

Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

Mechanical and Digital Phonorecord Delivery Rate
Adjustment Proceeding

Docket No. 2006-3 CRB DPRA

WITNESS STATEMENT OF JEREMY FABINYI
ON BEHALF OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.,
THE SONGWRITERS GUILD OF AMERICA AND THE NASHVILLE
SONGWRITERS ASSOCIATION INTERNATIONAL

1. I submit this statement in rebuttal to the testimony of Messrs. Geoffrey Michael Taylor and Richard Boulton concerning mechanical royalty rates in various countries.

2. I am a citizen of Australia and a resident of the United Kingdom. I live in London. I am the Managing Director of Mechanicals at the MCPS-PRS Alliance based in the U.K., which is a jointly owned operating company of the Mechanical Copyright Protection Society Limited and the Performing Right Society Limited.

3. MCPS was established in 1924. MCPS acts as an agent on behalf of over 17,000 composers, songwriters and music publishers. The essential function of MCPS is to collect and distribute mechanical royalties to its members generated from the copying of their music for use in the U.K. MCPS is more or less the equivalent of The Harry Fox Agency, Inc. ("HFA") in the United States.

4. PRS was formed in 1914, and is also a U.K. collecting society. PRS accepts an assignment of performing rights from its writer, composer and music publisher members (together with authors and composers from other countries through contracts with corresponding societies in those other countries) and authorizes the public performance, broadcast, and communication of their musical works in the U.K. PRS is similar to ASCAP, BMI and SESAC in the United States.

5. I have been employed by MCPS-PRS since April 2005. Originally, I was the Executive Director of MCPS. Later, I was promoted to be Commercial Licensing Director of the Alliance. Last year, I was appointed to my current position as Managing Director of Mechanicals.

6. From 2002-2005, while based in Paris, I was Chargé de Mission for the International Mechanical Rights Organization, Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique, also known as "BIEM." MCPS and HFA are members of BIEM. At BIEM, I participated, on behalf of music publisher and composer societies, in negotiating the standard agreements for mechanical royalty rates in Continental Europe and other countries with the International Federation of the Phonographic Industry, also known as "IFPI." At BIEM, I also advised local mechanical rights societies in their mechanical royalty negotiations with local IFPI affiliates throughout the world. During the same period, I was Senior Consultant to the International Confederation of Societies of Authors and Composers ("CISAC"), an international trade organization of author and composer rights societies. ASCAP, BMI, SESAC, MCPS and PRS, are members of CISAC. At CISAC, I provided advice to music author and composer societies on business and

governmental negotiations and chaired a number of technical committees. Through my work with BIEM and CISAC in these years, I became very familiar with the mechanical royalty rates of a number of countries, and how they are determined.

7. At present, I am on the Board of Directors of MCPS and the Management Committee of BIEM. I have served on the boards of the Australian Copyright Council, the Australian Audio-Visual Copyright Society, the Australian Record Industry Association, the Phonographic Performance Company of Australia, the Australian Music Development Company, Austrade's Rock Music Advisory Panel, and the music industry anti-piracy organization, MIPI.

8. Overall, I have been involved in the music industry for more than 25 years, in a number of different capacities. Prior to joining BIEM in 2002, I lived in Australia. From 1998-2001, I was in the record business in Australia and New Zealand as Group Managing Director of the Festival Group of Companies, which included Festival Records, Festival Music Publishing, Festival Studios, and Festival Mushroom Records, Australia's largest independent record company. At the same time, I also served on the Board of Directors of the Australian affiliate of IFPI, which is called the Australian Recording Industry Association.

9. From 1992-1998, I was CEO of the Australian Music Publishers Association Limited and its licensing arm, the Australasian Mechanical Copyright Owners Society, a copyright collection society that represents music publishers and writers in connection with the reproduction of their musical rights in Australia and New Zealand. There, I was responsible for negotiating industry mechanical rights agreements with the Australian Recording Industry Association.

10. Prior to 1992, I was an artist manager for many years in Australia. I represented a number of Australian music groups, including “Mental as Anything” (which has toured internationally and has had a number of records released in the U.S.) and “the Wiggles” (which has gone on to become one of the most popular groups in the world).

11. I have read the written testimony that Geoffrey Taylor and Richard Boulton submitted in this proceeding. I have also reviewed the transcript of the oral testimony they gave in this case on February 12-13, 2008. As I understand it, the substance of Mr. Taylor’s testimony is: (i) that there are “important similarities” between the U.S., U.K., and Japanese music industries, such that the mechanical royalty rates in the U.K. and Japan are suitable comparators for determining a U.S. rate, (ii) that no other country’s mechanical royalty rate, including any in Europe, is suitable as a comparator in setting the U.S. rate, and (iii) that “the United States has one of the highest mechanical royalty rates in the world for physical music formats, and its rate for online formats is higher than other countries with independently set or agreed rates.” Written Direct Testimony of Geoffrey Taylor at 17. Mr. Boulton describes the U.K. New Joint Online License (the “New JOL”) and invites a comparison between online U.K. mechanical rates and online rates in the U.S.

12. I disagree with the substance of this testimony, particularly Mr. Taylor’s, in a number of respects. There are a number of key differences between the mechanical royalty rate in the U.S. and those of other countries.

13. First, the mechanical royalty scheme in the United States is distinct from most of the rest of the world because of the prevalence of “controlled composition

clauses” in the U. S. I understand that the Court has already heard from a number of witnesses that controlled composition clauses are widespread in the United States and that they act to reduce mechanical royalties that are in fact paid to songwriters to a level far below the statutory 9.1¢ rate. It is also the case that U.S. record companies very often simply negotiate directly with copyright owners to get a lower mechanical rate. Thus, in the U.S., the statutory mechanical rate is the functional equivalent of a ceiling.¹

14. By contrast, in the U.K. controlled composition clauses, to the extent they exist at all, are expressly overridden by Article 3 of the AP.1 Agreement for the Manufacture and Distribution of Records for Retail Sale to the Public for Private Use (see Exhibit A). Article 3 is entitled “Overriding of Controlled Composition Clauses” and states:

The following provisions apply where any person, firm or company is or becomes a member of the Society or an Associated Society and that party itself or that party’s predecessor in title or grantor has a current contract with the Producer or the Producer’s predecessor in title or grantor. In such a case:-

3.1 to the extent that such contract would otherwise apply in relation to the grant of the license(s) referred to in this Agreement and/or the terms and conditions on which such license(s) is or are granted, the terms and conditions of this Agreement shall during the subsistence of this Agreement replace the terms and conditions of that contract;

3.2 upon the written request of the Producer the Society will provide the Producer with evidence that the relevant member has become a member and has given the Society or the relevant Associated Society authority to bind the member as regards this Agreement.

¹ I am aware that, in the U.S., controlled composition clauses do not apply to digital downloads for recordings that are incorporated in contracts entered into after 1995.

The subsequent AP2 and AP2A Agreements in the U.K. have the identical Article 3 (*see* Exhibits B & C). (Clause 16 of the New JOL contains similar language.)

15. Article 3 was reviewed and approved by the U.K. Copyright Tribunal in 1991. At pages 25-26 of its 1991 decision, the Tribunal stated that controlled composition clauses in the U.S. are “not uncommon,” may indeed “affect the effective rate” in the U.S., and that this “is one reason for not placing substantial reliance” on the U.S. rate in determining the U.K. rate. (I understand that the full text of this decision is already in evidence in this U.S. proceeding.)

16. Therefore, in the U.K., the royalty rates of 8.5% of PPD for physical product and 8.0% of retail for digital downloads serve as the effective rates, and not simply as a ceiling. Any comparison of U.K. and U.S. rates means the comparison of one rate that serves as an effective ceiling, with another that serves as the actual rate. In that circumstance, one would expect the U.S. rate to be higher if there was an effort to achieve parity.

17. Rates in continental European countries are similar in nature to the U.K. rate. That is, in each country, if the song is part of the repertoire of the local licensing society, the terms of agreements entered between the BIEM and IFPI local counterparts override any particular agreement that exists between an individual owner and user (*see* Article I(3) of Exhibit D). The royalty rate negotiated and agreed to between BIEM and IFPI is the product of collective bargaining, and is in fact the rate that is applied, subject to a limited number of local conditions relating to returns, promotional records, TV-advertised records, and other things.

18. Similarly, in Canada, the application of controlled composition clauses has been limited through a number of mechanisms. As detailed in the March 16, 2007 Decision of the Canadian Copyright Board, the Mechanical Licensing Agreement, as negotiated by CMRRA and CRIA, limits the application of these clauses. (see the Decision of the Canadian Copyright Board dated March 16, 2007, Exhibit E at pp. 8-9).

19. Second, in his statement Mr. Taylor compares the U.S. and U.K. rates as percentages of wholesale (in the U.S.) and as a percentage of Published Price to Dealer, or "PPD" (in the U.K.). At pages 17-18 of his statement, Mr. Taylor says that the U.S. rate of 9.1¢ for physical product amounted to 12.93% of wholesale in 2005, while the U.K. rate is 8.5% of PPD, and invites a comparison of the two. Mr. Taylor does not describe how he arrived at an average wholesale price for CDs in the United States, but the manner in which "wholesale" rates in the U.S. are determined is not the same as PPD in the U.K., from which the 8.5% royalty is calculated. It is my understanding that wholesale prices in the U.S. are net of discounts, while in the U.K, PPD is calculated for mechanical royalty purposes before discounting to the retailer.² Those discounts can be as high as 40%.

20. PPD in other European countries is calculated in a similar manner, save for a higher headline rate subject to a limited number of local conditions as described above. For example, the BIEM/IFPI agreement provides for a headline rate of

² Clause 1.15 of the AP1 Agreement defines PPD:

"Published Dealer Price" or "PPD" shall mean the highest price as published by the Producer (or where appropriate the Producer's distributor) payable by any dealer for the minimum quantity of copies of the relevant Format of the relevant Disc which any dealer can purchase from the Producer (or as appropriate the Producer's distributor) without the benefit of any applicable discounts, incentives, bonuses and other reductions or deductions.

11% of PPD subject to two deductions: a 10% packaging deduction and 9% deduction for invoiced discounts resulting in a net rate of 9.009%.

21. Third, and another key distinction, in the U.K. and in Europe, the societies representing copyright owners negotiate with and are paid directly by the music service providers for online exploitation. By contrast, in the U.S., copyright owners are paid royalties for permanent downloads through the record companies. In the former circumstance, it may be more suitable to have in place a royalty rate that is a percentage of the record company's PPD, together with a minimum royalty. (Also, in the former circumstance, music copyright owners have the critical benefit of transparency and audit rights from licensees who are actually making use of their rights—something they are often not able to do in the U.S.) In the latter circumstance, it is essential that the royalty rate not be based on a percentage of the record company's receipts as the interests of the record companies and the interests of the composers are not aligned. For example, record companies may agree to promotional arrangements such that one composer's works are given away at a discounted price in order to sell sound recordings containing the works of a different composer. A rate that is a percentage of record company receipts can also create great difficulties in defining the appropriate royalty base.³

³ It is also for these reasons and others that any percentage-based scheme also include an alternative minimum royalty. In the 2007 U.K. Tribunal Decision approving the new JOL, the Tribunal noted "In our view, the presence of minima in the New JOL provides a strong indication that in this field of licensing, the application of minima to each category of service is generally reasonable in the circumstances. . . . minima provide a practical way of compensating the Alliance for any underpricing of music by licensees." Copyright Tribunal Interim Decision In the Matter Between The British Phonographic Industry Ltd. et al and Mechanical Copyright Protection Society Ltd. et al., at p. 42 (July 19, 2007).

22. Fourth, Mr. Taylor argues that an international comparison is appropriate, but that the comparison should be limited to just the United Kingdom and Japan. Rates set in the U.K. present a poor comparison for the reasons described above. As for Japan, Mr. Taylor offers almost no explanation at all about the process by which online royalty rates are established there, except to say they are set by “voluntary agreement.” Mr. Taylor offers nothing about the music industry in Japan, other than the fact that it is big, to justify use of Japan as a comparator to the U.S., to the exclusion of the rest of the world. One very obvious distinction between Japan and the United States is that the U.S. is both a large exporter and importer of music. The U.S. is a large exporter of songs performed in English, and many U.S. consumers listen to imported music recorded in Spanish and other languages that reflect the multi-cultural tastes and diversity of the country. In Japan, approximately 85% of music purchased there is itself Japanese, and Japanese music is exported to other countries far less than U.S. music. Based on the above, I see no basis for including Japan as a comparator to the U.S., to the exclusion of every other country in the world except the U.K.

23. Fifth, to justify the exclusion of countries on the European continent from the analysis, Mr. Taylor implies (at page 15 of his statement) that rates in Europe are not appropriate comparators because they are “unilaterally promulgated by the collecting societies” in those countries, and, thus, too high. This is at odds with the reality and my own personal experience.

24. In Europe, the mechanical rate is the product of a collective bargaining process between BIEM and IFPI. As negotiated in 1997, the effective mechanical rate for physical product throughout Europe is 9.009% of PPD. The process

is such that if the parties cannot agree to a rate, there is some form of regulatory oversight, such as a tribunal, court or arbitration panel. For example, in 2003 the German affiliate of IFPI sought to cut Germany's 9.009% PPD rate to 5.6% of PPD, which publishers and songwriters refused to accept. The matter was submitted to arbitration, and the German Arbitration Court, and subsequently the Munich Court of Appeal, found there was no basis to reduce the rate from 9.009%. The Court also rejected IFPI's effort to eliminate a minimum.

25. Contrary to Mr. Taylor's view, a comparison of the European rate to the U.S. rate is informative. Though the European rate of 9.009% of PPD has not increased in 11 years, in most European countries it still translates into a higher royalty per work for full price physical product than the U.S. royalty of 9.1¢ (*see* Exhibit F-1).

26. Finally, Mr. Taylor's statement that "U.S. mechanical rates are among the highest in the world" is simply not correct. Written Direct Testimony of Geoffrey Taylor at 17. Mr. Taylor makes this assertion based upon a simple comparison of percentages. For example, for physical product Mr. Taylor claims that the current mechanical rate of 9.1¢ amounted to 14.15% of wholesale price in this county in 2006, and notes that 14.15% is higher than 8.5% of PPD in the United Kingdom and 9.009% of PPD in Europe.

27. As I stated before, the comparison is flawed because PPD in Europe, which is generally calculated before applying discounts, is not the equivalent of the U.S. wholesale price, and because controlled composition clauses and other factors in the U.S. mean that the rate in the U.S. functions as a ceiling. In addition, Mr. Taylor says nothing in his statement about actual wholesale prices or PPD for physical product in

these countries, or the average number of tracks on a CD in these countries, to enable someone to make an actual U.S. dollars-and-cents comparison of rates. Without this, a simple reference to percentages is useless.

28. Attached as Exhibits F-1 and F-2 are my own comparisons of mechanical royalty rates in the U.S. and certain other countries. The Canadian offline rate is of particular note. The Canadian offline rate is set pursuant to an agreement reached in November 2007, which increased the usage-based rate from 7.7 CAD cents to 8.1 CAD cents for the period 2007-09 and 8.3 CAD cents in 2010-12.

29. The data reflected in Exhibits F-1 and F-2 was assembled from responses to email inquiries to the local societies in these countries, internal data upon which MCPS-PRS routinely relies upon for its business, or from my own knowledge. Exhibit F-1 is for physical product; Exhibit F-2 is for permanent digital downloads. As reflected in the analysis, when mechanical royalty rates in the various countries are translated into local currency, then converted to U.S. currency under prevailing exchange rates, the current U.S. rate of 9.1¢ is far from being “one of the highest mechanical royalty rates in the world.”

Conclusion

30. As the above discussion illustrates, the U.K. and Japan, are far from optimal international comparators, and offer no distinct advantage, to the exclusion of other countries, in this Court’s analysis of international rates.

Declaration

I declare under penalty of perjury under the laws of United States of America that the foregoing is true and correct.

Dated: April 3, 2008

A handwritten signature in black ink, appearing to read 'J. Fabinyi', written over a horizontal line.

Jeremy Fabinyi

Errata to Written Rebuttal Testimony of Jeremy Fabinyi

1. The fifth sentence of paragraph 24 on page 10 reads: "The matter was submitted to arbitration, and the German Arbitration Court, and subsequently the Munich Court of Appeal, found there was no basis to reduce the rate from 9.009%."

The matter was not submitted to the Munich Court of Appeal. The sentence quoted above should instead read: "The matter was submitted to arbitration, and the German Arbitration Court found there was no basis to reduce the rate from 9.009%."

2. Exhibit F-1 includes the following information for the UK:

Average PPD – £7.79
Average # tracks – 12
Effective royalty per track – £0.055
Royalty per track in U.S. \$ – 0.109

Instead, F-1 should state, with regard to the UK:

Average PPD – £8.90
Average # tracks – 12.7
Effective royalty per track – £0.060
Royalty per track in U.S. \$ – 0.118

3. The third sentence of paragraph 21 on page 8 reads: "In the former circumstance, it may be more suitable to have in place a royalty rate that is a percentage of the record company's PPD, together with a minimum royalty."

The sentence quoted above should instead read: "In the former circumstance, it may be more suitable to have in place a royalty rate that is a percentage of the music service provider's gross revenue, together with a minimum royalty."

4. Exhibit F-2 includes the following information for the Netherlands:

Royalty rate – 10.000%
Royalty – €0.0832
Mechanical Royalty – €0.0624
Royalty Rate in U.S. \$ – 0.1297
Mechanical Royalty in U.S. \$ – 0.0973

Instead, F-2 should state, with regard to the Netherlands:

Royalty rate – 8.000%
Royalty – €0.0666
Mechanical Royalty – €0.0499
Royalty in U.S. \$ – 0.1038
Mechanical Royalty in U.S. \$ – 0.0778

mcps

AP-1 Agreement

AP1 Agreement

**FOR THE MANUFACTURE AND
DISTRIBUTION OF RECORDS FOR
RETAIL SALE TO THE PUBLIC FOR
PRIVATE USE**

This AP.1 agreement forms part of the Audio Product Licensing Scheme ordered by the Copyright Tribunal on the 12th March 1992. The full text of the scheme is available for inspection upon request to the MCPS Audio Product Scheme Manager.

This AGREEMENT is made on
BETWEEN:-

(1) MECHANICAL-COPYRIGHT PROTECTION SOCIETY LIMITED
whose registered office is at Elgar House, 41 Stratham High Road, London
SW16 1ER ("the Society") contracting for itself and on behalf of its
members and those Associated Societies (as defined below) it represents; and

(2) _____ of
("the Producer")

IT IS HEREBY AGREED as follows:-

1. DEFINITIONS

The following words and expressions shall have the following meanings, save where the context otherwise requires:-

11

"Associated Society" means a collecting society with which the Society has at the relevant time reciprocal arrangements under which the Society and that society authorise each other to grant licences in relation to each other's repertoire for the making of Discs reproducing such repertoire in the other's territory.

12

"Catalogue Number" shall have the meaning referred to in clause 24.12.

13

"Commencement Date" means _____

14

"Co-Exploitants" means:-

(a) any person, firm or company which carries out or arranges the manufacture of Discs the subject of this Agreement for the Producer; and

(b) any person, firm or company which acts as distributor of such Discs for the Producer.

15

"Disc" means a pre-recorded audio-only sound carrier and shall include all Formats whether now known or hereafter invented or exploited.

16

"EC" shall mean each country which is at the relevant time a full member state of the European Community.

17

"Equivalent Unit Quantity" for the purposes of clause 16 shall be calculated by multiplying the number of negative sales remaining of the discontinued Format by the PPD of that Format at the time it was discontinued, and then dividing by the PPD of the Format against which the deduction is to be made.

