submitted that there was an error made in the determination of its rate in the *Commercial Radio (2010)* decision because a constant 0.23 allocation for Artisti was subtracted for all rate levels, whereas a lower allocation should have been used for lower rates. We agree. The results of that correction are shown in Table 6 of Appendix A. We calculate the new rates by using the ratios derived from these corrected rates between the rates of the lower revenue categories and the rate for the highest revenue category. The new base rates for Connect/ SOPROQ for the period of January 1, 2012 to November 6, 2012 are shown in Table 6.

[359] These rates are higher than the rates certified by the Board in 2010 as a result of our elimination in the present instance of the MDS discount that was applied in 2010. The additional discount we apply to take away the relative value of the Music Evaluation copies only partially compensates for the elimination of the MDS discount.

ii. ***From November 7, 2012 to December 31, 2017***

[360] Over the period of November 7, 2012 to December 31, 2017, both the Music Evaluation and the Backup discounts apply. The resulting total discount is 23.73 (0.07 + 23.66) per cent. This is the discount we apply to the starting point of 0.688 to obtain 0.5244 per cent. Applying the same repertoire adjustment of 93.72 per cent leads to a rate of 0.492 per cent of revenues for the makers of sound recordings.

[361] To the starting point of 0.688 per cent of revenues for the performers' share, we apply, as we have done above, the reduction to account for those performances for which the copyright is still owned by the performers (5 per cent), the blanket discount for the exempted copies (23.73 per cent) and the repertoire adjustment (93.72 per cent). This leads to a rate of 0.467 per cent. The performers' share for Connect/SOPROQ is 0.448 (0.467 × 0.9593) per cent. As a result, the Connect/SOPROQ highest rate for the second period is 0.940 (0.492 + 0.448) per cent. The rates for the other revenue categories are determined as above and shown in Table 6.

[362] As we did for the CSI rate, we will allow broadcasters to benefit from a further potential discount, or limited MBL, to the Connect/SOPROQ new rates obtained above. The total value of the two remaining types of copies (Ingest and Voice-Tracking) that could benefit from the exception under section 30.9 of the Act is 26.76, which corresponds to 35.1 per cent of 76.27 per cent, the total relative value of the remaining types of copies that have not benefited from the blanket discount. Thus, the additional potential discount will be equal to:

$$0.351 \times (C \div D),$$

where D is the total number of the Ingest copies and Voice-Tracking copies being made by radio stations, and C is the actual number of these copies for which the broadcaster can demonstrate that they are compliant with the requirements of section 30.9.

F. THE ARTISTI RATES

[363] As we did in respect of the Connect/ SOPROQ rates and for the same reasons, we need to certify rates for Artisti according to two periods. For the first period between January 1, 2012 and November 6, 2012, we determined above that the total rate to be shared between Connect/SOPROQ and Artisti in respect of performers is 0.612 per cent. Since Artisti is to receive a share of 4.07 per cent, this results in an Artisti rate of 0.025 per cent for the highest revenue tranche of radio stations. Using the ratios between revenue category rates found in the *Commercial Radio (2010)* decision, the new base rates we obtain for Artisti are as shown in Table 7 of Appendix A. For the reasons explained in respect of the new Connect/SOPROQ rates, the new Artisti rates for this first period are higher than the rates certified in 2010.

[364] For the second period between November 7, 2012 and December 31, 2014, the total rate to be shared between Connect/ SOPROQ and Artisti in respect of performers is 0.467 per cent. The corresponding Artisti rate is 0.019 per cent (0.467 × 0.0407) for the highest revenue tranche. The new base rates for the other revenue tranche, calculated as described above, are also shown in Table 7.

[365] An additional potential discount will also be applied on the Artisti new base rates, identical to the Connect/SOPROQ formula.

G. THE SOCAN AND RE:SOUND RATES

[366] SOCAN sought no changes to the *status quo* regarding rates. Re:Sound sought two changes, the subsection 69(2) of the *Act* change and the GRBM change, both of which we have rejected. In addition, for reasons explained under Part V above, the same repertoire adjustment applies to Re:Sound's rates as was applied in the *Commercial Radio (2010)* decision. As a result, there are no changes to the rates for either SOCAN or Re:Sound relative to the rates certified in 2010. The rates we certify are shown in Table 8 of Appendix A.