18

"Format" shall mean the following audio-only sound carriers:-

(i) 45 rpm 7 inch vinyl single

(ii) 45 rpm 7 inch vinyl EP

(iii) 45 rpm 10 inch or 12 inch vinyl single

(iv) 33 rpm 7 inch vinyl EP

(v) 33 rpm 10 inch vinyl LP

(vi) 33 rpm 12 inch vinyl LP

(vii) 3 inch or 5 inch CD single

(viii) 5 inch CD LP

(ix) Cassette single

(x) Long-playing cassette

and each other individual type of audio-only sound carrier hereafter manufactured and distributed.

19

"Joint Record Agreement Committee" shall mean the committee consisting of MCPS nominees and record industry nominees.

20

"Musical Work" shall mean any work consisting of music and any lyrics or words written to be used with music. The expression shall extend to any dramatico-musical work (subject however to the provisions of clause 2.2) and to any part of any Musical Work (subject to clause 9).

21

"Net Shipments" for the purposes of clause 17 shall mean the gross number of Shipments during the relevant Quarter of the relevant Disc by Catalogue Number and Format in relation to which royalties are payable under this Agreement, less the number of Returns thereof during that Quarter. In calculating the gross number of Shipments for this purpose, no account shall be taken of Discs which are Deletions (clause 18) or which are exports (clause 13).

22

"New Release" means a Disc containing a particular content and configuration of tracks, copies of which have not previously been put into circulation in the United Kingdom in that Format. A Disc shall not qualify as a New Release for the purposes of this Agreement

where there has been a minor change in the content thereof.

118 "Notification of Intended Release" shall mean the form referred to in clause 24.11 below.

119 "Premium Record" shall mean a Disc supplied for use, or with the express or implied authority to sell it for use, as an incentive to purchase or acquire other goods or services of whatsoever nature.

120 "Published Dealer Price" or "PPD" shall mean the highest price as published by the Producer (or where appropriate the Producer's distributor) payable by any dealer for the minimum quantity of copies of the relevant Format of the relevant Disc which any dealer can purchase from the Producer (or as appropriate the Producer's distributor) without the benefit of any applicable discounts, incentives, bonuses and other reductions or deductions.

121 "Quarter" shall mean each of the periods 1 January to 31 March, 1 April to 30 June, 1 July to 30 September and 1 October to 31 December.

122 "Reconciliation Statement" for the purposes of clause 17 shall mean a statement showing the following information for each Disc by Catalogue Number and Format:-

- (a) separately in relation to each Quarter:-
 - (i) whether the retention was claimed under clause 17.1 or 17.2;
 - (ii) the retention percentage applied in that Quarter;
 - (iii) the Net Shipments in that Quarter;
 - (iv) the total number of Shipments against which royalties have been retained in relation to that Quarter;
 - (v) the total number of Shipments for which royalties have been paid in relation to that Quarter;
- (b) where the retention was claimed under clause 17.1, the release date;
- (c) where the retention was claimed under clause 17.2, the date on which the television campaign began, and the regions within which the campaign took place;
- (d) a summary of (a)(iii), (iv) and (v) for the total of all the relevant Quarters.

123 "Recording Matrix" shall mean any master tape or other contrivance of whatsoever nature from which Discs may be pressed or duplicated or from which re-recordings can be made.

124 "Re-Release" means a Disc containing a particular content and configuration of tracks, copies of which have previously been put into circulation in the United Kingdom in one or more Formats, and where the following criteria have been fulfilled:-

- (a) any retention period as permitted by clause 17 when the Disc was a New Release has terminated and a proper Reconciliation Statement delivered to the Society and the balance of the royalties due (if any) paid; and
- (b) the previous release has been deleted from the Producer's catalogue; and
- (c) the Producer has either destroyed its remaining stock of Discs or disposed of them as referred to in clause 18 and accounted to the Society for the royalties payable thereunder; and
- (d) at least one Quarter has occurred between completion of the above and the re-issue in (g) below; and
- (e) the Producer, having complied with (a), (b) and (c) above, has decided to re-issue the same Disc with the same content and configuration of tracks; and
- (f) the Producer has given the Disc a new Catalogue Number; and
- (g) the Producer has re-issued the Disc.

125 "Return" shall mean a Disc on which royalties have been paid or are due to be paid under this Agreement and which has been physically returned to the relevant Warehouse and credited as a return in the relevant accounting documents provided that a Disc shall not qualify as a Return for the purposes of this Agreement where it is returned to the Warehouse as part of a transaction which involves any kind of payment to the Producer for such Disc other than a bona fide administration charge for handling the return.

126 "Shipment" means the shipment of a Disc from a Warehouse (other than to another Warehouse in the United Kingdom) and to "Ship" shall be construed accordingly.

127 "Statement of Shipments" shall have the meaning set out in clause 25.1.

123 "Television-Promoted Disc" shall mean a Disc which is the subject of a bona fide television campaign advertising that Disc and where that campaign has taken place in more than one television region.

124 "United Kingdom" shall mean the United Kingdom of Great Britain and Northern Ireland and the Channel Islands and the Isle of Man.

125 "Warehouse" shall mean any building or other store where Discs are stored by or for the Producer including any fixed or moveable store (including vans).

2. REPERTOIRE OF THE SOCIETY

2.1 The repertoire of the Society consists of:-

(a) those Musical Works in relation to which and to the extent that the Society has been or is hereafter appointed agent as regards the right to reproduce such Works in the form of Discs and the right to distribute such Discs.

(b) Musical Works in the repertoire of the Associated Societies.

2.2 The limitations in relation to the Society's and the Associated Societies' rights to grant licences both to make Discs and to distribute those Discs in the United Kingdom are set out in Annex A, and any licence referred to in this Agreement is subject to those limitations. The Society will notify the Producer of any change thereto which has been notified to the Society.

2.3 Where the Producer is exercising the option to account referred to in clause 27 below, the Society will send to the Producer a full list of its members within 7 working days of the end of each Quarter. Where the Producer is not so exercising that option, the Society shall send to the Producer a full list of its members upon written request therefor by the Producer provided that such requests shall not be made more than once in any Quarter.

3. OVERRIDING OF CONTROLLED COMPOSITION CLAUSES

The following provisions apply where any person, firm or company is or becomes a member of the Society or an Associated Society and that party itself or that party's predecessor in title or grantor has a current contract with the Producer or the Producer's predecessor in

title or grantor. In such a case:-

3.1 to the extent that such contract would otherwise apply in relation to the grant of the licence(s) referred to in this Agreement and/or the terms and conditions on which such licence(s) is or are granted, the terms and conditions of this Agreement shall during the subsistence of this Agreement replace the terms and conditions of that contract;

3.2 upon the written request of the Producer the Society will provide the Producer with evidence that the relevant member has become a member and has given the Society or the relevant Associated Society authority to bind the member as regards this Agreement.

4. GRANT OF LICENCE

4.1 Subject to the terms and conditions of this Agreement the Society hereby grants to the Producer the following non-exclusive licences to do the following acts in the United Kingdom:-

(a) make audio-only master recordings embodying one or more Musical Works within the Society's repertoire for the purpose referred to in sub-clause (b) below;

(b) make audio-only copies of such master recordings in the form of Discs with a view to their retail sale to the public for private use;

(c) put such Discs as have been made under sub-clause (b) hereof into circulation with a view to such sale.

4.2 In relation to each Disc separately, any licence referred to in clause 4.1 shall be conditional upon the Producer not being in such material breach of any one or more of the following provisions as would entitle the Society to terminate this Agreement under clause 33.1:-

(a) those relating to the payment of royalties;

(b) those relating to the purposes for which Discs may be made and/or supplied under this Agreement;

(c) those relating to the circumstances in which Discs may not be made and/or supplied under this Agreement.

5. SCOPE OF LICENCE

5.1

The licences referred to in clause 4 apply only to Discs which are made available to the public through normal channels of retail distribution. Without prejudice to the generality of the foregoing therefore, it does not apply to Premium Records, Discs sold through record clubs or other Discs sold by any direct marketing method to the public without the intermediary of a dealer.

5.2

This Agreement applies to all such Discs:-

- (a) made after the Commencement Date, notwithstanding the fact that other copies thereof were released prior to such date;
- (b) put into circulation after the Commencement Date, notwithstanding the fact that such Discs were made prior to such date.

5.3

The licences referred to in clauses 4.1(b) and (c) above apply to all Formats.

5.4

All rights other than those expressly granted in this Agreement are reserved, and, without prejudice to the generality of the foregoing, Discs made for purposes other than those referred to in clauses 4, 7.4 or 19 (by way of example only, Discs made and/or supplied for the purposes of broadcasting) are not covered by the licence referred to in clause 4.

5.5

Nothing in this Agreement shall entitle the Producer to exercise the licences referred to in clause 4 in relation to Discs where the appropriate consents and/or licences have not been obtained from the person(s) owning or controlling rights in relation to the sound recordings and/or performances contained on such Discs.

6. LABELS TO WHICH LICENCE APPLIES

6.1

The licences referred to in clause 4 apply to all Discs bearing the trademarks or tradenames, or issued on the labels referred to in the Producer's application to the Society for this Agreement.

6.2

The licences shall be extended to Discs bearing any new trademark or tradename or issued on a new label which the Producer may hereafter exploit, provided that the Producer has given the Society advance written notice that it intends to exploit such trademark, tradename or label. If another record producer having a

contract with the Society in the same terms as this Agreement has already given notice to the Society that it is using the same trademark, tradename or label, the Society shall notify the Producer.

6.3

The licences may also upon prior written notice to the Society be extended to Discs bearing any existing trademark or tradename or issued on any existing label not referred to in the Producer's application to the Society for this Agreement. However, the licences shall not be so extended where both:-

- (a) the Producer has acquired the right not only to exploit the trademark, tradename or label, but also to make and distribute recordings previously available under that trademark, tradename or label; and
- (b) any royalties payable to the Society or any of its members or to any Associated Society in relation to Discs previously issued bearing such trademark or tradename or on such label remain unpaid.

6.4

The Producer is responsible for ensuring that it has the right to issue Discs bearing trademarks, tradenames or on labels which it notifies to the Society under the above provisions. The Producer will indemnify the Society and its members against any valid claims made against the Society and which relate to the Society having granted consent under this Agreement to the making and putting into circulation of Discs bearing any such trademark, tradename or label.

6.5

Where both the Producer and another record producer are exploiting Discs bearing the same trademark or tradename or using the same label, this Agreement shall only apply to the Discs bearing that trademark, tradename or on that label which have been made or put into circulation by or for the Producer.

6.6

The Society will notify the Producer of any importation of Discs bearing a trademark or tradename or issued on a label notified by the Producer to the Society under the above provisions which to the Society's knowledge infringes any right of the Producer in any such trademark, tradename or label.

7. RENTAL

7.1

It is hereby confirmed that, subject to clause 7.4, the licences referred to in clause 4 do not extend to the making or putting into circulation

of such Discs by or on behalf of the Producer with a view to or with express or implied authorisation for either the rental thereof or the lending thereof by any library authority.

7.2 The Producer shall only carry out or authorise any such act after it has reached agreement with the Society as to the terms and conditions on which the same should take place, including the payment of a proportion of any royalties or fees (if any) payable to the Producer in relation to such rental or lending.

7.3 Where either the Producer or the Society becomes aware of a third party's intention to rent or lend Discs made by or for the Producer without the Producer's consent, such party will give notice of this to the other party.

7.4 The licences referred to in clause 4 do extend to the supply of Discs direct to a library authority (as defined by the Public Libraries and Museums Act 1964) for the purposes of such library authority renting or lending such Discs where the Producer does not directly or indirectly charge or receive a royalty or other fee in relation to such renting or lending.

8. FIRST RECORDINGS

8.1 Where in relation to any particular Musical Work no Disc embodying that Work has previously been manufactured in or imported into the EC with the consent of the party entitled to grant consent for such reproduction or importation, the licences referred to in clause 4 shall not apply in relation to that Work until all the relevant members of the Society owning or controlling the rights in that Work have consented to the grant of the licence in accordance with this Agreement.

8.2 Such consent shall be deemed to be applied for from the Society when following the procedure set out in clause 24. Alternatively, such consent may be applied for either from the Society or direct from the relevant member(s) by using the consent form appearing at Annex B. Copies of such forms may be obtained from the Society. Where the Producer obtains consent direct from the member(s), the Producer shall when submitting the Notification of Intended Release (or label copy) to the Society as referred to in clause 24.11 send with it a copy of the completed and signed consent form.

8.3 In the event that the Producer bona fide wishes to know whether or not a particular Musical Work is subject to the restriction referred to in clause 8.1, the Producer may enquire of the Society also by using the standard form set out

in Annex B. Such enquiry shall be sent to the Society by registered post and the Society shall respond to such enquiry within 7 working days of the receipt thereof. In the event that the Society fails to respond within such time, and subsequently the Producer has to make extensive and expensive enquiries which the Producer should not have needed to make had the Society responded, then the Society shall reimburse the Producer its costs in relation to such enquiries.

9. ARRANGEMENTS AND MORAL RIGHTS

9.1 For the purpose of exercising the licence referred to in clause 4 and subject to clause 9.5, the Producer may make such modifications to the relevant Musical Work(s) as the Producer considers necessary in order to satisfy the requirements of the relevant recording.

9.2 No such modification shall however be made which:-

(a) would amount to an adaptation of the Work; or

(b) would amount to a derogatory treatment of the Work within the meaning of Chapter IV of the Copyright, Designs and Patents Act 1988

unless the relevant member of the Society or Associated Society has consented in writing thereto.

9.3 The licences referred to in clause 4 may only be exercised in relation to any modification which is authorised under clause 9.1, or to which the relevant member of the Society has consented in writing under clause 9.2.

9.4 Neither the Producer nor any party claiming through the Producer nor any party who carried out such modification may claim an interest in the copyright in the Musical Work, whether in its original or modified form, or any share of any income of whatsoever nature derived from the exploitation thereof, unless the relevant member of the Society has agreed otherwise, and any authority or consent contained in this clause or granted by the relevant member of the Society shall unless otherwise agreed be conditional upon no such claim being made.

9.5 Nothing in this Agreement affects the moral rights of the authors of Musical Works.

10. DURATION OF ROYALTIES PAYABLE

10.1 Royalties shall be payable under this Agreement in relation to every Musical Work from time to time in the repertoire of the Society which is the subject of copyright protection in the United Kingdom.

10.2 Each Musical Work in the repertoire of the Society and reproduced on a Disc shall also be taken into account in calculating the royalty payable to the Society hereunder, so long as that Work is the subject of copyright protection in the territory to which the Disc is Shipped.

11. ROYALTIES PAYABLE

11.1 Save as otherwise provided herein, the Producer shall pay to the Society or (where the Society so directs) to the Society's member in relation to each Disc which reproduces one or more Musical Work(s) in the Society's repertoire a royalty of 8.5% of the Published Dealer Price applicable to the relevant Disc on the day of the Shipment of the Disc from the Warehouse.

11.2 Where the Producer has not published a Published Dealer Price in relation to the relevant Disc, but the Producer has published a fixed or suggested retail price in relation thereto, the royalty shall be calculated at a rate of 6.5% of the fixed or suggested retail price applicable to the relevant Disc on the day of Shipment of the Disc from the Warehouse.

11.3 If the Producer is unable to show at the time the royalty is due that there was in force on the Shipment date a Published Dealer Price or fixed or suggested retail price (as the case may be) applicable to such Disc, the royalty shall be fixed by the Society on the basis of the price most generally used by other record producers in the United Kingdom for a comparable type of Disc.

11.4 This clause applies to sales to record clubs. No royalty shall accrue in relation to a Disc which is supplied by the Producer to a record club if the royalty will be paid by the record club pursuant to an agreement between the Society or any Associated Society and that record club provided that where the record club is not paying the royalties due thereunder the relevant Society is entitled on written notice to require that the Producer cease to supply such Discs until such royalties have been paid.

11.5 Where Discs are supplied by the Producer direct to HM Forces such sales shall be deemed to have been made in the United Kingdom.

12. TAXES

12.1 Before calculating the royalties payable on any Disc, Value Added Tax (or, where clause 13.2 applies, any similar tax included in the royalty base price) shall be excluded.

12.2 No other tax which forms part of the relevant price shall be deducted therefrom prior to calculation of the royalty.

12.3 The Producer shall pay VAT at the rate or rates from time to time in force on any royalties payable under this Agreement.

13. EXPORTS

13.1 The Producer may elect to export Discs to a licensee, affiliate or importer in a territory outside the United Kingdom without paying royalties thereon under this Agreement provided that:-

- (a) such licensee, affiliate or importer has an agreement with the Associated Society responsible for the collection of mechanical royalties in the territory to which such Discs are being exported under which such party is liable to pay mechanical royalties on such Discs; and
- (b) the Society has not notified the Producer that such party has failed to comply with that agreement in a material respect; and
- (c) at the same time as submitting the Statement of Shipments referred to in clause 25, the Producer delivers a separate statement identifying the gross number of Discs by Catalogue Number and Format which have been exported royalty-free under this provision, and the name and address of the licensee, affiliate or importer to whom such Discs have been supplied.

13.2 Where the Producer has not elected to export any Discs royalty-free under clause 13.1, the Producer shall pay royalties on Discs exported to a territory outside the United Kingdom in accordance with the provisions of this Agreement provided that:-

- (a) in relation to Discs exported to a territory within the EC, the royalty rate provided for in clause 11 shall be

applied to the PPD or fixed or suggested retail price (as the case may be) of the Discs in the territory to which the Discs are exported;

(b) in relation to Discs exported to a territory outside the EC, the royalty shall be calculated in accordance with the appropriate standard mechanical rights agreement or (in default thereof) in accordance with the law in the territory to which the Discs are exported.

13.3

Save where the Producer makes the election under clause 13.1 in relation to all copies of the relevant Disc per territory per Catalogue Number in the particular Quarter, exports not exceeding 500 Discs per territory per Catalogue Number per Quarter shall be deemed not to be exports and royalties thereon shall be calculated and paid fully in accordance with this Agreement.

13.4

Any export of Discs shall be subject to the exercise of any rights subsisting and lawfully exercisable in any territory to which such Discs are exported to prevent or control the importation of Discs into and distribution of Discs within such territory.

14. PRO-RATING PROVISIONS

14.1

This clause applies:-

(a) where a Disc reproduces Musical Works in the repertoire of the Society together with Musical Works which are not within the repertoire of the Society; and

(b) for the purposes of the Producer accounting, where the Producer has elected to account in accordance with clause 27.

14.2

In such circumstances:-

(a) where the notification sent by the Society under clause 24.5 specifies the duration of the Musical Works, the Society's share of the royalty shall be in the proportion which the duration of each of the Works in its repertoire bears to the total duration of all the Musical Works on the Disc in question;

(b) in all other cases, the Society's share of the royalty shall be in the

proportion which the number of tracks containing Musical Works in its repertoire bears to the total number of tracks on the Disc in question.

15. ACCRUAL OF ROYALTIES

15.1

The royalty referred to in clause 11 accrues on the day of Shipment of the Disc from the Warehouse.

15.2

The provisions of this clause are subject to those relating to royalty-free exports contained in clause 13.

16. RETURNS

16.1

When calculating the royalties due at the end of a Quarter in relation to a particular Disc by Format and Catalogue Number, the number of Returns during that Quarter of the same Disc by Format and Catalogue Number may be deducted from the gross Shipments thereof (including for the avoidance of doubt any exports which are deemed to be U.K. sales under clause 13.3 but not any other exports)

16.2

The Producer may carry forward any negative number of Shipments in relation to a particular Format and Catalogue Number in one Quarter against any Shipments of the same Format and Catalogue Number in any subsequent Quarter

16.3

Where the Producer discontinues one Format of a particular Disc by Catalogue Number, and there remains a negative number of Shipments of that Format, then the Producer may deduct from any future Shipments of any Format of that Disc then remaining available the Equivalent Unit Quantity in relation to the negative number remaining, provided that the Musical Works and the duration thereof on each of the relevant Formats are identical, and there are no additional tracks or reduced number of tracks.

16.4

The Producer shall not be entitled to any form of refund for royalties already paid except as specifically set out in this Agreement.

17. RETENTIONS AGAINST RETURNS

17.1

The following retention provisions apply in relation to Discs which are New Releases or Re-Releases and shall be applied separately in relation to each Format thereof:-

- (a) in relation to the Quarter in which copies of the New Release or Re-Release (as the case may be) were first put into circulation with a view to the retail sale thereof to the public for private use, the royalties payable on 10% of the Net Shipments during that Quarter may be retained against any possible Returns;
- (b) in relation separately to each of the following three Quarters, the royalties payable on 10% of the Net Shipments during the relevant Quarter may be retained against any possible Returns;
- (c) reconciliation must be effected in the 5th Quarter and a Reconciliation Statement delivered to the Society together with the Statement of Shipments relating to the 5th Quarter;
- (d) The balance of royalties due to the Society (if any) shall be accounted for in the same manner and paid at the same time as the other royalties due in respect of the 5th Quarter.

17.2

The following retention provisions apply in relation to Discs which are Television Promoted Discs, whether or not they are New Releases or Re-Releases, but in substitution for those set out in clause 17.1 if they are New Releases or Re-Releases, and shall be applied separately in relation to each Format thereof:-

- (a) in relation to the Quarter either in which copies of the Television Promoted Disc were first put into circulation with a view to the retail sale thereof to the public for private use or the Disc first qualified as a Television Promoted Disc (whichever is the later), the royalties payable on 25% of the Net Shipments during that Quarter may be retained against any possible Returns;
- (b) in relation to the following Quarter, the royalties payable on 25% of the Net Shipments during that Quarter may be retained against any possible Returns;
- (c) in relation to each of the following two Quarters, the royalties payable on 10% of the Net Shipments during the relevant Quarter may be retained against any possible Returns;
- (d) reconciliation must be effected in the 5th Quarter and a Reconciliation

Statement delivered to the Society together with the Statement of Shipments relating to the 5th Quarter;

- (e) the balance of royalties due to the Society (if any) shall be accounted for in the same manner and paid at the same time as the other royalties due in respect of the 5th Quarter.

17.3

No retention may be claimed until the Producer has demonstrated to the Society's reasonable satisfaction that it is able to operate the relevant provisions in a timely and accurate manner. Where there is a dispute between the Society and the Producer as to whether this is so, the Producer may elect to have the matter decided by the Joint Record Agreement Committee.

17.4

No royalties may be retained by the Producer except as expressly set out in this Agreement.

18. DELETIONS

18.1

Where at least 6 months after the date of first release, the Producer deletes a long-playing Disc (whether vinyl, cassette or compact disc) reproducing non-classical music from its catalogue, and thereafter sells or authorises the sale of its remaining stock of such Discs to one or more independent buyers on an arm's length basis, the royalty provisions set out in this clause shall apply in substitution for those referred to above.

18.2

The provisions of clause 18.1 shall apply to singles reproducing non-classical music, but substituting 3 months for 6 months.

18.3

The provisions of clause 18.1 above shall apply to Discs reproducing classical music, but substituting 2 years for 6 months.

18.4

The royalties payable in relation to such Discs shall be 10% of the gross price charged to the buyer(s) thereof with no deduction other than any appropriate duties or taxes provided for in clause 12.

18.5

The total number of Shipments of a particular Format in relation to which the Producer may apply this provision in each calendar year shall not exceed the following percentage of the total number of Shipments of the Producer containing one or more Musical Works in the repertoire of the Society during the preceding calendar year:-

- (a) singles: 10%;
- (b) each other Format: 5%.

19.6

None of the provisions of this Agreement relating to Returns (nor for the avoidance of doubt those relating to any retention against Returns) shall apply in relation to such sales provided that where there remains a negative figure of units Shipped as a result of the application of clause 16, the Producer shall not pay any royalties on the Equivalent Unit Quantity of units sold as deletions.

19.7

The Producer shall not manufacture Discs solely for the purpose of benefiting from these provisions.

19. PROMOTIONAL COPIES

19.1

Discs which are bona fide supplied free of charge only for the purposes of the genuine promotion of sales of other copies of the Discs in question shall be exempt from the royalties otherwise payable under this Agreement on condition that the criteria set out in clauses 19.2 to 19.6 are fulfilled.

19.2

A Disc shall only be regarded as having been supplied for such purposes as are referred to in clause 19.1 where it is supplied to a broadcaster or disc jockey or critic or other party for the purposes of that party broadcasting it or playing it in public or reviewing it, or some other bona fide promotional situation. For the avoidance of doubt a Disc shall not therefore be regarded as having been supplied for such purposes where it is:-

- (a) distributed commercially; or
- (b) not supplied free of charge; or
- (c) supplied free of charge but in consideration of or as a result of the party to whom it is supplied taking other Discs or other copies of the same Disc or giving other valuable consideration.

19.3

Each such Disc and the packaging thereof must at the time of manufacture be prominently marked with a non-removable or non-erasable notice carrying the words "PROMOTIONAL COPY - NOT FOR SALE".

19.4

The Statement of Shipments shall identify the number of Discs by Catalogue Number and Format which the Producer has supplied under the above provisions.

19.5

The Producer shall maintain information in reasonable detail for a period of not less than 2 years as to the general nature and categories of the recipients of Discs supplied under the above provision.

19.6

The Producer shall at all reasonable times and upon reasonable notice allow access to its premises by representatives of the Society for the purposes of the Society checking the then current details of the numbers of Discs manufactured referred to in the above provisions and the persons, firms and companies to whom they are being supplied and the numbers supplied to each such person, firm or company and the Producer shall also maintain such information in such detail as will enable the representatives of the Society reasonably to verify during such access that the numbers of Discs being supplied under the above provisions broadly corresponds with claims for royalty-free supply under Statements of Shipments.

20. NOTICES AND CREDITS

20.1

Each Disc reproducing a Musical Work in the repertoire of the Society shall bear the initials "MCPS".

20.2

A notice to the following effect shall appear on the label on each side of the Disc:-

"ALL RIGHTS OF THE PRODUCER AND OF THE OWNER OF THE WORKS REPRODUCED RESERVED. UNAUTHORISED COPYING, HIRING, LENDING, PUBLIC PERFORMANCE AND BROADCASTING OF THIS RECORD PROHIBITED."

20.3

On the label of each Disc there shall be reproduced:-

- (a) the title of each Musical Work reproduced thereon;
- (b) the name of each composer;
- (c) the name of each author;
- (d) the name of the arranger of the words and/or music where applicable.

20.4

Where it is technically impossible for the Producer to comply with clause 20.3, such information may be reproduced as follows:-

- (a) on the sleeve of the Disc; or
- (b) on the cardboard insert; or
- (c) on the surface of the Disc itself.

20.5

The Producer shall use its reasonable endeavours to include on the label (or as set out

in clause 20.4) the name of the United Kingdom publisher of each Musical Work in the repertoire of the Society.

21. SUPPLY OF INFORMATION

21.1 The Producer shall on entering into this Agreement, and during its continuance, supply to the Society the following documents without charge as soon as possible following the publication or issue thereof:-

- (a) two copies of all catalogues, supplements to catalogues and lists or notifications of New Releases and Re-Releases;
- (b) two copies of each list of Published Dealer Prices or fixed or suggested retail prices and each amendment or addition thereto.

21.2 At the request of the Society the Producer shall also furnish it free of charge with:-

- (a) one copy (which shall be exempt from royalty payment) of any Disc;
- (b) one copy of the label, sleeve or insert relating to any Disc.

21.3 The Producer must notify the Society immediately of any Disc which it deletes from its catalogue.

21.4 The Producer must also supply the Society with any further information or documentation in its possession, power, custody or control (and use its best endeavours to supply the Society with any further information or documentation not in its possession, power, custody or control) reasonably requested by the Society at any time, in order to enable the Society to verify the Musical Work(s) which are or will be reproduced on any Disc made and/or distributed by or for the Producer or its Co-Exploitants or to verify that the Producer is abiding by the terms and conditions of this Agreement.

22. PRODUCER ACTING FOR THIRD PARTIES

22.1 If the Producer undertakes or arranges pressing of Discs for any other party (whether this is a third party or a licensee or affiliate), the Producer must inform the Society in writing of the identity of that party.

22.2 On compliance with clause 22.1, the Society confirms that it will not seek to recover royalties from or pursue any other remedy against the Producer in relation to such Discs, subject to the provisions of clause 22.4.

22.3 The Producer hereby agrees that it will not undertake or arrange pressing of Discs reproducing one or more Musical Works in the repertoire of the Society for any third party which either:-

- (a) does not have a current agreement with the Society (either in this form or in the form of an AP.2 or AP.2A agreement) unless the Society has expressly authorised the Producer to carry out or arrange the same, such authorisation not to be unreasonably withheld or delayed; or
- (b) is in material breach of such an agreement, if the Society has notified the Producer of that breach and required the Producer to cease undertaking or arranging such pressing until such breach is rectified.

22.4 The Producer agrees that it will bear joint responsibility with the third party for any pressing carried out in contravention of clause 22.3.

22.5 In all cases, the Producer shall use its best endeavours to ensure that the Society has every facility for checking pressing undertaken or arranged for third parties. Where the relevant Discs reproduce one or more Musical Works in the repertoire of the Society, the Producer shall send to the Society copies of the relevant delivery or despatch notes or equivalent documentation indicating by Catalogue Number the quantities despatched and the name and address of the person, firm or company to whom they were despatched.

23. CO-EXPLOITANTS

23.1 The Producer shall use its best endeavours to procure that its Co-Exploitants:-

- (a) at no time act or fail to act in such a way as would cause the Producer to be in breach of this Agreement;
- (b) co-operate fully with the Society and its representatives in the application of this Agreement.

23.2 In exercising the licences to make Discs in accordance with clause 4, the Producer may

only use a Co-Exploitant so to make such Discs if:-

- (a) such Co-Exploitant appears on the Society's approved list (a copy of which will be supplied on signature of this Agreement to the Producer by the Society, with any changes thereto promptly being notified to the Producer); or
- (b) the Society consents, such consent not to be unreasonably withheld or delayed.

24. NOTIFICATIONS OF INTENDED RELEASE

24.1

The procedure set out below need not be complied with by the Producer as regards Discs in the Producer's catalogue prior to the Commencement Date provided that:-

- (a) the Producer has complied with its copyright obligations in relation thereto as regards the period prior to the Commencement Date; and
- (b) the Producer has given sufficient information to the Society to enable the Society to verify that it has the relevant details of such Discs on its database or to incorporate such details on its database.

In such cases, the Society will send the Producer the information referred to in clause 24.5 in relation to such Discs as soon as practicable after the Producer has supplied the Society with such information.

24.2

In relation to each Disc by Catalogue Number and Format thereof, the Producer shall deliver to the Society a Notification of Intended Release fully and accurately completed, save in relation to any information which it is not possible to obtain. This applies whether or not the relevant master recording was made by or for the Producer or assigned or licensed to the Producer. For the avoidance of doubt:-

- (a) when a Disc has been deleted from the Producer's catalogue, but is later to be re-issued, a new Notification of Intended Release must be submitted; and
- (b) a Notification of Intended Release must be submitted whether or not the Producer believes that the Disc contains any Musical Work in the repertoire of the Society.

24.3

Save in exceptional circumstances not caused or occasioned by the Producer's neglect or default, the Notification of Intended Release must be delivered to the Society at least 7 working days prior to first release of copies of the Disc.

24.4

A new Notification of Intended Release must be delivered to the Society in the event of any material change to the information referred to in clause 24.11. The Producer must also notify the Society if it subsequently decides not to release the relevant Disc.

24.5

Upon receipt of such Notification, the Society shall process the same and send notification to the Producer of the following information not later than the 7th working day following receipt of the accurate and properly completed Notification of Intended Release:-

- (a) where the Society is making a claim on behalf of a member, the identity of that member;
- (b) the share which that member claims in the relevant Musical Work;
- (c) whether the royalties in relation thereto will be payable to the Society or direct to that member;
- (d) the royalty percentage per track;
- (e) any status referred to in clause 24.9;
- (f) the Society's code number for the relevant Disc;
- (g) the Society's code number for each relevant Musical Work;
- (h) in relation to each Musical Work referred to in the Notification, for which the Society is making a claim, whether or not consent is being refused by reason of such a limitation or restriction as is referred to in clause 2.2 or 8, and the identity of the member refusing that consent.

24.6

Subject to clauses 24.7 and 24.8 below, the licences referred to in clause 4 shall apply in respect of every Musical Work reproduced on the Disc which is in fact in the repertoire of the Society, and that licence shall take effect even if the Society notifies the Producer that the Musical Work has one of the statuses described in clause 24.9 below.

24.7

In relation to the rights reserved as referred to in clause 2.2, the licence shall not apply until all the relevant members of the Society or Associated Society owning or controlling the rights in the relevant Musical Work(s) have

consented to the grant of the licence in accordance with this Agreement.

24.8

Where there are joint owners of a Musical Work, and the Society does not represent all the parties owning or controlling the rights in such Musical Work, the licences referred to in clause 4 are not licences for the joint owner(s) whom the Society does not represent.

24.9

The statuses referred to in clause 24.3 are:-

- (a) NS (non member);
- (b) SAI (copyright status not known at present);
- (c) PAI (copyright owner not known at present);
- (d) Public Domain Work.

24.10

Where the Society has notified the Producer that a Musical Work is in whole or in part in its repertoire, and subsequently such Work or a share in such Work or an interest therein ceases to be in its repertoire (either because the relevant member has ceased to be a member or because the copyright in such Work or an interest therein has been transferred or reverted to a non-member), then the Society shall promptly notify the Producer unless the Disc on which the Work was reproduced has been deleted from the Producer's catalogue.

24.11

The Notification of Intended Release shall be in the form appearing in Annex C to this Agreement or such other form as may have been agreed between the Society and the Producer PROVIDED THAT:-

- (a) the minimum information which the Producer is obliged to furnish is:-
 - (i) the Producer's name and address;
 - (ii) the label of the Producer on which the Disc will appear;
 - (iii) the title of the Disc;
 - (iv) the name of the main artist, broken down into tracks where the main artist is different on different tracks, (by way of example, compilations);
 - (v) the Format of the Disc;
 - (vi) the Catalogue Number;
 - (vii) the number of Discs, i.e. if double

pack, boxed set etc.;

- (viii) the scheduled release date, where available;
 - (ix) the number of tracks;
 - (x) the titles of the Musical Works;
 - (xi) the writer/composer/arranger of each Musical Work;
 - (xii) the side and track sequence number, where available;
 - (xiii) the duration of each Work, where available;
 - (xiv) whether the track in whole or in part consists of a medley unless the Producer has supplied the side and track sequence numbers in relation to that Disc.
- (b) the Society will accept the Producer's label copy instead of a Notification of Intended Release provided that it contains the required information.

24.12

The Producer shall procure that each Disc is given a unique Catalogue Number applicable only to Discs with the same content and configuration of tracks. Each Format thereof must bear either a different Catalogue Number or a different prefix or suffix within that Catalogue Number.

24.13

Without prejudice to the rights of either party hereto in respect of any breaches of this Agreement, where the Society expressly notifies the Producer pursuant to a specific obligation hereunder that a particular musical work is in its repertoire and such notification is incorrect in this respect, the Society shall indemnify the Producer against any liability for damages or costs which the Producer may reasonably incur in reasonable reliance upon such information having been correct. For the avoidance of doubt, the Producer shall not be entitled to continue to rely on such notification where it has notice from any party that such notification was or may have been incorrect. This indemnity shall not apply where the incorrectness of such notification was consequential upon the Producer having supplied incorrect, incomplete or misleading information. For the avoidance of doubt the foregoing indemnity does not extend to any claim by any party that a copyright musical work properly licensed under this Scheme infringes some other copyright musical work.

25. STATEMENTS OF SHIPMENTS

25.1

At the end of each Quarter the Producer shall prepare a Statement of Shipments showing by Catalogue Number and Format the gross Shipments thereof and each deduction specifically provided for in this Agreement. The detailed information and format of such statement shall be in accordance with the Society's specification in relation thereto and notified by the Society to the Producer. The Society will give reasonable consideration to any reasonable proposal by the Producer for a variation in relation to the format thereof, provided that such variation will still enable the Society without additional expense to process the information in accordance with its normal procedure and comply with clause 26.

25.2

The statement shall be delivered to the Society no later than by close of business on the 21st day of the month following the end of the relevant Quarter (by way of example, the statement in relation to the first Quarter in each year shall be delivered on or before April 21st of that year).

25.3

The Producer shall deliver the statement in the form of industry standard computer readable magnetic media.

26. ACCOUNTING PERIOD AND PAYMENTS: CALCULATION BY SOCIETY

26.1

On receipt of the Statement of Shipments the Society will process the information included therein, and will prepare royalty statements in relation thereto.

26.2

The Society will deliver to the Producer such royalty statements and invoices in relation to the royalties payable thereunder no later than close of business on the 17th day following receipt of the Statement of Shipments from the Producer.

26.3

The Society will procure that each invoice indicates the payee (that is, the Society itself, or its relevant member) and the details of the account to which the monies should be transferred. Save in the case of and to the extent of any manifest error, the Producer must pay the invoices (including the VAT element thereof):-

- (a) in the case of payments to the Society, by irrevocable bank transfer by close of business on the 45th day following the end of the Quarter;

- (b) in the case of payments to members of the Society, by bank transfer or cheque by close of business on the 45th day following the end of the Quarter.

27. ACCOUNTING PERIOD AND PAYMENTS: CALCULATION BY PRODUCER

27.1

The Producer shall operate the procedure set out in clause 27.2 where it has notified the Society in writing that it wishes to do so at the date of signature of this Agreement. If the Producer does not do so, but later wishes to operate such procedure, then the Producer must notify the Society in writing not later than the first day of the Quarter preceding the Quarter in relation to which the Producer intends to start operating such procedure (by way of example, if the Producer wishes to operate the procedure with effect from the first Quarter in any year, the Producer must give notice to the Society not later than 1st October in the previous year). The same period of notice must also be given where the Producer has at any time given such notice and wishes to cease operating such procedure.

27.2

The procedure referred to in clause 27.1 is as follows in relation to each relevant Quarter:-

- (a) the Producer shall still comply with clause 25 of this Agreement;

- (b) clause 26 shall not apply;

- (c) the Producer shall prepare a royalty statement showing the royalties due in relation to the Society's repertoire using exactly the same information as was contained in the statement referred to in clause 25 and delivered to the Society. Such royalty statement shall be in such standard form as shall enable the Society to process the royalties due to its members without delay and to reconcile the Society's information and calculations with those of the Producer. The royalty statement shall further be provided to the Society on industry standard computer readable magnetic media in a format and layout to be agreed by the Society and shall include the information specified in Annex D hereto.

- (d) Not later than 35 days after the end of the relevant Quarter, the Producer shall deliver in relation to the relevant royalties due for that Quarter:-

- (i) the royalty statement to the Society;
 - (ii) to any member which is collecting its royalties direct as notified by the Society to the Producer, a self-billing invoice for the royalties due to that member;
 - (iii) to the Society, a self-billing invoice for the remainder of the royalties.
- (e) The Producer must pay the invoices (including the VAT element thereof):-
- (i) in the case of payments to the Society, by irrevocable bank transfer by close of business on the 45th day following the end of the Quarter;
 - (ii) in the case of payments to members of the Society, by bank transfer or cheque by close of business on the 45th day following the end of the Quarter.

27.1

Where the Producer is carrying out the accounting as referred to in this clause, and there are inaccuracies in any such accounting, the Producer shall indemnify the Society and its relevant members and the author(s) of the relevant Musical Works for any costs, losses or damages of whatsoever nature (including legal costs on an indemnity basis) suffered by the Society or the member or author and which are caused by or occasioned by such error.