[367] Notwithstanding the previous paragraph, subparagraph 68.1(1)(*a*)(i) of the *Act* entitles broadcasters to pay Re:Sound only $100 in royalties on their first $1.25 million of annual "advertising revenues."

XI. FINAL CERTIFIED TARIFFS AND ROYALTIES GENERATED

[368] The Tables in Appendix B summarize the rates we are certifying for all Collectives.

[369] Using financial data from Exhibit Collectives-4, Appendix Q for the year 2011, and CRTC's financial summaries in respect of commercial radio[171] for extrapolation, we estimate that for the year 2013, the rates we certify will generate approximately $93.5 million in royalties for all Collectives. This estimate reflects the unchanged SOCAN and Re:Sound rates as well as the reproduction rates reduced by the blanket discount, but does not take into account the additional potential discount in respect of the ephemeral reproductions. The estimate also takes into account the reduced payment of $100 per year to Re:Sound on the first $1.25 million of advertising revenues. Of the total amount, about $55 million would go to SOCAN, $18 million to Re:Sound, $10 million to CSI, $10 million to Connect/SOPROQ and $200,000 to Artisti.

[370] [Based on these same financial data, the blanket discount applied to the reproduction rates translates into a reduction in the total royalties paid by radio stations of about $5.6 million. Radio stations may benefit from further reductions in royalties to the extent they avail themselves of the

[171] Commercial radio – Statistical and Financial Summaries, 2010-2014, CRTC.

modified blanket licence. In this case, the maximum additional reduction in royalties that would result is about $7 million.

[371] Using the same data, total revenues of commercial radio stations are slightly over $1.5 billion for 2011. With total royalties amounting to $93 million, the effective total royalty rate of radio stations is 5.95 per cent. This is the measure of the proportion of revenues that are paid in royalties to all Collectives taking into account the lower rates for low income and low music-use stations, as well as the Re:Sound reduced payment of $100.

XII. TARIFF WORDING

A. "GROSS REVENUES"

[372] As mentioned above in Part II, the Collectives sought that the definition of gross revenues be expanded to explicitly include contra and barter revenues as well as agency advertising revenues. The Collectives explained that the modification was necessary for the following reasons:

> SOCAN had discovered, during audits of two station groups, that, while most stations were including contra in their revenues in the station's gross income for the purposes of calculating the SOCAN tariff, some stations had not understood that the fair market value of contra, trade, and barter was to be included.[172]

[373] CAB stated that it does not take issue with the inclusion of contra revenues, but wants to ensure that the modifications to the language do not result in the capture of other revenue sources. Furthermore, CAB argues that the evidence shows that a change is not even necessary, as the vast majority of broadcasters already include such income in their calculations.[173]

[374] [Nevertheless, in CAB's submission, if the definition of "gross income" does need to be amended, it proposed that the definition be modified as follows:

> "gross income" means the gross amounts paid by any person for the use of one or more broadcasting services or facilities provided by a station's operator, including the value of any goods or services provided by any person in exchange for the use of such services or facilities, and the fair market value of non-monetary consideration (e.g., barter or "contra"), but excluding the following […][174]

[375] As mentioned above, SOCAN agreed to this wording.[175]

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[172] Exhibit Collectives-1 at para 55.
[173] Exhibit CAB-1A at para 43.
[174] Exhibit CAB-1A at para 44.
[175] Transcripts, Vol. 1 at p 26:2–11.

[376] We find this wording to be acceptable, and the definition in the tariff is amended to incorporate equivalent language.

B. "FOR PRIVATE OR DOMESTIC USE"

[377] The proposed tariffs by SOCAN and Re:Sound would allow commercial radio stations to communicate to the public by telecommunication works and published sound recordings "for private or domestic use," in connection with their over-the-air broadcasting operations. For example, SOCAN proposed the following wording:

> 3. (1) This tariff sets the royalties to be paid each month by commercial radio stations for the communication to the public by telecommunication, by over-the-air broadcasting and for private or domestic use, of musical and dramatico-musical works in SOCAN's repertoire and of published sound recordings embodying musical works and performers' performances of such works in RE:SOUND's repertoire. [emphasis added]

[378] We note that historically, tariffs did not always include such a restriction. See, for example, NRCC (1998, 1999, 2000, 2001 and 2002). Later tariffs, like *Commercial Radio Tariff (2008)*[176] and *Commercial Radio Tariff (2010)*[177] included such a restriction. Prior SOCAN tariffs for commercial radio did include the reference to "for private or domestic use."