27.1

Where the Producer has elected to account in accordance with the above provisions, but delivers royalty statements and/or invoices materially late or which are materially inaccurate for 2 consecutive Quarters or 2 out of 4 consecutive Quarters, the Society shall be entitled by notice in writing to require that the Society carry out the accounting in accordance with clause 26. In such circumstances, the Producer shall not be entitled to elect to account again until the Producer has demonstrated to the reasonable satisfaction of the Society (subject to review by the Joint Record Agreement Committee provided that the Producer has so elected a review in writing within 21 days of notification of the Society's decision to require that the Society continue to carry out the accounting) that the Producer will comply with the provisions hereof.

28. COPYRIGHT CONTROL ACCOUNT

28.1

The Producer shall maintain an interest-bearing Copyright Control Account, and shall pay into such Account in relation to any Musical Work

or interest therein which has been designated by the Society as PAI or SAI a sum equal to the royalties which would have been payable under this Agreement had such Musical Work been designated as a Work within the repertoire of the Society. The Producer shall continue to pay royalties in relation to that Work or interest therein into that account until it has discovered the person, firm or company entitled to the relevant royalties, or until the Society notifies the Producer that the Musical Work or interest is within the repertoire of the Society.

28.2

Where a third party (not being a member of the Society or an Associated Society) claims the right to grant the licences referred to in clause 4 in relation to a Musical Work or interest therein which remains designated by the Society as SAI or PAI:-

(a) the Producer shall notify the Society in writing within 7 days of such claim;

(b) at the same time as giving such notice, the Producer may require the Society to investigate the position, and notify the Producer within 3 months of receipt of such notification whether the Society claims that the relevant rights are controlled by a member of the Society or a non-member. In default of the Society so notifying the Producer, the relevant Musical Work or interest therein shall be deemed to be of non-member status, and the Society shall then have no right to claim any royalties which are subsequently paid to the third party by the Producer, unless such royalties were paid to the third party after the Society has made a new claim in relation to the relevant Musical Work or interest therein.

28.3

Nothing in this Agreement shall prevent the Producer at its own risk in good faith paying royalties arising in relation to a Musical Work or interest therein which remains designated by the Society as SAI or PAI to a bona fide third party which is not a member of the Society or an Associated Society claiming the same provided that the Producer shall where possible give 7 days prior notice of its intention so to do to the Society.

28.4

No later than 45 days after the end of each Quarter the Producer shall deliver to the Society a statement showing:-

(a) the Musical Works in relation to which the Producer paid royalties into the account referred to in clause 28.1;

- (b) the amount of royalties paid into such account in relation to each such Work;
- (c) the title and Catalogue Number of the Disc in relation to which such royalties arose.

29. DISPUTES

29.1

Where the Society at any time notifies the Producer that a Musical Work or interest therein is in the repertoire of the Society, and subsequently either the Producer or the Society receives notice that a third party claims the relevant rights therein, and/or the royalties arising in relation thereto, the party receiving such notice shall notify the other party in writing within 7 days of receipt thereof.

29.2

In any circumstances where both the Society and a third party not being a member of the Society or an Associated Society make a claim against the Producer in relation to the same Musical Work or the same interest in a Musical Work, the Producer shall pay the royalties relating to that Work or interest therein (calculated in accordance with this Agreement) into an interest-bearing account in the joint names of the Society and the Producer. Any royalties held in such account shall be held in trust for the party entitled thereto and such royalties shall remain in that account until the dispute in relation thereto is resolved.

29.3

No later than 45 days after the end of each Quarter, the Producer shall deliver to the Society a schedule showing:-

- (a) the Musical Works in relation to which the Producer paid royalties into the account referred to in clause 29.2;
- (b) the amount of royalties paid into such account in relation to each such Work;
- (c) the title and Catalogue Number of the Disc in relation to which such royalties arose.

29.4

For the avoidance of doubt, where the ownership or control of a Musical Work or interest therein is in dispute between two or more members of the Society, the royalties in relation thereto shall be paid to the Society.

30. CHANGES IN INFORMATION AND ADJUSTMENTS

30.1

The Society will notify the Producer of any changes in the information referred to in clause

24.5 or any notice pursuant to Clause 24.10 during a Quarter not later than 7 working days following the end of that Quarter. Whether the Society is carrying out the accounting in accordance with clause 26 or the Producer is carrying out the accounting in accordance with clause 27, no account shall be taken of any information or change in information which the Society is required to provide under clause 24.5 or any notice pursuant to clause 24.10 unless it has been notified no later than the date specified above.

30.2

Where the Society notifies the Producer that a Musical Work or interest therein previously designated SAI or PAI is in the repertoire of the Society, the Producer shall within 7 working days of receipt of such notification pay to the Society any royalties held in the Copyright Control Account in relation thereto, together with the interest thereon PROVIDED THAT where the Society's member is or has a direct contract with the author of that Musical Work or interest and such member has failed without good cause to notify its claim to the Society promptly, no interest shall be payable. Where any royalties have been paid to a third party in accordance with clause 28, and the Producer accepts or the Court adjudicates that the Society is entitled thereto, then the Society's claim shall, subject to clause 28.2, be limited to such royalties as should have been paid if the Work or interest therein had been designated as within the repertoire of the Society, together with interest thereon from the date on which such royalties should normally have been paid to the date of payment. The Producer shall not be obliged to account for such royalties on magnetic media.

30.3

Without prejudice to clause 24.13 and the foregoing provisions of this clause, where the Society or the Producer discover that one or the other has by mistake or unintentionally provided the other with incorrect information on the basis of which incorrect royalties have been paid or invoiced or royalties have been paid or invoiced to the wrong party:-

- (a) the party discovering the error shall notify the other, giving full details thereof;
- (b) where the party alleged to be in error accepts it, such party shall correct the error within 7 working days of receipt of notification of the same, and shall pay or repay any royalties owing to the other party, together with interest thereon computed in accordance with clause 33.6 from the date on which such royalties should have been paid or were paid (as the case may be) to the date of payment or repayment.

31. AUDITS

31.1

The Producer shall upon entering into this Agreement inform the Society of the addresses of the Warehouses (or in the case of moveable Warehouses the addresses at which they are normally situated) used for storing Discs the subject of this Agreement and shall promptly notify any changes to any such locations.

31.2

The Producer shall permit the Society by its duly authorised representatives at all reasonable times to have access to the Warehouses for the purpose of inspecting and checking the stocks of such Discs.

31.3

Where the Producer does not have its own warehousing facilities, the Producer shall use its best endeavours to procure reasonable rights of access to the warehouses of its Co-Exploitants for the duly authorised representatives of the Society.

31.4

The Producer shall keep proper accounting records dealing with, by reference to each Quarter, its activities the subject matter of this Agreement and without prejudice to the generality of the foregoing, setting out in particular the following:-

- (a) the manufacture, Shipment, Return and stock holding of Discs;
- (b) the export of Discs;
- (c) the export of Recording Matrices;
- (d) the import of Recording Matrices;
- (e) the import of Discs;
- (f) the PPD and/or fixed or suggested retail prices of Discs;
- (g) the calculation of royalties due on Discs, where clause 27 applies;
- (h) any sale of Discs under clause 18, together with the names and addresses of the parties to whom they were sold;
- (i) any supply of Discs under clause 19, together with the information maintained under clause 19.5 and 19.6;
- (j) the dates and amounts paid in respect of mechanical royalties on Discs together with the identity of the party to whom such payments were made;
- (k) any retentions claimed under clause 17, the calculation thereof and their reconciliation;

- (l) the calculation and payment into the relevant accounts of royalties referred to in clauses 28 and 29.

31.5

These accounting records shall be maintained to a standard sufficient to enable an audit trail to be established and followed through.

31.6

Such accounting records together with any supporting documentation relating thereto shall be open for inspection (both during and for 9 months after termination of this Agreement) by representatives of the Society upon reasonable notice and no more than once a calendar year unless payment of royalties is over 45 days in arrears. For these purposes, the Producer shall allow access to the premises of the Producer. The Society's representatives shall be entitled to inspect, make extracts and take copies of the information available, and to carry out such work as is in their reasonable opinion considered necessary to verify the royalties due to the Society including for the avoidance of doubt the examination of stock movements.

31.7

The reasonable fees incurred by the Society in auditing the Producer under this Agreement shall be borne by the Society except in circumstances where the audit report (a copy of which shall be made available to the Producer within nine months of the commencement of the audit) discloses underpayment of royalties in excess of a sum equal to 7% of the total royalties found due for the calendar year or any other financial period to which the audit relates. In that event and provided that either:-

- (a) the Producer agrees and accepts that such unpaid royalties are due; or
- (b) the quantum of unpaid royalties is determined by the Court as a result of legal action,

the said reasonable fees shall be paid by the Producer.

31.8

The Society undertakes to use its best endeavours to ensure that audits are carried out expeditiously to enable audit reports to be provided to the Producer within the nine month period specified in clause 31.7.

31.9

Any royalties accepted by the Producer as being unpaid or so adjudged by the Court shall be paid in full by the Producer to the Society within 30 days of acceptance or judgment to the Society and shall carry interest calculated in accordance with clause 33.6.

31.10

The agents of the Society with access to the premises of the Producer under clause 31.6 shall, subject to clause 31.11, be independent

31.6

qualified Chartered or Certified Accountants (or persons employed by or under the supervision of the same), and shall not directly or indirectly own any interest in any phonographic business or trade.

31.7

Where the turnover of the Producer from the sale of Discs for the four Quarters preceding the commencement of the relevant audit has not exceeded £5 million (such figure to be increased on 1st January 1993 and each subsequent 1st January by the percentage increase in the latest Retail Prices Index by comparison with the equivalent figure in the corresponding month of the previous year), the agents of the Society with access to the premises of the Producer under clause 31.6 may be:-

- (a) qualified Chartered or Certified Accountants who are employees of the Society; and/or
- (b) the Manager of the Society's Audit Department (or some other person employed by the Society of equivalent rank); and/or
- (c) persons employed by the Society under the supervision of any person referred to in (a) or (b).

Where an audit is carried out in accordance with this sub-clause, clause 31.7 shall not apply and the costs relating to (a), (b) and (c) above shall be borne by the Society.

31.8

The obligation as to confidentiality referred to in clause 34.2 shall for the avoidance of doubt apply in relation to such audits as are referred to above and the Society shall procure that all its staff, agents and inspectors carrying out audits on behalf of the Society are notified of the obligation not to disclose information which is confidential to those who are not entitled to such information.

32. CIRCULATION OF RECORDING MATRICES

32.1

The Producer shall not export a Recording Matrix reproducing a Musical Work in the repertoire of the Society from the United Kingdom or authorise the export thereof or supply such a Recording Matrix for the purposes of such export except in the following circumstances:-

- (a) where the territory to which the Matrix is exported is a member of the Berne Convention or the Universal Copyright Convention, and each Musical Work reproduced thereon is

not protected by copyright in that territory; or

- (b) where the party to whom the Matrix is exported has an agreement with an Associated Society under which that party will pay mechanical royalties in relation to Discs which are copies thereof; or
- (c) where the Society has previously consented thereto, such consent not to be unreasonably withheld or delayed. The Society shall by way of example be entitled to withhold its consent where it reasonably considers that it has no satisfactory evidence that mechanical royalties will be paid by the consignee. The Society shall be entitled to impose reasonable terms and conditions for the grant of consent in order to prevent any infringement of copyright of Musical Works in its repertoire.

32.2

Upon the Producer exporting a Recording Matrix reproducing a Musical Work in the repertoire of the Society or authorising the export thereof or supplying a Recording Matrix for the purposes of such export, the Producer shall forthwith notify the Society in writing of the following information:-

- (a) the name and address of the consignee;
- (b) sufficient details to enable the Society to identify the recordings included on the Recording Matrix.

33. SANCTIONS AND CANCELLATION OF THE CONTRACT

33.1

The Society shall have the rights set out in clause 33.3 where the Producer:-

- (a) commits a material breach of this Agreement which is capable of remedy and fails to remedy such breach within 14 clear days after receipt by the Producer of a formal notice served by registered post specifying in reasonable detail the breach on which the Society relies;
- (b) commits a material breach of this Agreement which is not capable of remedy, or commits fraud, in which event the Society shall specify in reasonable detail the fraud or material

breach on which the Society relies, by notice to the Producer.

33.2

No notice served under clause 33.1 in respect of any failure to comply with clause 20 may require remedy other than with effect from the first subsequent repressing or reprinting of the item in respect of which the relevant obligation under clause 20 applied, unless there has been a previous failure in relation to the same information and the same Disc by Catalogue Number.

33.3

In such circumstances, the Society shall have the right to take the following action:-

- (a) to terminate this Agreement forthwith without prejudice to any rights which have already accrued to the Society or its members under this Agreement or to the Producer; or
- (b) to require the Producer to comply with the standard terms and conditions of the AP.2 or AP.2A version of the Society's licensing scheme for the manufacture and distribution of Discs for retail sale to the public for private use.

33.4

The Society shall in addition have the rights referred to in clause 33.3(a) or (b) where there has been a material change in the factors on the basis of which the Society granted the Producer this Agreement provided that:-

- (a) the Society shall have given the Producer 28 days' notice in writing specifying the material changes relied on;
- (b) the Producer may within 7 days of such notice elect to have the matter reviewed by the Joint Record Agreement Committee by notice in writing to the Company Secretary of the Society.

33.5

Upon the Society validly terminating this Agreement in accordance with the above provisions royalties shall become due on the total number of Discs remaining in the possession, power, custody or control of the Producer in accordance with the standard terms and conditions referred to in clause 33.3(b).

33.6

Without prejudice to any other right or remedy of the Society or its relevant member(s) under this Agreement, where the Producer fails to fulfil any of the following obligations it shall pay to the Society daily interest calculated at a rate of 3% above the base rate of National Westminster Bank plc for that day, or, in the absence of such base rate, such equivalent rate

as the Society shall determine within its reasonable discretion:-

- (a) for failure to deliver the statements or invoices as referred to in clause 25.2 or 27.2 within the time specified therein, interest shall be payable on the total royalties payable on the basis of the information which should have been included therein;
- (b) for omitting Musical Works in the repertoire of the Society notified as such by the Society or Discs reproducing any such Musical Work from such statements or invoices, interest shall be payable on the royalties which should have been payable in relation thereto;
- (c) for any invoices properly due and not paid in full within the time prescribed by clause 26.3 or 27.2, interest shall be paid on the relevant sums not paid.

In each case, interest shall be payable from the date of default to the date on which the default was rectified.

Provided that where the liability to interest arises under sub-clause (a) above, no interest shall be payable save to the extent of any loss or expense actually suffered or incurred by the Society or its relevant member(s) and arising by reason of the Producer's failure.

33.7

If the Producer shall cease to trade, or have a winding-up Petition presented against it which is not dismissed or withdrawn within 21 days, or goes into voluntary liquidation (other than for the purposes of reconstruction or amalgamation), or makes any composition with its creditors, or if a Trustee or Receiver or Administrative Receiver is appointed to take over all or a substantial part of its assets and undertaking and such appointment is not discharged within 21 days, or, being a subsidiary company, its parent suffers such an event, then the Society is entitled to terminate this Agreement immediately.

In such an event:-

- (a) all Discs remaining in the possession, power, custody or control of the Producer or the Producer's distributor or subsequently returned thereto shall be deemed unlicensed;
- (b) the Producer and its Co-Exploitants shall cease forthwith to make or supply any Discs containing Musical Works in the repertoire of the Society;

(c) any royalties accrued which have not yet become payable or have not yet been paid shall become payable forthwith, and Statements of Shipments or (where the Producer is accounting under clause 27) royalty statements as referred to in clause 27.2(c) shall be sent to the Society within 21 days.

33.8

The Producer shall have the right to terminate this Agreement on giving at least one Quarter's notice in writing.

33.9

Upon the Society properly giving notice of termination in accordance with clause 33.3, 33.4 or 33.7, the Society may deduct from any deposit or advance paid to the Society such amount as is required to pay any sums payable under this Agreement.

33.10

Upon termination of this Agreement, the terms and conditions of this Agreement shall, save where otherwise expressly stated, continue to have effect as regards Discs in relation to which royalties have already been paid.

33.11

After termination of this Agreement (other than by the Society under clause 33.3 or 33.7) the Producer may place at the disposal of a third party which has signed an agreement with an Associated Society to pay mechanical royalties any Recording Matrix which has been lawfully made and/or exploited provided that such third party reaches agreement with such Society that the terms of its agreement with that Society will govern the exploitation of such Recording Matrix. Subject thereto, the Producer shall not exploit the relevant Recording Matrix or authorise such exploitation or supply the Recording Matrix for the purposes of such exploitation without the consent of the Society or the Society's relevant member.

34. FINAL CLAUSES

34.1

This Agreement shall come into effect on the Commencement Date.

34.2

Save for the purposes of complying with its obligations to the Producer or to its members or to any Associated Society and save for disclosure to its professional advisers, the Society shall not, without the Producer's written consent, disclose any confidential information (so long as it remains confidential) supplied by the Producer hereunder to any other person or Society.

34.3

For the purpose only of calculating interest under this Agreement where any payment or statement is sent by first class post:- (a) the

postmark shall be sufficient proof of the date the payment or statement was sent; and (b) such payment or statement shall be deemed to have been received before close of business on the second working day after posting.

34.4

This Agreement shall be subject to the laws of the United Kingdom and both parties agree to submit to the jurisdiction of the High Court of England and Wales.

Mechanical-Copyright Protection Society Limited
Elgar House, 41 Streatham High Road, London SW16 1ER

Tel: 020 8664 4563/4618 Fax: 020 8677 4614
E.mail: ap.info@mcps.co.uk

mcps



mcps

AP.2 Agreement

AP2 Agreement

**FOR THE MANUFACTURE AND
DISTRIBUTION OF RECORDS FOR
RETAIL SALE TO THE PUBLIC FOR
PRIVATE USE**

This AP.2 agreement forms part of the Audio Product Licensing Scheme ordered by the Copyright Tribunal on the 12th March 1992. The full text of the scheme is available for inspection upon request to the MCPS Audio Product Scheme Manager.

This AGREEMENT is made on
BETWEEN:-

(1) MECHANICAL-COPYRIGHT PROTECTION SOCIETY LIMITED
whose registered office is at Elgar House, 41 Streatham High Road, London
SW16 1ER ("the Society") contracting for itself and on behalf of its
members and those Associated Societies (as defined below) it represents and

(2) _____ of
("the Producer")

IT IS HEREBY AGREED as follows:-

1. DEFINITIONS

The following words and expressions shall have the following meanings, save where the context otherwise requires:-

- 1.1** "Accounting Period" means every three calendar month period commencing with the date of the first day of the month in which the invoice referred to in clause 4.8 is issued.
- 1.2** "AFL" and "AFRL" shall have the meanings referred to in clause 4.2.
- 1.3** "Associated Society" means a collecting society with which the Society has at the relevant time reciprocal arrangements under which the Society and that society authorise each other to grant licences in relation to each other's repertoire for the making of Discs reproducing such repertoire in the other's territory.
- 1.4** "Catalogue Number" shall have the meaning referred to in clause 16.6.
- 1.5** "Commencement Date" shall be the date on which the Society and the Producer enter into this Agreement unless the Producer and the Society agree in writing on an alternative date.
- 1.6** "Co-Exploitants" means:-
(a) any person, firm or company which carries out or arranges the manufacture of Discs the subject of this Agreement for the Producer; and
(b) any person, firm or company which acts as distributor of such Discs for the Producer.
- 1.7** "Disc" means a pre-recorded audio-only sound carrier and shall include all Formats whether now known or hereafter invented or exploited.
- 1.8** "EC" means each country which is at the relevant time a full member state of the European Community.