[379] For the reasons below, we do not include this wording in the tariff we certify.

[380] To start with, this restriction, grammatically, is ambiguous as to whom it applies. One reading could suggest that it is to the commercial radio station. This is clearly not the intent of the provision: the radio broadcaster uses it for public, commercial purposes. The wording, therefore, seeks to restrict the licence to those communications that result in private or domestic use.

[381] Therein lies the main issue with such a restriction: commercial over-the-air radio broadcasts, by their very nature, are done indiscriminately. Anyone with a radio receiving set or apparatus, who is within the broadcast range of the radio station, may receive the broadcast signal, and therefore hear the sound recordings—whatever use they happen to make of it.

[382] The radio broadcaster has no means of restricting or controlling the use to which its broadcast will be put, or even knowing what use is made of it. Furthermore, a radio station's revenues are generally tied to the number of listeners it has, whether those listeners are in a

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[176] Statement of Royalties to Be Collected by SOCAN (2003-2007), Re:Sound (2003-2007) in Respect of Commercial Radio Stations, *Canada Gazette*, February 23, 2008. [*Commercial Radio Tariff (2008)*]
[177] *Commercial Radio Tariff (2010)*, *supra* note 21.

private or domestic situation or not. As discussed above in Part IX, the royalties that radio stations pay are calculated without regard as to this restriction.

[383] The restriction is therefore fictitious: not only do radio stations not limit their broadcasts "for private or domestic use," but the royalties they pay are calculated in a manner that is strongly linked with a listenership population that includes persons that use the sound recordings in ways other than merely private or domestic.

[384] Therefore, the relevant part of subparagraph 3(1)(*a*)(i) of the tariff will read as follows:

> to communicate to the public by telecommunication in Canada, musical or dramatico-musical works in the repertoire of SOCAN and published sound recordings embodying musical works and performers' performances of such works in the repertoire of Re:Sound […]

[385] This change to the tariff wording does not modify the activities targeted by the tariff but merely reflects the reality.

C. MUSIC-USE INFORMATION

[386] The *Commercial Radio Tariff (2010)* required radio stations to provide

> the date and time of the broadcast, the title of the work, the title of the album, the record label, the name of its author and composer, the name of the performers or performing group, the duration, in minutes and seconds[178] to relevant collectives who made a request. Other information, namely the Universal Product Code (UPC) of the album and the International Standard Recording Code (ISRC) of the sound recording from which the musical work is taken, only had to be provided if it was available.[179]

[387] Furthermore, such information only had to be provided with respect to 28 days in a year. This was an increase from the reporting requirements in the *Commercial Radio Tariff (2008)*,[180] which only required reporting in relation to 14 days in a year.

[388] In these proceedings, the Collectives proposed that additional information be provided by radio stations (the catalogue number of the album, the track number on the album, the duration of the sound recording, the type of usage, whether the track is a published sound recording, and cue sheets for syndicated programming) and that the information be provided in relation to all 365 days in a year.[181]

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[178] *Ibid* at s. 10(1)(*a*).
[179] *Ibid* at s. 10(1)(*b*).
[180] *Supra* note 176 at s. 7(3).
[181] Exhibit Collectives-1 at paras 70–78.

i. *The information to be provided*

[389] The Collectives argue that the additional information is necessary, even though all of it may not be actually required to identify each track. Nevertheless, "[h]aving the additional categories of information available increases the likelihood that each Collective will be able to properly identify the particular sound recording and, as applicable, the musical work(s) and performers' performances it contains."[182]

[390] CAB argues that

> radio broadcasters cannot be required to provide information they are not provided and do not have. The vast majority of broadcasters obtain their music from DMDS, and not all of these categories of music use information are transmitted with the songs when they are obtained from DMDS. This is particularly true for the UPC and ISRC codes. DMDS is a service provided by the record labels, which are members of AVLA and, indirectly, Re:Sound. Radio stations should not be required to provide information to the Collectives which the Collectives' members fail to transmit to stations in the first place.
>
> Furthermore, when stations obtain singles or releases that are not part of an album, as is often the case in this age of digital music recording and production, there may not even be a catalogue number for the album or a track number on the album because there is no album. Also, the digital music environment also makes it difficult for a radio station to determine whether a track is a "published sound recording" as this is a legal definition that may or may not be obvious to the radio station operator.[183]

[391] We agree that a radio station cannot provide information that it does not have, nor do we believe it to be reasonable for a radio station to research such information, or attempt to make legal conclusions about whether a sound recording is "published" or not, as that term is used in the *Act*. Therefore, the obligation to provide the information will remain with the proviso that such information must be provided "where available."

[392] CSI argued that the "where available" standard is insufficient, pointing to instances where UPC codes and the ISRC codes are available, but not being provided by the radio stations.[184]

[393] However, given that such information is not always available, there is no practical way to make the reporting of such information mandatory. A radio station that is not providing information when it is readily available to it is an issue of compliance with the terms of the tariff, not of wording.

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[182] Exhibit Collectives-1 at para 76.
[183] Exhibit CAB-1A at paras 52–53.
[184] Transcripts, Vol. 12 at p 2049:11–17.

[394] We wish to emphasize here that the standard of "where available" is not intended to be, and should not be, interpreted as conveying any level of discretion upon the person or entity having the obligation to provide the music-use information. All the listed information in its possession or under its control, regardless of the form or way in which it was obtained, must mandatorily be provided for the station to effectively be in compliance with the requirement we set.

[395] Further to consultations by the Board[185] with the parties on this issue, the Collectives jointly submitted that a music-use reporting provision making reference to 'where available' would "make all music use information non-mandatory," "would be a significant loosening of the requirements under the current certified tariff and would jeopardize rights holders' ability to receive the royalties to which they are entitled." It is not the intent nor the effect of the provision as drafted in the tariff wording. CAB shared this view in its response to the Board's consultation, where it stated that "[t]he CAB does not contest the requirement that stations provide all the information they have pertaining to the music they use. The CAB and its members understand the importance of accurate music use information reporting to ensure accurate distribution of royalties to rights holders."

[396] Clarifying language is added to the tariff to highlight the mandatory character of the reporting of all information available to radio stations.

ii. ***Reporting days***

[397] The current tariff requires radio stations to report the sound recordings that they broadcast for 28 days in a year. However, approximately 40 per cent of radio stations voluntarily provide 365-day reporting.[186] Where only 28-day reporting is received, the 28-day data is grossed-up and used as a proxy for the remainder of the year.[187]

[398] Re:Sound supplements this information by purchasing listings from Nielsen Broadcast Data Systems (BDS).[188] The listings from Nielsen BDS provide a sequential list for 365 days of music use for approximately 236 stations. The cost is approximately $110,000 per year. Ms. Tay, Director of Distribution at Re:Sound, stated that the purchase of the Nielsen BDS started in 2010 when Re:Sound received only the 14-day reports from radio stations, and was intended as a temporary measure. However, because their systems have been adapted to use Nielsen BDS data,

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[185] See Notice of the Board *CB-CDA 2015-078*, December 11, 2015.
[186] *Ibid* at p 83:4–11.
[187] *Ibid* at p 76:6–11.
[188] *Ibid* at p 73:2–5.

and because they do not receive 365-day reports from all radio stations, they have continued to use it. However, Ms. Tay states that it is not feasible to continue paying $110,000 per year.[189]

[399] The creation of full 365-day reports is greatly facilitated by the use of programming software, such as MusicMaster or Selector. Based on the reports it received, Re:Sound believes that approximately 80 per cent of radio stations are using programming software. Among these radio stations, approximately 47 per cent provide 365-day reporting.[190] The Collectives point to the responses provided by radio stations in the course of interrogatories, according to which 90 out of 98 radio stations use "some form of programming software."[191] The Collectives argue that all stations that use programming software should be able to generate 365-day sequential lists.[192]

[400] CAB submits that while "all stations with the technological capability to comply with the proposals should generally be required to do so, […] provision must be made for stations that do not have the technological resources to comply in the manner proposed."[193] CAB also states that "talk stations do not use programming software capable of generating the lists requested by the Collectives and therefore would be incapable of providing such information."[194] Thus, while CAB does not oppose the provision of 365-day lists as such, it wants to limit the requirement to only those stations that have the technological capability to do so.