1.9 "Format" shall mean the following audio-only sound carriers:-

- (i) 45 rpm 7 inch vinyl single
- (ii) 45 rpm 7 inch vinyl EP
- (iii) 45 rpm 10 inch or 12 inch vinyl single
- (iv) 33 rpm 7 inch vinyl EP
- (v) 33 rpm 10 inch vinyl LP
- (vi) 33 rpm 12 inch vinyl LP
- (vii) 3 inch or 5 inch CD single
- (viii) 5 inch CD LP
- (ix) Cassette single
- (x) Long-playing cassette

and any other audio-only sound carrier hereafter manufactured and distributed.

1.10 "Musical Work" shall mean any work consisting of music and any lyrics or words written to be used with music. The expression shall extend to any dramatico-musical work (subject however to the provisions of clause 2.2) and to any part of any Musical Work (subject to clause 10).

1.11 "Notification of No Claim" shall have the meaning referred to in clause 4.5.

1.12 "Premium Record" shall mean a Disc supplied for use, or with the express or implied authority to sell it for use, as an incentive to purchase or acquire other goods or services of whatsoever nature.

1.13 "Pressing Plant" shall mean the pressing plant or other duplicating facility at which the relevant Discs are to be made.

1.14 "Published Dealer Price" or "PPD" shall mean the highest price as published by the Producer (or where appropriate the Producer's distributor) payable by any dealer for the minimum quantity of copies of the relevant Format of the relevant Disc which any dealer can purchase from the Producer (or as appropriate the Producer's distributor) without the benefit of any applicable discounts, incentives, bonuses and other reductions or deductions.

1.15

"Recording Matrix" shall mean any master tape or other contrivance of whatsoever nature from which Discs may be pressed or duplicated or from which re-recording can be made.

1.16

"Return" shall mean a Disc the subject of a Licence to which clause 15.1 applies on which royalties have been paid to the Society in relation to that Licence for Discs of the same Format and Catalogue Number (being royalties which the Society is required to be holding in accordance with clause 15) and which has been physically returned to the relevant Warehouse and credited as a return in the relevant accounting documents including the accounting statement referred to in clause 15.3 provided that a Disc shall not qualify as a Return for the purposes of this Agreement where it is returned to the Warehouse as part of a transaction which involves any kind of payment to the Producer for such Disc other than a bona fide administration charge for handling the return.

1.17

The Producer and a member of the Society shall be regarded as "Related Parties" where:-

- (a) (if the Producer and the member are incorporated under the Companies Act 1985) one is the holding company or a subsidiary of the other, or one is the subsidiary of the holding company of the other (all such terms to be construed in accordance with that Act as amended);
- (b) (in any other case) where the Producer and the member are the same person or legal entity, or where one owns the business of the other.

1.18

"Related Party Repertoire Work(s)" means those Musical Works in the repertoire of the Society at the time of manufacture of the relevant Discs:-

- (a) the copyright(s) in which are controlled or administered by a member of the Society who is or which is a Related Party of the Producer; and
- (b) in relation to which such member has properly excluded from the Society's powers of agency the collection of royalties from the Producer.

1.19

"United Kingdom" shall mean the United Kingdom of Great Britain and Northern Ireland and the Channel Islands and the Isle of Man.

1.20

"Warehouse" shall mean any building or other store where Discs are stored by or for the Producer including any fixed or moveable store (including vans).

2. REPERTOIRE OF THE SOCIETY

2.1

The repertoire of the Society consists of:-

- (a) those Musical Works in relation to which and to the extent that the Society has been or is hereafter appointed agent as regards the right to reproduce such Works in the form of Discs and the right to distribute such Discs.
- (b) Musical Works in the repertoire of the Associated Societies.

2.2

The limitations in relation to the Society's and the Associated Societies' rights to grant licences both to make Discs and to distribute those Discs in the United Kingdom are set out in Annex A, and any licence referred to in this Agreement is subject to those limitations.

3. OVERRIDING OF CONTROLLED COMPOSITION CLAUSES

The following provisions apply where any person firm or company is or becomes a member of the Society or an Associated Society and that party itself or that party's predecessor in title or grantor has a current contract with the Producer or the Producer's predecessor in title or grantor. In such a case:-

3.1

to the extent that such contract would otherwise apply in relation to the grant of the licence(s) referred to in this Agreement and/or the terms and conditions on which such licence(s) is or are granted, the terms and conditions of this Agreement shall during the subsistence of this Agreement replace the terms and conditions of that contract.

3.2

Upon the written request of the Producer the Society will provide the Producer with evidence that the relevant member has become a member and has given the Society or the relevant Associated Society authority to bind the member as regards this Agreement.

4. PROCEDURE FOR OBTAINING A LICENCE TO MANUFACTURE AND DISTRIBUTE

4.1

The Producer shall follow the procedure contained in this clause wherever it wishes to manufacture or authorise the manufacture of any Disc in the United Kingdom which reproduces one or more Musical Works with a view to its retail sale to the public for private use.

4.2

Specimens of the Society's forms Application for Licence ("AFL") and Application for Repress

Licence ("AFRL") appear respectively at Annex C and Annex D. In respect of each order of Discs as referred to in clause 4.1, the Producer shall submit to the Society the appropriate form fully and accurately completed, save in relation to any information which it is not possible to obtain. The appropriate form is as follows:-

- (a) an AFL is required for the first order of Discs with a particular Catalogue Number and content and configuration of tracks. An AFL is also necessary in the case of a subsequent order if no Licence under this Agreement has been issued by the Society in relation to any previous order of Discs with the same Catalogue Number and content and configuration of tracks;
- (b) an AFRL is required for any subsequent order where a Licence under this Agreement has been issued by the Society in relation to a previous order of Discs with the same Catalogue Number and content and configuration of tracks.

4.3

Supplies of the AFL Forms may be obtained from the Society. Together with any Licence as referred to in clause 4.8, the Society will send to the Producer an AFRL for the Producer to use for subsequent orders of Discs with the same Catalogue Number and content and configuration of tracks.

4.4

Following receipt and processing of each properly completed AFL or AFRL, the Society will send out the relevant notice or invoice to the Producer in accordance with the following provisions, within 7 working days following receipt in the case of an AFL, and within 1 working day following receipt in the case of an AFRL.

4.5

Where the AFL submitted by the Producer refers only to Musical Works which are in the public domain and/or which are not Works which the Society believes to be in its repertoire at that time, then the Society will send to the Producer (as well as to the Pressing Plant specified in the AFL) a notice that the Society has at that time no claim in relation to such Musical Works. Such statement is called in this Agreement a Notification of No Claim. Notwithstanding the terms of clause 4.2, once a Notification of No Claim has been issued to the Producer, neither an AFL nor AFRL need be submitted to the Society by the Producer in relation to subsequent orders of Discs with the same content and configuration of tracks unless the Society otherwise notifies the Producer.

4.6

Where the AFL or AFRL submitted by the

Producer refers to one or more Works in the repertoire of the Society, the Society may refuse to grant a Licence or issue an invoice for a Licence under this Agreement in the following circumstances:-

- (a) where the AFL or AFRL contains materially incorrect or materially incomplete information;
- (b) where the Society has reasonable cause to believe that the intended manufacture and/or distribution is outside the scope of or would be in material breach of the terms and conditions contained in this Agreement;
- (c) where the Producer has failed to pay royalties or other fees owing and due to the Society or its members hereunder or is in breach of any other material term or condition contained in this Scheme, whether in relation to previous copies of Discs with the same content and track configuration or other Discs;
- (d) where there is a reservation of rights as referred to in clause 2.2, and the relevant party refuses to grant consent for the making of such Discs.

4.7

Where the Society refuses to grant a Licence, the Society will notify the Producer of this decision promptly specifying the reason for refusal. The Society may also notify the Pressing Plant, save where refusal is solely on the grounds referred to in clause 4.6(a).

4.8

Save where the Society has refused to grant a Licence or issue an invoice for a Licence under clause 4.7, the Society will raise and send to the Producer an invoice for the royalties due in relation to the quantity of Discs specified in the AFL or AFRL, specifying the Musical Work(s) or interest therein to which it relates and in relation to which the Society will subject to Clause 4.6 above grant a Licence upon payment thereof. No Licence will be granted until the invoice has been paid in full.

4.9

Each invoice for royalties or other sums and VAT thereon must be paid in full within 28 days of delivery of the invoice to the Producer. If any invoice is not paid in full within that period, the Society reserves the right without further notice to cancel the invoice, and refuse to grant the Licence other than upon receipt of a further application duly submitted in accordance with this Clause 4. Payment may be made by banker's draft or cheque, upon the back of which the Producer must specify the identifying number of the Society's invoice in payment of which that cheque or banker's draft

is submitted. The Society reserves the right to wait until it holds cleared funds before treating a payment as having been made. Where a Licence is issued before cleared funds have been received by the Society, the Society reserves the right to cancel the invoice and revoke the Licence if any banker's draft or cheque for the royalties payable for that Licence is dishonoured.

4.10

As soon as reasonably practicable and in any event no later than 2 working days after receipt as cleared funds of payment in full of the invoice the Society will send to the Producer and the Pressing Plant specified in the AFL or AFRL a Licence to Manufacture and Distribute the relevant quantity of Discs. The Producer must not authorise the Pressing Plant to manufacture any Disc unless or until the Pressing Plant has received from the Society the relevant Licence or Notification of No Claim.

4.11

Where the relevant Discs contain either:-

- (a) only Related Party Repertoire Works; or
- (b) only Related Party Repertoire Works together with Musical Works which are public domain works or not in the Society's repertoire.

no invoice will be raised and the Licence referred to in clause 4.8 will be supplied to the Producer and Pressing Plant within the time set out in clause 4.4.

4.12

In any case where the Producer decides not to proceed with the manufacture in respect of which an AFL or AFRL has been submitted, the Producer must notify the Society in writing promptly. Where the Society has already issued a Licence, the Society will then send a Notice of Cancellation of the Licence to both the Producer and the Pressing Plant and issue a credit note in respect of the relevant invoice.

4.13

Where the identity of either the Musical Works or Catalogue Number or the quantity ordered to be manufactured as specified in the AFL or AFRL is changed, then the Producer must submit a new AFL or AFRL as appropriate, and notify the Society that this replaces the previous AFL or AFRL. Where the Society has already issued a Licence, the Society will send a Notice of Cancellation and replacement Licence to both the Producer and the Pressing Plant. Where the identity of the Pressing Plant changes, the Producer shall promptly notify the Society, but the Licence shall continue to have effect subject to clause 19.2.

4.14

The Producer must notify the Society promptly of any other material change in the information

notified in the AFL or AFRL, and in particular any changes as to the Published Dealer Price, or any fixed or suggested retail price, or the title of the Disc, or the identity of its distributor and the effective date of such change. In such circumstances however, no Notice of Cancellation or replacement Licence will be raised.

4.15

After the Society has issued a Notification of No Claim or where a Licence has been granted in relation to Discs which contain Musical Works to which the Society made no claim, it is possible that one or more of the relevant Musical Works may become ones for which the Society has a claim. Where this happens, the Society will notify the Producer. Unless the Producer already has a licence from, and has paid royalties to, the correct party entitled thereto in relation to the relevant quantity of such Discs, the Society may raise an invoice in accordance with the provisions of clause 4.8. Such invoice must be paid by the payment date of the original invoice or within 7 days, whichever is the later and the Society will send to the Producer a retrospective Licence. Where the Producer claims it already has a licence from and has paid royalties to the correct party entitled thereto, it must on the Society's request provide evidence that it has done so.

4.16

At the same time as the relevant Discs are transferred from the Pressing Plant to the Producer's distributor(s), the Producer shall deliver a copy of the relevant Licence to each such distributor.

4.17

Without prejudice to the rights of either party hereto in respect of any breaches of this Agreement, where the Society expressly notifies the Producer pursuant to a specific obligation hereunder that a particular musical work is in its repertoire (other than pursuant to a claim by an entity which is a Related Party to the Producer) and such notification is incorrect in this respect, the Society shall indemnify the Producer against any liability for damages or costs which the Producer may reasonably incur in reasonable reliance upon such information having been correct. For the avoidance of doubt, the Producer shall not be entitled to continue to rely on such notification where it has notice from any party that such notification was or may have been incorrect. This indemnity shall not apply where the incorrectness of such notification was consequential upon the Producer having supplied incorrect, incomplete or misleading information. For the avoidance of doubt the foregoing indemnity does not extend to any claim by any party that a copyright musical work properly licensed under this Scheme infringes some other copyright musical work.

4.18

Nothing in this Agreement shall entitle the Producer to exercise the licences referred to in clause 4 in relation to Discs where the appropriate consents and/or licences have not been obtained from the person(s) owning or controlling rights in relation to the sound recordings and/or performances contained on such Discs.

5. OVERPRESSINGS AND UNDERPRESSINGS

5.1

The Society recognises that, as a result of the process by which Discs are made, the number of Discs specified on the AFL or AFRL and for which orders are placed with Pressing Plants may not equate exactly with the number of Discs which are actually made and supplied to the Producer. Where this occurs, the provisions set out in this clause shall apply.

5.2

Where the quantity of Discs manufactured materially exceeds the quantity specified in the relevant AFL or AFRL, the Society reserves the right to issue supplemental invoices in respect of the excess quantity manufactured.

5.3

Where the quantity manufactured is materially less than the quantity specified in the AFL or AFRL, the Society shall at the request of the Producer make within 30 days of the relevant manufacture:-

- (a) where it is still holding in accordance with clause 16 sufficient sums in relation to those Discs, refund the royalties already paid in relation to the excess;
- (b) where it is not holding such sums, send the Producer a credit note in relation to further pressings of the same Disc with the same content and configuration of tracks.

6. DEFINITION OF THE LICENCE

6.1

The Licence to Manufacture and Distribute Discs referred to in clause 4 is a non-exclusive licence, subject to the terms and conditions of this Agreement, to do the following acts in the United Kingdom in relation to the Musical Works or interests therein specified in the Licence:-

- (a) make audio-only master recordings of such Works for the purpose referred to in subclause (b) below;
- (b) make the quantity of Discs specified in the Licence with a view to their retail sale to the public for private use;

- (c) put such Discs as have been made under (b) above into circulation with a view to such sale.

6.2

In relation to each Disc separately, any licence referred to in clause 6.1 shall be conditional upon the Producer not being in such material breach of any one or more of the following provisions as would entitle the Society to terminate this Agreement under clause 21.1:-

- (a) those relating to the payment of royalties;
- (b) those relating to the purposes for which Discs may be made and/or supplied under this Agreement;
- (c) those relating to the circumstances in which Discs may not be made and/or supplied under this Agreement.

7. SCOPE OF LICENCE

7.1

The licence referred to in clause 6 does not apply to Premium Records.

7.2

The licence referred to in clause 6 applies to all Formats.

7.3

Where there are joint owners of a Musical Work, and the Society does not represent all the parties owning or controlling the rights in such Musical Work, the licence referred to in clause 6 is not a licence for the joint owner(s) whom the Society does not represent.

7.4

All rights other than those expressly granted in this Agreement are reserved, and, without prejudice to the generality of the foregoing, Discs made for purposes other than those referred to in clauses 6, 8.4 or 14 (by way of example only, Discs made and/or supplied for the purposes of broadcasting) are not covered by the licence referred to in clause 6.

8. RENTAL

8.1

It is hereby confirmed that, subject to clause 8.4, the licence referred to in clause 6 does not extend to the making or putting into circulation of such Discs by or on behalf of the Producer with a view to or with express or implied authorisation for either the rental thereof or the lending thereof by any library authority.

8.2

The Producer shall only carry out or authorise any such act after it has reached agreement with the Society as to the terms and conditions on which the same should take place, including the payment of a proportion of any royalties or fees

(if any) payable to the Producer in relation to such rental or lending.

8.3

Where either the Producer or the Society becomes aware of a third party's intention to rent or lend Discs made by or for the Producer without the Producer's consent, they will give notice of this to the other party.

8.4

The licence referred to in clause 6 does extend to the supply of Discs direct to a library authority (as defined by the Public Libraries and Museums Act 1964) for the purposes of such library authority renting or lending such Discs, where the Producer does not directly or indirectly charge, or receive a royalty or other fee in relation to such renting or lending.

9. FIRST RECORDINGS

9.1

Where in relation to any particular Musical Work no Disc embodying that Work has previously been manufactured in or imported into the EC with the consent of the party entitled to grant consent for such reproduction or importation, the licence referred to in clause 6 shall not apply in relation to that Work until all the relevant members of the Society owning or controlling the rights in that Work have consented to the grant of the licence in accordance with this Agreement.

9.2

Such consent shall be deemed to be applied for from the Society when following the procedure set out in clause 4. Alternatively, such consent may be applied for either from the Society or, direct from the relevant member(s) by using the consent form appearing at Annex B. Copies of such forms may be obtained from the Society. Where the Producer obtains consent direct from the member(s), the Producer shall when submitting the AFL to the Society as referred to in clause 4 send with it a copy of the completed and signed consent form.

9.3

In the event that the Producer bona fide wishes to know whether or not a particular Musical Work is subject to the restriction referred to in clause 9.1, the Producer may enquire of the Society also by using the standard form set out in Annex B. Such enquiry shall be sent to the Society by registered post and the Society shall respond to such enquiry within 7 working days of the receipt thereof. In the event that the Society fails to respond within such time, and subsequently the Producer has to make extensive and expensive enquiries which the Producer should not have needed to make had the Society responded, then the Society shall reimburse the Producer its costs in relation to such enquiries.

10. ARRANGEMENTS AND MORAL RIGHTS

10.1

For the purpose of exercising the licence referred to in clause 6 and subject to clause 10.5, the Producer may make such modifications to the relevant Musical Work(s) as the Producer considers necessary in order to satisfy the requirement of the relevant recording.

10.2

No such modification shall however be made which:-

- (a) would amount to an adaptation of the Work; or
- (b) would amount to a derogatory treatment of the Work within the meaning of Chapter IV of the Copyright Designs and Patents Act 1988,

unless the relevant member of the Society or Associated Society has consented in writing thereto.

10.3

The licences referred to in clause 6 may only be exercised in relation to any modification which is authorised under clause 10.1, or to which the relevant member of the Society has consented in writing under clause 10.2.

10.4

Neither the Producer nor any party claiming through the Producer nor any party who carried out such modification may claim an interest in the copyright in the Musical Work, whether in its original or modified form, or any share of any income of whatsoever nature derived from the exploitation thereof, unless the relevant member of the Society has agreed otherwise, and any authority or consent contained in this clause or granted by the relevant member of the Society shall unless otherwise agreed be conditional upon no such claim being made.

10.5

Nothing in this Agreement affects the moral rights of the authors of Musical Works.

11. ROYALTIES PAYABLE

11.1

Save as otherwise provided herein, the royalties payable in relation to each order of Discs shall be 8.5% of the Published Dealer Price which will be applicable to the relevant Discs on the date of first distribution thereof, applied to the number of Discs the subject of that order.

11.2

Where the Producer has not published a Published Dealer Price in relation to the relevant Discs, but the Producer has published a fixed or suggested retail price in relation thereto the royalties payable shall be calculated at a

rate of 6.5% of the fixed or suggested retail price which will be applicable to the relevant Discs on the date of first distribution thereof, applied to the number of Discs the subject of that order.

11.3

In the event that the Producer is unable to show at the time the royalties are due that there will be in force a Published Dealer Price or fixed or suggested retail price (as the case may be) applicable to such Discs, the royalties shall be fixed by the Society on the basis of the price most generally used by other record producers in the United Kingdom for a comparable type of Disc.

12. TAXES

12.1

Before calculating the royalties payable on any Disc, Value Added Tax shall be excluded.

12.2

No other tax which forms part of the relevant price shall be deducted therefrom prior to calculation of the royalty.

12.3

The Producer shall pay VAT at the rate or rates from time to time in force on any royalties payable under this Agreement.

13. PRO-RATING PROVISIONS

13.1

This clause applies where a Disc reproduces Musical Works in the repertoire of the Society together with Musical Works which are not within the repertoire of the Society.

13.2

In such circumstances:-

(a) where the AFL or AFRL specifies the duration of the Musical Works, the Society's share of the royalty shall be in the proportion which the duration of each of the Works in its repertoire bears to the total duration of all the Musical Works on the Disc in question;

(b) in all other cases, the Society's share of the royalty shall be in the proportion which the number of tracks containing Musical Works in its repertoire bears to the total number of tracks on the Disc in question.

14. PROMOTIONAL COPIES

14.1

Discs which are manufactured and bona fide supplied free of charge only for the purposes of the genuine promotion of sales of other copies

of the Discs in question shall be exempt from the royalties otherwise payable under this Agreement on condition that the criteria set out in clauses 14.2 to 14.6 are fulfilled.

14.2

A Disc shall only be regarded as having been supplied for such purposes as are referred to in clause 14.1 where it is supplied to a broadcaster or disc jockey or critic or other party for the purposes of that party broadcasting it or playing it in public or reviewing it, or some other bona fide promotional situation. For the avoidance of doubt a Disc shall not therefore be regarded as having been supplied for such purposes where it is:-

- (a) distributed commercially; or
- (b) not supplied free of charge;
- (c) supplied free of charge but in consideration of or as a result of the party to whom it is supplied taking other Discs or other copies of the same Disc or giving other valuable consideration.

14.3

Each such Disc and the packaging thereof must at the time of manufacture be prominently marked with a non-removable or non-erasable notice carrying the words "PROMOTIONAL COPY - NOT FOR SALE".

14.4

The Producer shall maintain information in reasonable detail for a period of not less than 2 years as to the general nature and categories of the recipients of Discs supplied under the above provision.

14.5

The Producer shall at all reasonable times and upon reasonable notice allow access to its premises by representatives of the Society for the purposes of the Society checking the then current details of the numbers of Discs manufactured referred to in the above provisions and the persons, firms and companies to whom they are being supplied and the numbers supplied to each such person, firm or company and the Producer shall also maintain such information in such detail as will enable the representatives of the Society reasonably to verify during such access that the numbers of Discs being supplied under the above provisions broadly correspond with claims for royalty-free supply under Statements of Shipments.

14.6

The Producer shall specify in the AFL or AFRL (as the case may be) the number of Discs to which the provisions of clause 14.1 will apply. At the end of each calendar month, the Producer shall prepare a statement setting out by Licence number, title and Catalogue Number the Discs supplied by the Producer during that month which qualify under the above provisions. The statement shall be delivered to

the Society within 21 days of the end of each calendar month.

14.7

Where a Licence which includes Discs for which it is claimed the provisions of this clause 14 apply and the Discs manufactured under that Licence do not satisfy the provisions of clauses 14.1 to 14.6, then the Society may issue an invoice in respect of that Licence which shall be paid in accordance with clause 4.9, save that payment shall be made within 7 days of the date of the invoice.

15. ROYALTIES OPTION

15.1

The provisions of this clause will only apply where in relation to a particular order for Discs for which an AFL or AFRL is submitted:-

- (a) the royalties generated under this Agreement in relation to that order will be either more than £50 for each Musical Work in the repertoire of the Society reproduced thereon or more than £500 for the order such amounts to be increased on 1st January 1993 and each subsequent 1st January by the percentage increase in the latest Retail Prices Index by comparison with the equivalent figure in the corresponding month of the preceding year; and
- (b) the Producer elects to take such option at the time of submitting the AFL or AFRL; and
- (c) the Producer has demonstrated to the reasonable satisfaction of the Society that it is capable of accounting accurately and promptly in accordance with the provisions contained in this clause.

15.2

In such circumstances, the Society will not release the royalties paid in relation thereto to its members except as specified in this clause.

15.3

For every Accounting Period in respect of each Licence from the date of the relevant invoice to the completion of all procedures set out in clause 15.7 for that Licence the Producer shall prepare an accounting statement showing the total number of the relevant Discs which are the subject of that Licence which have been supplied by or for the Producer or the Producer's distributor, and the total number of Returns in that period by Format. The detailed information and format required in relation to such statement shall be in accordance with the Society's specification in relation thereto and notified by the Society to Producer. The Society will give reasonable consideration to any

reasonable proposal by the Producer for a variation in relation to the format thereof, provided that such variation will still enable the Society without additional expense to process the information in accordance with its normal procedure and release the royalties to its members expeditiously.

15.4

Such statement shall be delivered to the Society in the form of industry standard computer readable magnetic media within 21 days of the end of the Accounting Period referred to.

15.5

Upon receipt of the accounting statement referred to in clause 15.3, the Society may pay through to its relevant member(s) the royalties paid in relation to the number of Discs supplied less the number of Discs by Format and Catalogue Number which are Returns.

15.6

The Society may also pay through to its member(s) the total royalties or remaining royalties held by it in relation to the relevant order of Discs in the following circumstances:-

- (a) where the Producer submits an AFRL or further AFRL in relation to the same Discs in the same format with the same content and configuration of tracks; or
- (b) where the Producer fails to deliver an accounting statement in accordance with clause 15.4 within the time stipulated; or
- (c) where the Producer delivers an accounting statement which is materially inaccurate as regards the number of Discs supplied or the number of Returns; or
- (d) where the Producer agrees in writing.

15.7

Within 30 days after the expiry of four Accounting Periods as referred to in clause 15.3, the Producer shall by notice in writing to the Society elect to do one or more of the following in relation to the remaining stock of the relevant Discs (and, where it elects to do more than one, shall identify the number of Discs in respect of which each option is to apply):-

- (a) deliver up such Discs for destruction by the Society. Where the Producer elects to take this option, the Society shall within 14 days give written notice to the Producer of the address to which such Discs should be delivered up. Within 14 days of receipt of such notice, the Producer shall deliver the Discs to such address, having made prior arrangements as to the precise delivery date, and, within 14 days thereafter, the Society shall refund the royalties payable in relation to those

Discs which have been delivered up and the Society shall authorise or arrange the destruction of the Discs. If there is then any balance of royalties left, the Society may pay this through to its members.

(b) delete them. In such circumstances, the Society will not later than 14 days after delivery of the invoices referred to in sub-clause (ii) below refund the difference between the royalties held in relation to those Discs and 10% of the gross price charged to the buyer(s) thereof exclusive only of VAT provided that:-

- (i) such Discs have been sold to one or more independent buyer, on an arm's length basis; and
- (ii) copies of the invoices to the buyer(s) thereof are delivered to the Society within 3 months of the one year period;
and the Society may then pay the balance of royalties through to its members;

(c) continue to sell them. The Society may pay through the remaining royalties to its member(s).

15.8

If the Producer fails to give a notice of election under clause 15.7, it shall be deemed to have elected to take the option under clause 15.7(c).

15.9

Where the Producer gives notice of election under clause 15.7 (a) or (b), and there are any sums arising under this Agreement which should have been paid but have not been paid, the Society may use any sums due to be refunded to the Producer to pay such invoices.

15.10

No interest shall be payable to the Producer on any sums referred to in this clause, and no refund of monies shall be made except as specifically set out in this clause.

16. NOTICES AND CREDITS

16.1

Each Disc reproducing a Musical Work in the repertoire of the Society shall bear the initials "MCPS".

16.2

A notice to the following effect shall appear on the label on each side of the Disc:-

"ALL RIGHTS OF THE PRODUCER AND OF THE OWNER OF THE WORKS REPRODUCED RESERVED. UNAUTHORISED COPYING, HIRING, LENDING, PUBLIC PERFORMANCE AND

BROADCASTING OF THIS RECORD PROHIBITED."

16.3

On the label of each Disc there shall be reproduced:-

- (a) the title of each Musical Work reproduced thereon;
- (b) the name of each composer;
- (c) the name of each author;
- (d) the name of the arranger of the words and/or music where applicable.

16.4

Where it is technically impossible for the Producer to comply with clause 16.3 such information may be reproduced as follows:-

- (a) on the sleeve of the Disc; or
- (b) on the cardboard insert; or
- (c) on the surface of the Disc itself.

16.5

The Producer shall use its reasonable endeavours to include on the label (or as set out in clause 16.4) the name of the United Kingdom publisher of each Musical Work in the repertoire of the Society.

16.6

The Producer shall procure that each Disc is given a unique Catalogue Number applicable only to Discs with the same content and configuration of tracks. Each Format thereof must bear either a different Catalogue Number or a different prefix or suffix within that Catalogue Number.

17. SUPPLY OF INFORMATION

17.1

The Producer shall on entering into this Agreement, and during its continuance, supply to the Society the following documents without charge as soon as possible following the publication or issue thereof:-

- (a) two copies of all catalogues, supplements to catalogues and lists or notifications of New Releases and Re-Releases;
- (b) two copies of each list of Published Dealer Prices or fixed or suggested retail prices and each amendment or addition thereto.

17.2

At the request of the Society the Producer shall also furnish it free of charge with:-

- (a) one copy (which shall be exempt from royalty payment) of any Disc;
- (b) one copy of the label, sleeve or insert relating to any Disc.

17.3

The Producer must notify the Society forthwith of any Disc which it deletes from its catalogue.

17.4

The Producer must also supply the Society with any further information or documentation in its possession, power, custody or control (and use its best endeavours to supply the Society with any further information or documentation not in its possession, power, custody or control) reasonably requested by the Society at any time, in order to enable the Society to verify the Musical Work(s) which are or will be reproduced on any Disc made and/or distributed by or for the Producer or its Co-Exploitants or to verify that the Producer is abiding by the terms and conditions of this Agreement.

18. CO-EXPLOITANTS

18.1

The Producer shall use its best endeavours to procure that its Co-Exploitants:-

- (a) at no time act or fail to act in such a way as would cause the Producer to be in breach of this Agreement;
- (b) co-operate fully with the Society and its representatives in the application of this Agreement including, without limitation, providing the Society with every facility for checking pressings undertaken for the Producer.

18.2

In exercising the licence to make Discs in accordance with clause 6, the Producer may only use a Co-Exploitant so to make such Discs if:-

- (a) such Co-Exploitant appears on the Society's approved list (a copy of which will be supplied on signature of this Agreement to the Producer by the Society, with any changes thereto being promptly notified to the Producer); or
- (b) the Society consents, such consent not to be unreasonably withheld or delayed.

19. AUDITS

19.1

The Producer shall upon entering into this Agreement inform the Society of the addresses of the Warehouses (or in the case of moveable Warehouses the addresses at which they are normally situated) used for storing Discs the subject of this Agreement and shall promptly notify any changes to any such locations.

19.2

The Producer shall permit the Society by its duly authorised representatives at all reasonable times to have access to the Warehouses for the

purpose of inspecting and checking the stocks of such Discs.

19.3

Where the Producer does not have its own warehousing facilities, the Producer shall use its best endeavours to procure reasonable rights of access to the warehouses of its Co-Exploitants for the duly authorised representatives of the Society.

19.4

The Producer shall keep proper accounting records dealing with its activities the subject matter of this Agreement, and, without prejudice to the generality of the foregoing, setting out in particular the following:-

- (a) the manufacture and supply of Discs;
- (b) the export of Recording Matrices;
- (c) the import of Recording Matrices;
- (d) the PPD and/or fixed or suggested retail price of Discs;
- (e) any supply of Discs under clause 14, together with the information maintained under clauses 14.5 and 14.6;
- (f) the dates and amounts paid in respect of mechanical royalties on Discs together with the identity of the party to whom such payments were made.

19.5

These accounting records shall be maintained to a standard sufficient to enable an audit trail to be established and followed through.

19.6

Such accounting records together with any supporting documentation relating thereto shall be open for inspection (both during and for 9 months after termination of this Agreement) by representatives of the Society upon reasonable notice and no more than once a calendar year, unless payment of any invoice is over 28 days in arrears. For these purposes, the Producer shall allow access to the premises of the Producer. The Society's representatives shall be entitled to inspect, make extracts and take copies of the information available, and to carry out such work as is in their reasonable opinion considered necessary to verify the royalties due to the Society, including for the avoidance of doubt the examination of stock movements.

19.7

The reasonable costs of the Society in auditing the Producer under this Agreement shall be borne by the Society except in circumstances where the audit report (a copy of which shall be made available to the Producer within nine months of the commencement of the audit) discloses underpayment of royalties in excess of a sum equal to the greater of £1000 or 7 1/2% of the total royalties found due for the calendar year or any other financial period to which the audit relates. In that event and provided that

either:-

- (a) the Producer agrees and accepts that such unpaid royalties are due; or
- (b) the quantum of unpaid royalties is determined by the Court as a result of legal action.

the said reasonable fees shall be paid by the Producer.

19.8

The Society undertakes to use its best endeavours to ensure that audits are carried out expeditiously to enable audit reports to be provided to the Producer within the nine month period specified in clause 19.6.

19.9

Any royalties accepted by the Producer as being unpaid or so adjudged by the Court shall be paid in full by the Producer to the Society within 30 days of acceptance or judgment to the Society and shall carry interest calculated in accordance with clause 21.6.

19.10

The agents of the Society with access to the premises of the Producer under clause 19.6 shall subject to clause 19.11 be independent qualified Chartered or Certified Accountants (or persons employed by or under the supervision of the same), and shall not directly or indirectly own any interest in any phonographic business or trade.

19.11

Where the turnover of the Producer from the sale of Discs for the four Quarters preceding the commencement of the relevant audit has not exceeded £5 million (such figure to be increased on 1st January 1993 and each subsequent 1st January by the percentage increase in the latest Retail Prices Index by comparison with the equivalent figure in the corresponding month of the previous year), the agents of the Society with access to the premises of the Producer under clause 19.6 may be:-

- a) a qualified Chartered or Certified Accountants who are employees of the Society; and/or
- b) the Manager of the Society's Audit Department or some other person employed by the Society of equivalent rank; and/or
- c) persons employed by the Society under the supervision of any person referred to in (a) or (b).

Where an audit is carried out in accordance with this sub-clause, clause 19.7 shall apply as if the words "the greater of £1000 or" were deleted. Further, if the Producer is required to pay the said reasonable audit costs in such circumstances and there is a bona fide dispute as to whether the fees claimed by the Society are reasonable, then provided that the Producer

pays to the Society a sum representing its bona fide determination of the said reasonable fees, the Society shall not, pending settlement or determination by a court of competent jurisdiction of the reasonableness of the fees, exercise, by virtue of the Producer's failure to pay such fees, any right to refuse to grant licences or to terminate this agreement.

19.12

The obligation as to confidentiality referred to in clause 22.2 shall for the avoidance of doubt apply in relation to such audits as are referred to above and the Society shall procure that all its staff, agents and inspectors carrying out audits on behalf of the Society are notified of the obligation not to disclose information which is confidential to those who are not entitled to such information.

20. CIRCULATION OF RECORDING MATRICES

20.1

The Producer shall not export a Recording Matrix reproducing a Musical Work in the repertoire of the Society from the United Kingdom or authorise the export thereof or supply such a Recording Matrix for the purposes of such export except in the following circumstances:-

- (a) where the territory to which the Matrix is exported is a member of the Berne Convention or the Universal Copyright Convention, and each Musical Work reproduced thereon is not protected by copyright in that territory; or
- (b) where the party to whom the matrix is exported has an agreement with an Associated Society under which that party will pay mechanical royalties in relation to Discs which are copies thereof; or
- (c) where the Society has previously consented thereto, such consent not to be unreasonably withheld or delayed. The Society shall by way of example be entitled to withhold its consent where it reasonably considers that it has no satisfactory evidence that mechanical royalties will be paid by the consignee. The Society shall be entitled to impose reasonable terms and conditions for the grant of consent in order to prevent any infringement of copyright of Musical Works in its repertoire.

20.2

Upon the Producer exporting a Recording Matrix reproducing a Musical Work in the repertoire of the Society, or authorising the

export thereof, or supplying a Recording Matrix for the purposes of such export, the Producer shall forthwith notify the Society in writing of the following information:-

- (a) the name and address of the consignee;
- (b) sufficient details to enable the Society to identify the recordings included on the Recording Matrix.

21. SANCTIONS AND CANCELLATION OF THE CONTRACT

21.1

The Society shall have the rights set out in clause 21.3 where the Producer:-

- (a) commits a material breach of this Agreement which is capable of remedy and fails to remedy such breach within 14 clear days after receipt by the Producer of a formal notice served by registered post specifying in reasonable detail the breach on which the Society relies;
- (b) commits a material breach of this Agreement which is not capable of remedy, or commits fraud, in which event the Society shall specify in reasonable detail the fraud or material breach on which the Society relies, by notice to the Producer.

21.2

No notice served under clause 21.1 in respect of any failure to comply with clause 16 may require remedy other than with effect from the first subsequent repressing or reprinting of the item in respect of which the relevant obligation under clause 16 applied, unless there has been a previous failure in relation to the same information and the same Disc by Catalogue Number.

21.3

In such circumstances, the Society shall have the right to terminate this Agreement forthwith, without prejudice to any rights which have already accrued to the Society or its members under this Agreement or to the Producer.

21.4

Without prejudice to any other right or remedy of the Society or its relevant member(s), where the Producer fails to pay any sum arising under this Agreement by the date on which it should have been paid, the Society shall be entitled to require daily interest to be paid from the date on which payment should have been made to the date when payment is made, calculated at a rate of 3% above the base rate of National Westminster Bank plc for that day, or, in the absence of such base rate, such equivalent rate as the Society shall determine within its reasonable discretion.

21.5

If the Producer shall cease to trade, or have a winding-up Petition presented against it which is not dismissed or withdrawn within 21 days, or goes into voluntary liquidation (other than for the purposes of reconstruction or amalgamation), or makes any composition with its creditors, or if a Trustee, or Receiver or Administrative Receiver is appointed to take over all or a substantial part of its assets and undertaking and such appointment is not discharged within 21 days, or, being a subsidiary company, its parent suffers such an event, then the Society is entitled to terminate this Agreement immediately. In such an event, any invoices which have not yet become payable shall become payable forthwith.

21.6

The Producer shall have the right to terminate this Agreement on giving at least 3 calendar months notice in writing not to expire except on the last day of a calendar month.

21.7

Upon termination of this Agreement, the terms and conditions of this Agreement shall, save where otherwise expressly stated, continue to have effect as regards Discs in relation to which royalties have already been paid.

21.8

Upon the Society properly giving notice of termination in accordance with clauses 21.3, 21.4 or 21.7, the Society may deduct from any deposit or advance paid to the Society such amount as is required to pay any sums payable under this Agreement.

21.9

After termination of this Agreement (other than by the Society under clause 21.3 or 21.7) the Producer may place at the disposal of a third party which has signed an agreement with an Associated Society to pay mechanical royalties any Recording Matrix which has been lawfully made and/or exploited provided that such third party reaches agreement with such Society that the terms of its agreement with that Society will govern the exploitation of such Recording Matrix. Subject thereto, the Producer shall not exploit the relevant Recording Matrix or authorise such exploitation or supply the Recording Matrix for the purposes of such exploitation without the consent of the Society or the Society's relevant member.

22. FINAL CLAUSES

22.1

This Agreement shall come into effect on the Commencement Date.

22.2

Save for the purposes of complying with its obligations to the Producer or to its members or to any Associated Society and save for

disclosure to its professional advisers, the Society shall not, without the Producer's written consent, disclose any confidential information (so long as it remains confidential) supplied by the Producer hereunder to any other person or Society.

22.3

For the purpose only of calculating interest under this Agreement where any payment or statement is sent by first class post:- (a) the postmark shall be sufficient proof of the date the payment or statement was sent; and (b) such payment or statement shall be deemed to have been received before close of business on the second working day after posting.

22.4

This Agreement shall be subject to the laws of the United Kingdom and both parties agree to submit to the jurisdiction of the High Court of England and Wales.