[401] We are also of the opinion that better information about the music that is broadcast can result in more accurate payments being made to rights owners. A smaller sample (such as a 14- or 28-day sample) will tend to favour those rights owners whose music is played more often while those rights owners whose music is played less frequently are more likely to be missed by such samples.

[402] Ms. Tay's evidence on the increase in the number of unique tracks captured in a year when more days were reported is very suggestive in this respect.[195] Were it not for the voluntary 365-day reporting of certain stations and the Nielsen BDS, the number of unique tracks that are likely to be captured by a full 365-day requirement will be about double that of the number of unique tracks captured under a 28-day requirement (i.e., from approx. 100,000/year to approx. 200,000/year).

[403] It is reasonable to determine that radio stations that use programming software should easily be able to generate 365-day sequential lists at no significant additional costs, given that

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[189] *Ibid* at pp 74–75.
[190] *Ibid* at p 85:5–18.
[191] Exhibit Collectives-1 at para 71.
[192] *Ibid.*
[193] Exhibit CAB-1A at para 46.
[194] *Ibid* at para 48.
[195] Exhibit Re:Sound-5 at p 2.

close to half of such stations already do so, on a voluntary basis. The evidence also shows that some stations that already provide 365-day sequential lists do not use programming softwares. Given the above, wording will be added to the tariff requiring that 365-day sequential listings be provided by all radio stations, with a phase-in period of 180 days for radio stations which have never provided a 365-day sequential list in the past and are unable to comply with this requirement immediately.

[404] We believe this change, which has been considered for some time, will effectively translate into more accurate redistribution of royalties perceived by the collective societies.

iii. *Penalties for late reporting*

[405] On the issue of imposing penalties for late reporting of financial and music-use information, as proposed by the Collectives, we agree with CAB that this is a compliance and enforcement issue rather than a tariff certification issue. As the Board has noted in the past, "enforcement issues are outside the jurisdiction of the Board."[196] As such, we will not set penalties for late reporting in the tariff we certify.

D. SHARING OF INFORMATION

[406] The Collectives proposed changes to the confidentiality provisions to allow the sharing of confidential information with "service providers." After considering the evidence, the submissions of the parties during the hearing and consultations on the wording,[197] we decided to include the possibility for the sharing of information with service providers that are "professional service provider[s] which may be retained by a collective society to assist in the conduct of an audit or in the distribution of royalties to rights holders." The sharing of confidential information is also limited to the extent required by the service providers for the service they are contracted to provide. As a safeguard, a service provider with which confidential information about a radio station is shared is required to sign a confidentiality agreement prior to getting access to such information.

E. TRANSITIONAL PROVISIONS

[407] The tariff contains certain transitional provisions made necessary because it takes effect in the past,[198] and because the tariff reporting requirements, based on 365-day reporting, do not necessarily reflect past practices of radio stations subject to the tariff. Radio stations cannot be expected to provide information that they did not keep or track. Also, the period under

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[196] *Private Copying Tariff Enforcement in 2001, 2002, 2003* (19 January 2004) Copyright Board decision.
[197] *Supra* note 185.
[198] January 1, 2011 for SOCAN, January 1, 2012 for Re:Sound, Artisti and Connect/SOPROQ, and November 7, 2012 for CSI.

examination has already ended for most Collectives. For those reasons, transitional provisions are required in the tariff to account for radio stations which may be unable to comply immediately with the music-use requirements going forward. We estimate that six months to make the transition is sufficient.

F. OTHER WORDING FROM CONSULTATIONS

[408] We reviewed all submissions from the parties in response to the consultations with the parties on proposed wording of definitions and administrative provisions of the tariff.[199] We incorporated those we consider reasonable and supported by the record of this case. Some proposed wording changes, however, amounted to improper substantive amendments falling outside the parameters of the consultation notice of the Board and, as such, were rejected.

G. INTEREST

[409] A table included in the tariff sets out the multiplying interest factors to be applied on the amounts owed as a result of the certification of this tariff. Since both the SOCAN and the Re:Sound rates are left unchanged, the interest factors will only apply in respect of royalties paid on account of the CSI, Connect/SOPROQ, and Artisti rates. The factors were derived using month-end Bank Rates. Interest is not compounded. The amounts owed in a given month correspond to the difference between the amount paid (or received) pursuant to the previous tariff and the amount to be paid (or received) as a result of the tariff we now certify. Since in this case, the rates we certify are lower than before for some collectives, the multiplying factors will apply to amounts due by these collective societies (i.e., the overpayments by radio stations).

Gilles McDougall
Secretary General

XIII. APPENDIX A

TABLE 1: RELATIVE VALUE OF TYPES OF COPIES – REITMAN'S CALCULATIONS

TYPES OF COPIES	ADJUSTED USEFULNESS	PERCENT OF STATIONS THAT	WEIGHTED USEFULNESS	RELATIVE VALUE

[199] *Supra* note 185.

	RATING (A)	USE EACH TYPE OF COPY (B)	(C) = (A) × (B)	(D)
Ingest	7.6	84.5%	6.4	25.2%
Music Evaluation	7.3	9.6%	7.0	2.8%
Main Automation System	9.8	91.7%	9.0	35.2%
Voice-Tracking	6.7	26.4%	1.8	7.0%
Live Performance	5.3	31.0%	1.6	6.5%
Streaming	5.4	3.0%	0.2	0.6%
Backup	6.2	90.8%	5.6	22.3%
Extra	1.9	5.9%	0.2	0.4%

TABLE 2: ROYALTY ALLOCATION – BOYER AND CREMIEUX'S CALCULATIONS

TYPES OF COPIES	ACCOUNTING FOR INTERDEPENDENCY FOR CONNECT/SOPROQ	ACCOUNTING FOR INTERDEPENDENCY FOR CSI
Ingest	11.3	10.4
Music Evaluation	3.6	3.4
Main Automation System	68.3	66.9
Voice-Tracking	4.9	4.5
Live Performance	N/A	3.4
Streaming	N/A	0.4
Backup	11.5	10.7
Other	0.4	0.4

TABLE 3: RELATIVE VALUE OF TYPES OF COPIES – BOARD'S CALCULATIONS

TYPES OF COPIES	USEFULNESS (A)	USE (B)	WEIGHTED USEFULNESS (C) = (A) × (B)	RELATIVE VALUE (D)
Ingest	18.40%	77.60%	14.28%	16.90%
Music Evaluation	0.86%	7.26%	0.06%	0.07%
Main Automation System	41.75%	98.73%	41.22%	48.78%
Voice-Tracking	14.00%	57.11%	8.00%	9.46%
Live Performance	3.92%	30.98%	1.22%	1.44%
Streaming	1.11%	3.17%	0.04%	0.04%
Backup	19.95%	98.73%	19.70%	23.31%

TABLE 4: NEW CSI BASE RATES

CATEGORY	CSI 2010 STARTING RATES	CSI NEW BASE RATES
Low Music-Use Stations		
For revenues:		
• not exceeding $625,000	0.135%	0.103%
• above $625,000 but not exceeding $1.25M	0.259%	0.198%
• above $1.25M	0.434%	0.332%
Other Stations		

For revenues:		
• not exceeding $625,000	0.304%	0.233%
• above $625,000 but not exceeding $1.25M	0.597%	0.457%
• above $1.25M	1.238%	0.948%

TABLE 5: RELATIVE VALUE OF TYPES OF COPIES IN RESPECT OF CONNECT/SOPROQ

TYPES OF COPIES	USEFULNESS (A)	USE (B)	WEIGHTED USEFULNESS (C) = (A) × (B)	RELATIVE VALUE (D)
Ingest	18.40%	77.60%	14.28%	17.15%
Music Evaluation	0.86%	7.26%	0.06%	0.07%
Main Automation System	41.75%	98.73%	41.22%	49.51%
Voice-Tracking	14.00%	57.11%	8.00%	9.61%
Backup	19.95%	98.73%	19.70%	23.66%