Mechanical-Copyright Protection Society Limited
Elgar House, 41 Streatham High Road, London SW16 1ER

Tel: 020 8664 4563/4618 Fax: 020 8677 4614
E.mail: ap.info@mcps.co.uk

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AP2A Agreement

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AP2A

AP2A Agreement

**FOR THE MANUFACTURE AND
DISTRIBUTION OF RECORDS FOR
RETAIL SALE TO THE PUBLIC FOR
PRIVATE USE**

This AP.2A agreement forms part of the Audio Product Licensing Scheme ordered by the Copyright Tribunal on the 12th March 1992. The full text of the scheme is available for inspection upon request to the MCPS Audio Product Scheme Manager.

This AGREEMENT is made on
BETWEEN:-

(1) MECHANICAL-COPYRIGHT PROTECTION SOCIETY LIMITED
whose registered office is at Elgar House, 41 Streatam High Road, London
SW16 1ER ("the Society") contracting for itself and on behalf of its
members and those Associated Societies (as defined below) it represents and

(2) _____ of
("the Producer")

IT IS HEREBY AGREED as follows:-

1. DEFINITIONS

The following words and expressions shall have the following meanings, save where the context otherwise requires:-

- 1.1** "Accounting Period" means every three calendar month period commencing with the date of the first day of the month in which the invoice referred to in clause 4.8 is issued.
- 1.2** "AFL" and "AFRL" shall have the meanings referred to in clause 4.2.
- 1.3** "Associated Society" means a collecting society with which the Society has at the relevant time reciprocal arrangements under which the Society and that society authorise each other to grant licences in relation to each other's repertoire for the making of Discs reproducing such repertoire in the other's territory.
- 1.4** "Catalogue Number" shall have the meaning referred to in clause 16.6.
- 1.5** "Commencement Date" shall be the date on which the Society and the Producer enter into this Agreement unless the Producer and the Society agree in writing on an alternative date.
- 1.6** "Co-Exploitants" means:-
(a) any person, firm or company which carries out or arranges the manufacture of Discs the subject of this Agreement for the Producer; and
(b) any person, firm or company which acts as distributor of such Discs for the Producer.
- 1.7** "Disc" means a pre-recorded audio-only sound carrier and shall include all Formats whether now known or hereafter invented or exploited.
- 1.8** "EC" means each country which is at the relevant time a full member state of the European Community.

1.9

"Format" shall mean the following audio-only sound carriers:-

- (i) 45 rpm 7 inch vinyl single
- (ii) 45 rpm 7 inch vinyl EP
- (iii) 45 rpm 10 inch or 12 inch vinyl single
- (iv) 33 rpm 7 inch vinyl EP
- (v) 33 rpm 10 inch vinyl LP
- (vi) 33 rpm 12 inch vinyl LP
- (vii) 3 inch or 5 inch CD single
- (viii) 5 inch CD LP
- (ix) Cassette single
- (x) Long-playing cassette

and any other audio-only sound carrier hereafter manufactured and distributed.

1.10

"Joint Record Agreement Committee" shall mean the committee consisting of MCPS nominees and record industry nominees.

1.11

"Musical Work" shall mean any work consisting of music and any lyrics or words written to be used with music. The expression shall extend to any dramatico-musical work (subject however to the provisions of clause 2.2) and to any part of any Musical Work (subject to clause 10).

1.12

"Notification of No Claim" shall have the meaning referred to in clause 4.5.

1.13

"Premium Record" shall mean a Disc supplied for use, or with the express or implied authority to sell it for use, as an incentive to purchase or acquire other goods or services of whatsoever nature.

1.14

"Pressing Plant" shall mean the pressing plant or other duplicating facility at which the relevant Discs are to be made.

1.15

"Published Dealer Price" or "PPD" shall mean the highest price as published by the Producer (or where appropriate the Producer's distributor) payable by any dealer for the minimum quantity of copies of the relevant Format of the relevant

Disc which any dealer can purchase from the Producer (or as appropriate the Producer's distributor) without the benefit of any applicable discounts, incentives, bonuses and other reductions or deductions.

1.16

"Recording Matrix" shall mean any master tape or other contrivance of whatsoever nature from which Discs may be pressed or duplicated or from which re-recording can be made.

1.17

"Return" shall mean a Disc the subject of a Licence to which clause 15.1 applies on which royalties have been paid to the Society in relation to that Licence for Discs of the same Format and Catalogue Number (being royalties which the Society is required to be holding in accordance with clause 15) and which has been physically returned to the relevant Warehouse and credited as a return in the relevant accounting documents including the accounting statement referred to in clause 15.3 provided that a Disc shall not qualify as a Return for the purposes of this Agreement where it is returned to the Warehouse as part of a transaction which involves any kind of payment to the Producer for such Disc other than a bona fide administration charge for handling the return.

1.18

The Producer and a member of the Society shall be regarded as "Related Parties" where:-

- (a) (if the Producer and the member are incorporated under the Companies Act 1985) one is the holding company or a subsidiary of the other, or one is the subsidiary of the holding company of the other (all such terms to be construed in accordance with that Act as amended);
- (b) (in any other case) where the Producer and the member are the same person or legal entity, or where one owns the business of the other.

1.19

"Related Party Repertoire Work(s)" means those Musical Works in the repertoire of the Society at the time of manufacture of the relevant Discs:-

- (a) the copyright(s) in which are controlled or administered by a member of the Society who is or which is a Related Party of the Producer; and
- (b) in relation to which such member has properly excluded from the Society's powers of agency the collection of royalties from the Producer.

1.20

"United Kingdom" shall mean the United Kingdom of Great Britain and Northern Ireland and the Channel Islands and the Isle of Man.

1.21

"Warehouse" shall mean any building or other store where Discs are stored by or for the Producer including any fixed or moveable store (including vans).

2. REPERTOIRE OF THE SOCIETY

2.1

The repertoire of the Society consists of:-

- (a) those Musical Works in relation to which and to the extent that the Society has been or is hereafter appointed agent as regards the right to reproduce such Works in the form of Discs and the right to distribute such Discs.
- (b) Musical Works in the repertoire of the Associated Societies.

2.2

The limitations in relation to the Society's and the Associated Societies' rights to grant licences both to make Discs and to distribute those Discs in the United Kingdom are set out in Annex A, and any licence referred to in this Agreement is subject to those limitations.

3. OVERRIDING OF CONTROLLED COMPOSITION CLAUSES

The following provisions apply where any person, firm or company is or becomes a member of the Society or an Associated Society and that party itself or that party's predecessor in title or grantor has a current contract with the Producer or the Producer's predecessor in title or grantor. In such a case:-

3.1

to the extent that such contract would otherwise apply in relation to the grant of the licence(s) referred to in this Agreement and/or the terms and conditions on which such licence(s) is or are granted, the terms and conditions of this Agreement shall during the subsistence of this Agreement replace the terms and conditions of that contract;

3.2

upon the written request of the Producer the Society will provide the Producer with evidence that the relevant member has become a member and has given the Society or the relevant Associated Society authority to bind the member as regards this Agreement.

4. PROCEDURE FOR OBTAINING A LICENCE TO MANUFACTURE AND DISTRIBUTE

4.1

The Producer shall follow the procedure contained in this clause wherever it wishes to

manufacture or authorise the manufacture of any Disc in the United Kingdom which reproduces one or more Musical Works with a view to its retail sale to the public for private use.

4.2

Specimens of the Society's forms Application for Licence ("AFL") and Application for Repress Licence ("AFRL") appear respectively at Annex C and Annex D. In respect of each order of Discs as referred to in clause 4.1, the Producer shall submit to the Society the appropriate form fully and accurately completed, save in relation to any information which it is not possible to obtain. The appropriate form is as follows:-

- (a) an AFL is required for the first order of Discs with a particular Catalogue Number and content and configuration of tracks. An AFL is also necessary in the case of a subsequent order if no Licence under this Agreement has been issued by the Society in relation to any previous order of Discs with the same Catalogue Number and content and configuration of tracks;
- (b) an AFRL is required for any subsequent order where a Licence under this Agreement has been issued by the Society in relation to a previous order of Discs with the same Catalogue Number and content and configuration of tracks.

4.3

Supplies of the AFL Forms may be obtained from the Society. Together with any Licence as referred to in clause 4.8, the Society will send to the Producer an AFRL for the Producer to use for subsequent orders of Discs with the same Catalogue Number and content and configuration of tracks.

4.4

Following receipt and processing of each properly completed AFL or AFRL, the Society will send out the relevant notice or invoice and Licence to the Producer in accordance with the following provisions, within 7 working days following receipt in the case of an AFL, and within 1 working day following receipt in the case of an AFRL.

4.5

Where the AFL submitted by the Producer refers only to Musical Works which are in the public domain and/or which are not Works which the Society believes to be in its repertoire at that time, then the Society will send to the Producer (as well as to the Pressing Plant specified in the AFL) a notice that the Society has at that time no claim in relation to such Musical Works. Such statement is called in this Agreement a Notification of No Claim. Notwithstanding the terms of clause 4.2, once a

Notification of No Claim has been issued to the Producer, neither an AFL nor AFRL need be submitted to the Society by the Producer in relation to subsequent orders of Discs with the same content and configuration of tracks unless the Society otherwise notifies the Producer.

4.6

Where the AFL or AFRL submitted by the Producer refers to one or more Works in the repertoire of the Society, the Society may refuse to grant a Licence under this Agreement in the following circumstances:-

- (a) where the AFL or AFRL contains materially incorrect or materially incomplete information;
- (b) where the Society has reasonable cause to believe that the intended manufacture and/or distribution is outside the scope of or would be in material breach of the terms and conditions contained in this Agreement.
- (c) where the Producer has failed to pay royalties or other fees owing and due to the Society or its members hereunder or is in breach of any other material term or condition contained in this Scheme, whether in relation to previous copies of Discs with the same content and track configuration or other Discs;
- (d) where there is a reservation of rights as referred to in clause 2.2, and the relevant party refuses to grant consent for the making of such Discs.

4.7

Where the Society refuses to grant a Licence, the Society will notify the Producer of this decision promptly specifying the reason for refusal. The Society will also notify the Pressing Plant, save where refusal is solely on the grounds referred to in clause 4.6(a).

4.8

Save where the Society has refused to grant a Licence under clause 4.7, the Society will raise and send to the Producer:-

- (a) an invoice for the royalties due in relation to the quantity of Discs specified in the AFL or AFRL, specifying the Musical Work(s) or interest therein to which it relates; and
- (b) a Licence to Manufacture and Distribute the relevant quantity of Discs in relation to such Musical Work(s) or interest therein.

The Society shall also send a copy of the Licence to the Pressing Plant specified in the AFL, save (i) in the case of AFRLs and (ii) where the Society has authorised the Pressing

Plant in writing to manufacture Discs on behalf of the Producer on production by the Producer of the relevant Licence.

4.9

Subject to clause 4.11, each invoice for royalties or other sums and VAT thereon must be paid in full within the period specified in Part I of Annex E running from the date of the relevant invoice. Payment may be made by banker's draft or cheque, upon the back of which the Producer must specify the identifying number of the Society's invoice in payment of which that cheque or banker's draft is submitted. Where the Producer fails to pay an invoice within the credit period:-

- (a) If the Producer has paid a deposit or advance as a condition of the Society agreeing to enter into this Agreement, the Society may forthwith use such deposit or advance to satisfy any sum outstanding (including for the avoidance of doubt any interest payable thereon) and require the Producer to pay such sums as will then be necessary in order that the deposit or advance held by the Society be at the same level as before the right under this clause was exercised.
- (b) The Producer hereby irrevocably authorises and instructs each of its distributors to pay to the Society, in satisfaction of any sum outstanding hereunder, any monies of whatsoever nature which any such distributor is or thereafter becomes liable to pay to the Producer, but only up to the amount of the sum outstanding as certified by the Society to the relevant distributor. The Producer irrevocably authorises the Society to give a valid receipt and discharge to any such distributor in relation to any monies paid to the Society in accordance with this provision.
- (c) The Society shall be entitled at its discretion to require the Producer to pay interest as referred to in clause 21.6.

4.10

The Producer must not authorise the Pressing Plant to manufacture any Disc unless or until the Pressing Plant has received from the Society the relevant Licence or Notification of No Claim (or other written authorisation to manufacture Discs on behalf of the Producer on production by the Producer of the relevant Licence), save that the Producer may so authorise the Pressing Plant where:-

- (a) a Licence under this Agreement has previously been issued in relation to a Disc with the same content and configuration of tracks; and

- (b) the Producer has submitted to the Society an AFRL for subsequent orders of Discs with the same content and configuration of tracks; and

- (c) the provisions of clause 4.11 would not apply on the raising of an invoice in respect of the AFRL.

4.11

Where the Producer submits an AFL or AFRL in relation to a quantity of Discs, and the raising of an invoice for the royalties payable in relation to such Discs would mean that the total outstanding amount of invoices not paid in full by the Producer (whether or not the same are yet payable) would exceed the credit limit referred to in Part II of Annex E, then the Society may at its option require that the invoice be paid in full before issuing a Licence.

4.12

Where the relevant Discs contain either:-

- (a) only Related Party Repertoire Works; or
- (b) only Related Party Repertoire Works together with Musical Works which are public domain works or not in the Society's repertoire.

No invoice will be raised and the Licence referred to in clause 4.8 will be supplied to the Producer and Pressing Plant within the time set out in clause 4.4 and the provisions of clause 4.8 shall apply except for clause 4.8(a).

4.13

In any case where the Producer decides not to proceed with the manufacture in respect of which an AFL or AFRL has been submitted, the Producer must notify the Society in writing promptly. Where the Society has already issued a Licence, the Society will then send a Notice of Cancellation of the Licence to both the Producer and the Pressing Plant and issue a credit note in respect of the relevant invoice.

4.14

Where the identity of either the Musical Works or Catalogue Number or the quantity ordered to be manufactured as specified in the AFL or AFRL is changed, then the Producer must submit a new AFL or AFRL as appropriate, and notify the Society that this replaces the previous AFL or AFRL. Where the Society has already issued a Licence, the Society will send a Notice of Cancellation and replacement Licence to both the Producer and the Pressing Plant. Where the identity of the Pressing Plant changes, the Producer shall promptly notify the Society, but the Licence shall continue to have effect subject to clause 19.2.

4.15

The Producer must notify the Society promptly of any other material change in the information notified in the AFL or AFRL, and in particular any changes as to the Published Dealer Price, or

any fixed or suggested retail price, or the title of the Disc, or the identity of its distributor and the effective date of such change. In such circumstances however, no Notice of Cancellation or replacement Licence will be raised.

4.16

After the Society has issued a Notification of No Claim or where a Licence has been granted in relation to Discs which contain Musical Works to which the Society made no claim, it is possible that one or more of the relevant Musical Works may become ones for which the Society has a claim. Where this happens, the Society will notify the Producer. Unless the Producer already has a licence from, and has paid royalties to, the correct party entitled thereto in relation to the relevant quantity of such Discs, the Society may raise an invoice in accordance with the provisions of clause 4.8. Such invoice must be paid in accordance with the provisions of clause 4.9 and the Society will send to the Producer a retrospective Licence. Where the Producer claims it already has a licence from and has paid royalties to the correct party entitled thereto, it must on the Society's request provide evidence that it has done so.

4.17

At the same time as the relevant Discs are transferred from the Pressing Plant to the Producer's distributor(s), the Producer shall deliver a copy of the relevant Licence to each such distributor.

4.18

Without prejudice to the rights of either party hereto in respect of any breaches of this Agreement, where the Society expressly notifies the Producer pursuant to a specific obligation hereunder that a particular musical work is in its repertoire (other than pursuant to a claim by an entity which is a Related Party to the Producer) and such notification is incorrect in this respect, the Society shall indemnify the Producer against any liability for damages or costs which the Producer may reasonably incur in reasonable reliance upon such information having been correct. For the avoidance of doubt, the Producer shall not be entitled to continue to rely on such notification where it has notice from any party that such notification was or may have been incorrect. This indemnity shall not apply where the incorrectness of such notification was consequential upon the Producer having supplied incorrect, incomplete or misleading information. For the avoidance of doubt the foregoing indemnity does not extend to any claim by any party that a copyright musical work properly licensed under this Scheme infringes some other copyright musical work.

4.19

Nothing in this Agreement shall entitle the Producer to exercise the licences referred to in

clause 4 in relation to Discs where the appropriate consents and/or licences have not been obtained from the person(s) owning or controlling rights in relation to the sound recordings and/or performances contained on such Discs.

5. OVERPRESSINGS AND UNDERPRESSINGS

5.1

The Society recognises that, as a result of the process by which Discs are made, the number of Discs specified on the AFL or AFRL and for which orders are placed with Pressing Plants may not equate exactly with the number of Discs which are actually made and supplied to the Producer. Where this occurs, the provisions set out in this clause shall apply.

5.2

Where the quantity of Discs manufactured materially exceeds the quantity specified in the relevant AFL or AFRL, the Society reserves the right to issue supplemental invoices in respect of the excess quantity manufactured.

5.3

Where the quantity manufactured is materially less than the quantity specified in the AFL or AFRL, the Society shall at the request of the Producer made within 30 days of the relevant manufacture:-

- (a) where it is still holding in accordance with clause 15 sufficient sums in relation to those Discs, refund the royalties already paid in relation to the excess;
- (b) where it is not holding such sums, send the Producer a credit note in relation to further pressings of the same Disc with the same content and configuration of tracks or, if the invoice for those Discs remains unpaid, alternatively cancel that invoice and issue a revised invoice.

6. DEFINITION OF THE LICENCE

6.1

The Licence to Manufacture and Distribute Discs referred to in clause 4 is a non-exclusive licence, subject to the terms and conditions of this Agreement, to do the following acts in the United Kingdom in relation to the Musical Works or interests therein specified in the Licence:-

- (a) make audio-only master recordings of such Works for the purpose referred to in subclause (b) below;
- (b) make the quantity of Discs specified in the Licence with a view to their retail sale to the public for private use;

- (c) put such Discs as have been made under (b) above into circulation with a view to such sale.

6.2

In relation to each Disc separately, any licence referred to in clause 6.1 shall be conditional upon the Producer not being in such material breach of any one or more of the following provisions as would entitle the Society to terminate this Agreement under clause 21.1:-

- (a) those relating to the payment of royalties;
- (b) those relating to the purposes for which Discs may be made and/or supplied under this Agreement;
- (c) those relating to the circumstances in which Discs may not be made and/or supplied under this Agreement.

7. SCOPE OF LICENCE

7.1

The licence referred to in clause 6 does not apply to Premium Records.

7.2

The licence referred to in clause 6 applies to all Formats.

7.3

Where there are joint owners of a Musical Work, and the Society does not represent all the parties owning or controlling the rights in such Musical Work, the licence referred to in clause 6 is not a licence for the joint owner(s) whom the Society does not represent.

7.4

All rights other than those expressly granted in this Agreement are reserved, and, without prejudice to the generality of the foregoing, Discs made for purposes other than those referred to in clauses 6, 8.4 or 14 (by way of example only, Discs made and/or supplied for the purposes of broadcasting) are not covered by the licence referred to in clause 6.

8. RENTAL

8.1

It is hereby confirmed that, subject to clause 8.4, the licence referred to in clause 6 does not extend to the making or putting into circulation of such Discs by or on behalf of the Producer with a view to or with express or implied authorisation for either the rental thereof or the lending thereof by any library authority.

8.2

The Producer shall only carry out or authorise any such act after it has reached agreement with the Society as to the terms and conditions on which the same should take place, including the payment of a proportion of any royalties or fees

(if any) payable to the Producer in relation to such rental or lending.

8.3

Where either the Producer or the Society becomes aware of a third party's intention to rent or lend Discs made by or for the Producer without the Producer's consent, they will give notice of this to the other party.

8.4

The licence referred to in clause 6 does extend to the supply of Discs direct to a library authority (as defined by the Public Libraries and Museums Act 1964) for the purposes of such library authority renting or lending such Discs, where the Producer does not directly or indirectly charge, or receive a royalty or other fee in relation to such renting or lending.