TABLE 6: NEW CONNECT/SOPROQ BASE RATES

CATEGORY	2010 CONNECT/ SOPROQ CERTIFIED RATES	2010 CONNECT/ SOPROQ CORRECTED RATES	NEW CONNECT/SOPROQ BASE RATES (Jan. 1 2012- Nov. 6, 2012)	NEW CONNECT/SOPROQ BASE RATES (Nov. 7 2012- Dec 31, 2017)
Low Music-Use Stations				
For revenues:				
• not exceeding $625,000	0.113%	0.130%	0.134%	0.103%
• above $625,000 but not exceeding $1.25M	0.234%	0.249%	0.257%	0.196%
• above $1.25M	0.405%	0.417%	0.431%	0.329%
Other Stations				
For revenues:				
• not exceeding $625,000	0.278%	0.292%	0.302%	0.230%
• above $625,000 but not exceeding $1.25M	0.564%	0.574%	0.593%	0.452%
• above $1.25M	1.192%	1.192%	1.231%	0.940%

TABLE 7: NEW ARTISTI BASE RATES

CATEGORY	2010 ARTISTI RATES	NEW ARTISTI BASE RATES (Jan. 1 2012- Nov. 6, 2012)	NEW ARTISTI BASE RATES (Nov. 7 2012- Dec 31, 2014)
Low Music-Use Stations			
For revenues:			
• not exceeding $625,000	0.003%	0.003%	0.003%
• above $625,000 but not exceeding	0.005%	0.005%	0.004%

$1.25M			
• above $1.25M	0.008%	0.009%	0.007%
Other Stations			
For revenues:			
• not exceeding $625,000	0.006%	0.007%	0.005%
• above $625,000 but not exceeding $1.25M	0.011%	0.012%	0.009%
• above $1.25M	0.023%	0.025%	0.019%

TABLE 8: NEW SOCAN AND RE:SOUND RATES

CATEGORY	SOCAN RATES	RE:SOUND RATES
Low Music-Use Stations		
For revenues:		
• not exceeding $625,000	1.5%	0.75%
• above $625,000 but not exceeding $1.25M	1.5%	0.75%
• above $1.25M	1.5%	0.75%
Other Stations		
For revenues:		
• not exceeding $625,000	3.2%	1.44%
• above $625,000 but not exceeding $1.25M	3.2%	1.44%
• above $1.25M	4.4%	2.1%

XIV. APPENDIX B

SOCAN, Re:Sound and CSI Rates Certified by the Board, In Percentage of Gross Income

	SOCAN (2011-2013)	Re:Sound (2012-2014)	CSI (Nov. 7, 2012-Dec. 31, 2013)
Low Music-Use Stations			
For revenues :			
• not exceeding $625,000	1.5	0.75	(0.103 × X)
• above $625,000 but not exceeding $1.25M	1.5	0.75	(0.198 × X)
• above $1.25M	1.5	0.75	(0.332 × X)
Other Stations			
For revenues :			
• not exceeding $625,000	3.2	1.44	(0.233 × X)
• above $625,000 but not exceeding $1.25M	3.2	1.44	(0.457 × X)
• above $1.25M	4.4	2.1	(0.948 × X)

where the discount factor $X = 1 - (0.363 \times (A \div B))$, and wherein

B is the total number of Ingest, Live Performance and Voice-Tracking copies that are being made by the radio station, and

A is the actual number of these copies in compliance with the requirements of section 30.9 of the *Act*.

Connect/SOPROQ and Artisti Rates Certified by the Board, In Percentage of Gross Income

	Connect/SOPROQ		Artisti	
	(Jan. 1 2012-Nov. 6, 2012)	(Nov. 7, 2012-Dec. 31, 2017)	(Jan. 1 2012-Nov. 6, 2012)	(Nov. 7, 2012-Dec. 31, 2014)
Low Music-Use Stations				
For revenues :				
• not exceeding $625,000	0.134	(0.103 × Y)	0.003	(0.003 × Y)
• above $625,000 but not exceeding $1.25M	0.257	(0.196 × Y)	0.005	(0.004 × Y)
• above $1.25M	0.431	(0.329 × Y)	0.009	(0.007 × Y)
Other Stations				
For revenues :				
• not exceeding $625,000	0.302	(0.230 × Y)	0.007	(0.005 × Y)
• above $625,000 but not exceeding $1.25M	0.593	(0.452 × Y)	0.012	(0.009 × Y)
• above $1.25M	1.231	(0.940 × Y)	0.025	(0.019 × Y)

where the discount factor $Y = 1 - (0.351 \times (C \div D))$, and wherein

D is the total number of the Ingest and Voice-Tracking copies being made by the radio station, and

C is the actual number of these copies in compliance with the requirements of section 30.9 of the *Act*.