9. FIRST RECORDINGS

9.1

Where in relation to any particular Musical Work no Disc embodying that Work has previously been manufactured in or imported into the EC with the consent of the party entitled to grant consent for such reproduction or importation, the licence referred to in clause 6 shall not apply in relation to that Work until all the relevant members of the Society owning or controlling the rights in that Work have consented to the grant of the licence in accordance with this Agreement.

9.2

Such consent shall be deemed to be applied for from the Society when following the procedure set out in clause 4. Alternatively, such consent may be applied for either from the Society or, direct from the relevant member(s) by using the consent form appearing at Annex B. Copies of such forms may be obtained from the Society. Where the Producer obtains consent direct from the member(s), the Producer shall when submitting the AFL to the Society as referred to in clause 4 send with it a copy of the completed and signed consent form.

9.3

In the event that the Producer bona fide wishes to know whether or not a particular Musical Work is subject to the restriction referred to in clause 9.1, the Producer may enquire of the Society also by using the standard form set out in Annex B. Such enquiry shall be sent to the Society by registered post and the Society shall respond to such enquiry within 7 working days of the receipt thereof. In the event that the Society fails to respond within such time, and subsequently the Producer has to make extensive and expensive enquiries which the Producer should not have needed to make had the Society responded, then the Society shall reimburse the Producer its costs in relation to such enquiries.

10. ARRANGEMENTS AND MORAL RIGHTS

10.1

For the purpose of exercising the licence referred to in clause 6 and subject to clause 10.5, the Producer may make such modifications to the relevant Musical Work(s) as the Producer considers necessary in order to satisfy the requirement of the relevant recording.

10.2

No such modification shall however be made which:-

- (a) would amount to an adaptation of the Work; or
- (b) would amount to a derogatory treatment of the Work within the meaning of Chapter IV of the Copyright Designs and Patents Act 1988

unless the relevant member of the Society or Associated Society has consented in writing thereto.

10.3

The licences referred to in clause 6 may only be exercised in relation to any modification which is authorised under clause 10.1, or to which the relevant member of the Society has consented in writing under clause 10.2.

10.4

Neither the Producer nor any party claiming through the Producer nor any party who carried out such modification may claim an interest in the copyright in the Musical Work, whether in its original or modified form, or any share of any income of whatsoever nature derived from the exploitation thereof, unless the relevant member of the Society has agreed otherwise, and any authority or consent contained in this clause or granted by the relevant member of the Society shall unless otherwise agreed be conditional upon no such claim being made.

10.5

Nothing in this Agreement affects the moral rights of the authors of Musical Works.

11. ROYALTIES PAYABLE

11.1

Save as otherwise provided herein, the royalties payable in relation to each order of Discs shall be 8.5% of the Published Dealer Price which will be applicable to the relevant Discs on the date of first distribution thereof, applied to the number of Discs the subject of that order.

11.2

Where the Producer has not published a Published Dealer Price in relation to the relevant Discs, but the Producer has published a fixed or suggested retail price in relation thereto the royalties payable shall be calculated at a

rate of 6.5% of the fixed or suggested retail price which will be applicable to the relevant Discs on the date of first distribution thereof, applied to the number of Discs the subject of that order.

11.3

In the event that the Producer is unable to show at the time the royalties are due that there will be in force a Published Dealer Price or fixed or suggested retail price (as the case may be) applicable to such Discs, the royalties shall be fixed by the Society on the basis of the price most generally used by other record producers in the United Kingdom for a comparable type of Disc.

12. TAXES

12.1

Before calculating the royalties payable on any Disc, Value Added Tax shall be excluded.

12.2

No other tax which forms part of the relevant price shall be deducted therefrom prior to calculation of the royalty.

12.3

The Producer shall pay VAT at the rate or rates from time to time in force on any royalties payable under this Agreement.

13. PRO-RATING PROVISIONS

13.1

This clause applies where a Disc reproduces Musical Works in the repertoire of the Society together with Musical Works which are not within the repertoire of the Society.

13.2

In such circumstances:-

- (a) where the AFL or AFRI specifies the duration of the Musical Works, the Society's share of the royalty shall be in the proportion which the duration of each of the Works in its repertoire bears to the total duration of all the Musical Works on the Disc in question;
- (b) in all other cases, the Society's share of the royalty shall be in the proportion which the number of tracks containing Musical Works in its repertoire bears to the total number of tracks on the Disc in question.

14. PROMOTIONAL COPIES

14.1

Discs which are manufactured and bona fide supplied free of charge only for the purposes of the genuine promotion of sales of other copies

of the Discs in question shall be exempt from the royalties otherwise payable under this Agreement on condition that the criteria set out in clauses 14.2 to 14.6 are fulfilled.

14.2

A Disc shall only be regarded as having been supplied for such purposes as are referred to in clause 14.1 where it is supplied to a broadcaster or disc jockey or critic or other party for the purposes of that party broadcasting it or playing it in public or reviewing it, or some other bona fide promotional situation. For the avoidance of doubt a Disc shall not therefore be regarded as having been supplied for such purposes where it is:-

- (a) distributed commercially; or
- (b) not supplied free of charge;
- (c) supplied free of charge but in consideration of or as a result of the party to whom it is supplied taking other Discs or other copies of the same Disc or giving other valuable consideration.

14.3

Each such Disc and the packaging thereof must at the time of manufacture be prominently marked with a non-removable or non-erasable notice carrying the words "PROMOTIONAL COPY - NOT FOR SALE".

14.4

The Producer shall maintain information in reasonable detail for a period of not less than 2 years as to the general nature and categories of the recipients of Discs supplied under the above provision.

14.5

The Producer shall at all reasonable times and upon reasonable notice allow access to its premises by representatives of the Society for the purposes of the Society checking the then current details of the numbers of Discs manufactured referred to in the above provisions and the persons, firms and companies to whom they are being supplied and the numbers supplied to each such person, firm or company and the Producer shall also maintain such information in such detail as will enable the representatives of the Society reasonably to verify during such access that the numbers of Discs being supplied under the above provisions broadly correspond with claims for royalty-free supply under Statements of Shipments.

14.6

The Producer shall specify in the AFL or AFRL (as the case may be) the number of Discs to which the provisions of clause 14.1 will apply. At the end of each calendar month, the Producer shall prepare a statement setting out by Licence number, title and Catalogue Number the Discs supplied by the Producer during that month which qualify under the above

provisions. The statement shall be delivered to the Society within 21 days of the end of each calendar month.

14.7

Where a Licence which includes Discs for which it is claimed the provisions of this clause 14 apply and the Discs manufactured under that Licence do not satisfy the provisions of clauses 14.1 to 14.6, then the Society may issue an invoice in respect of that Licence which shall be paid in accordance with clause 1.9, save that payment shall be made within 7 days of the date of the invoice.

15. ROYALTIES OPTION

15.1

The provisions of this clause will only apply where in relation to a particular order for Discs for which an AFL or AFRL is submitted:-

- (a) the royalties generated under this Agreement in relation to that order will be either more than £50 for each Musical Work in the repertoire of the Society reproduced thereon or more than £500 for the order such amounts to be increased on 1st January 1993 and each subsequent 1st January by the percentage increase in the latest Retail Prices Index by comparison with the equivalent figure in the corresponding month of the preceding year; and
- (b) the Producer elects to take such option at the time of submitting the AFL or AFRL; and
- (c) the Producer has demonstrated to the reasonable satisfaction of the Society that it is capable of accounting accurately and promptly in accordance with the provisions contained in this clause.

15.2

In such circumstances, the Society will not release the royalties paid in relation thereto to its members except as specified in this clause.

15.3

For every Accounting Period in respect of each Licence from the date of the relevant invoice to the completion of all procedures set out in clause 13.7 for that Licence the Producer shall prepare an accounting statement showing the total number of the relevant Discs which are the subject of that Licence which have been supplied by or for the Producer or the Producer's distributor, and the total number of Returns in that period by Format. The detailed information and format required in relation to such statement shall be in accordance with the Society's specification in relation thereto and

notified by the Society to Producer. The Society will give reasonable consideration to any reasonable proposal by the Producer for a variation in relation to the format thereof, provided that such variation will still enable the Society without additional expense to process the information in accordance with its normal procedure and release the royalties to its members expeditiously.

15.4

Such statement shall be delivered to the Society in the form of industry standard computer readable magnetic media within 21 days of the end of the Accounting Period referred to.

15.5

Upon receipt of the accounting statement referred to in clause 15.3, the Society may pay through to its relevant member(s) the royalties paid in relation to the number of Discs supplied less the number of Discs by Format and Catalogue Number which are Returns.

15.6

The Society may also pay through to its member(s) the total royalties or remaining royalties held by it in relation to the relevant order of Discs in the following circumstances:-

- (a) where the Producer submits an AFRL or further AFRL in relation to the same Discs in the same format with the same content and configuration of tracks; or
- (b) where the Producer fails to deliver an accounting statement in accordance with clause 15.4 within the time stipulated; or
- (c) where the Producer delivers an accounting statement which is materially inaccurate as regards the number of Discs supplied or the number of Returns; or
- (d) where the Producer agrees in writing.

15.7

Within 30 days after the expiry of four Accounting Periods as referred to in clause 15.3, the Producer shall by notice in writing to the Society elect to do one or more of the following in relation to the remaining stock of the relevant Discs (and, where it elects to do more than one, shall identify the number of Discs in respect of which each option is to apply):-

- (a) deliver up such Discs for destruction by the Society. Where the Producer elects to take this option, the Society shall within 14 days give written notice to the Producer of the address to which such Discs should be delivered up. Within 14 days of receipt of such notice, the Producer shall deliver the Discs to such address, having made prior arrangements as to the precise

delivery date, and, within 14 days thereafter, the Society shall refund the royalties payable in relation to those Discs which have been delivered up and the Society shall authorise or arrange the destruction of the Discs. If there is then any balance of royalties left, the Society may pay this through to its members.

- (b) delete them. In such circumstances, the Society will not later than 14 days after delivery of the invoices referred to in sub-clause (ii) below refund the difference between the royalties held in relation to those Discs and 10% of the gross price charged to the buyer(s) thereof exclusive only of VAT provided that:-

- (i) such Discs have been sold to one or more independent buyer, on an arm's length basis; and
- (ii) copies of the invoices to the buyer(s) thereof are delivered to the Society within 3 months of the one year period; and the Society may then pay the balance of royalties through to its members;

- (c) continue to sell them. The Society may pay through the remaining royalties to its member(s).

15.8

If the Producer fails to give a notice of election under clause 15.7, it shall be deemed to have elected to take the option under clause 15.7(c).

15.9

Where the Producer gives notice of election under clause 15.7 (a) or (b), and there are any sums arising under this Agreement which should have been paid but have not been paid, the Society may use any sums due to be refunded to the Producer to pay such invoices.

15.10

No interest shall be payable to the Producer on any sums referred to in this clause, and no refund of monies shall be made except as specifically set out in this clause.

16. NOTICES AND CREDITS

16.1

Each Disc reproducing a Musical Work in the repertoire of the Society shall bear the initials "MCPS".

16.2

A notice to the following effect shall appear on the label on each side of the Disc:-

"ALL RIGHTS OF THE PRODUCER AND OF THE OWNER OF THE WORKS REPRODUCED RESERVED."

UNAUTHORISED COPYING, HIRING, LENDING, PUBLIC PERFORMANCE AND BROADCASTING OF THIS RECORD PROHIBITED."

16.3 On the label of each Disc there shall be reproduced:-

- (a) the title of each Musical Work reproduced thereon;
- (b) the name of each composer;
- (c) the name of each author;
- (d) the name of the arranger of the words and/or music where applicable.

16.4 Where it is technically impossible for the Producer to comply with clause 16.3 such information may be reproduced as follows:-

- (a) on the sleeve of the Disc; or
- (b) on the cardboard insert; or
- (c) on the surface of the Disc itself.

16.5 The Producer shall use its reasonable endeavours to include on the label (or as set out in clause 16.4) the name of the United Kingdom publisher of each Musical Work in the repertoire of the Society.

16.6 The Producer shall procure that each Disc is given a unique Catalogue Number applicable only to Discs with the same content and configuration of tracks. Each Format thereof must bear either a different Catalogue Number or a different prefix or suffix within that Catalogue Number.

17. SUPPLY OF INFORMATION

17.1 The Producer shall on entering into this Agreement, and during its continuance, supply to the Society the following documents without charge as soon as possible following the publication or issue thereof:-

- (a) two copies of all catalogues, supplements to catalogues and lists or notifications of New Releases and Re-Releases;
- (b) two copies of each list of Published Dealer Prices or fixed or suggested retail prices and each amendment or addition thereto.

17.2 At the request of the Society the Producer shall also furnish it free of charge with:-

- (a) one copy (which shall be exempt from royalty payment) of any Disc;
- (b) one copy of the label, sleeve or insert relating to any Disc.

17.3 The Producer must notify the Society forthwith of any Disc which it deletes from its catalogue.

17.4 The Producer must also supply the Society with any further information or documentation in its possession, power, custody or control (and use its best endeavours to supply the Society with any further information or documentation not in its possession, power, custody or control) reasonably requested by the Society at any time, in order to enable the Society to verify the Musical Work(s) which are or will be reproduced on any Disc made and/or distributed by or for the Producer or its Co-Exploitants or to verify that the Producer is abiding by the terms and conditions of this Agreement.

18. CO-EXPLOITANTS

18.1 The Producer shall use its best endeavours to procure that its Co-Exploitants:-

- (a) at no time act or fail to act in such a way as would cause the Producer to be in breach of this Agreement;
- (b) co-operate fully with the Society and its representatives in the application of this Agreement including, without limitation, providing the Society with every facility for checking pressings undertaken for the Producer.

18.2 In exercising the licence to make Discs in accordance with clause 6, the Producer may only use a Co-Exploitant so to make such Discs if:-

- (a) such Co-Exploitant appears on the Society's approved list (a copy of which will be supplied on signature of this Agreement to the Producer by the Society, with any changes thereto being promptly notified to the Producer); or
- (b) the Society consents, such consent not to be unreasonably withheld or delayed.

19. AUDITS

19.1 The Producer shall upon entering into this Agreement inform the Society of the addresses of the Warehouses (or in the case of moveable Warehouses the addresses at which they are normally situated) used for storing Discs the subject of this Agreement and shall promptly notify any changes to any such locations.

19.2

The Producer shall permit the Society by its duly authorised representatives at all reasonable times to have access to the Warehouses for the purpose of inspecting and checking the stocks of such Discs.

19.3

Where the Producer does not have its own warehousing facilities, the Producer shall use its best endeavours to procure reasonable rights of access to the warehouses of its Co-Exploitants for the duly authorised representatives of the Society.

19.4

The Producer shall keep proper accounting records dealing with its activities the subject matter of this Agreement, and, without prejudice to the generality of the foregoing, setting out in particular the following:-

- (a) the manufacture and supply of Discs;
- (b) the export of Recording Matrices;
- (c) the import of Recording Matrices;
- (d) the PPD and/or fixed or suggested retail price of Discs;
- (e) any supply of Discs under clause 14, together with the information maintained under clauses 14.5 and 14.6;
- (f) the dates and amounts paid in respect of mechanical royalties on Discs together with the identity of the party to whom such payments were made.

19.5

These accounting records shall be maintained to a standard sufficient to enable an audit trail to be established and followed through.

19.6

Such accounting records together with any supporting documentation relating thereto shall be open for inspection (both during and for 9 months after termination of this Agreement) by representatives of the Society upon reasonable notice and no more than once a calendar year, unless payment of any invoice is over 28 days in arrears. For these purposes, the Producer shall allow access to the premises of the Producer. The Society's representatives shall be entitled to inspect, make extracts and take copies of the information available, and to carry out such work as is in their reasonable opinion considered necessary to verify the royalties due to the Society, including for the avoidance of doubt the examination of stock movements.

19.7

The reasonable costs of the Society in auditing the Producer under this Agreement shall be borne by the Society except in circumstances where the audit report (a copy of which shall be made available to the Producer within nine months of the commencement of the audit) discloses underpayment of royalties in excess of

a sum equal to the greater of £1000 or 7¼% of the total royalties found due for the calendar year or any other financial period to which the audit relates. In that event and provided that either:-

- (a) the Producer agrees and accepts that such unpaid royalties are due; or
- (b) the quantum of unpaid royalties is determined by the Court as a result of legal action

the said reasonable fees shall be paid by the Producer.

19.8

The Society undertakes to use its best endeavours to ensure that audits are carried out expeditiously to enable audit reports to be provided to the Producer within the nine month period specified in clause 19.6

19.9

Any royalties accepted by the Producer as being unpaid or so adjudged by the Court shall be paid in full by the Producer to the Society within 30 days of acceptance or judgment to the Society and shall carry interest calculated in accordance with clause 21.6.

19.10

The agents of the Society with access to the premises of the Producer under clause 19.6 shall subject to clause 19.11 be independent qualified Chartered or Certified Accountants (or persons employed by or under the supervision of the same), and shall not directly or indirectly own any interest in any phonographic business or trade.

19.11

Where the turnover of the Producer from the sale of Discs for the four Quarters preceding the commencement of the relevant audit has not exceeded £5 million (such figure to be increased on 1st January 1993 and each subsequent 1st January by the percentage increase in the latest Retail Prices Index by comparison with the equivalent figure in the corresponding month of the previous year), the agents of the Society with access to the premises of the Producer under clause 19.6 may be:-

- (a) qualified Chartered or Certified Accountants who are employees of the Society; and/or
- (b) the Manager of the Society's Audit Department (or some other person employed by the Society of equivalent rank); and/or
- (c) persons employed by the Society under the supervision of any person referred to in (a) or (b).

Where an audit is carried out in accordance with this sub-clause, clause 19.7 shall apply as if the words "the greater of £1000 or" were deleted. Further, if the Producer is required to

pay the said reasonable audit costs in such circumstances and there is a bona fide dispute as to whether the fees claimed by the Society are reasonable, then provided that the Producer pays to the Society a sum representing its bona fide determination of the said reasonable fees, the Society shall not, pending settlement or determination by a court of competent jurisdiction of the reasonableness of the fees, exercise, by virtue of the Producer's failure to pay such fees, any right to refuse to grant licences or to terminate this agreement.

19.12

The obligation as to confidentiality referred to in clause 22.2 shall for the avoidance of doubt apply in relation to such audits as are referred to above and the Society shall procure that all its staff, agents and inspectors carrying out audits on behalf of the Society are notified of the obligation not to disclose information which is confidential to those who are not entitled to such information.

20. CIRCULATION OF RECORDING MATRICES

20.1

The Producer shall not export a Recording Matrix reproducing a Musical Work in the repertoire of the Society from the United Kingdom or authorise the export thereof or supply such a Recording Matrix for the purposes of such export except in the following circumstances:-

- (a) where the territory to which the Matrix is exported is a member of the Berne Convention or the Universal Copyright Convention, and each Musical Work reproduced thereon is not protected by copyright in that territory; or
- (b) where the party to whom the Matrix is exported has an agreement with an Associated Society under which that party will pay mechanical royalties in relation to Discs which are copies thereof; or
- (c) where the Society has previously consented thereto, such consent not to be unreasonably withheld or delayed. The Society shall by way of example be entitled to withhold its consent where it reasonably considers that it has no satisfactory evidence that mechanical royalties will be paid by the consignee. The Society shall be entitled to impose reasonable terms and conditions for the grant of consent in order to prevent any infringement of copyright of Musical Works in its repertoire.

20.2

Upon the Producer exporting a Recording Matrix reproducing a Musical Work in the repertoire of the Society, or authorising the export thereof, or supplying a Recording Matrix for the purposes of such export, the Producer shall forthwith notify the Society in writing of the following information:-

- (a) the name and address of the consignee;
- (b) sufficient details to enable the Society to identify the recordings included on the Recording Matrix.

21. SANCTIONS AND CANCELLATION OF THE CONTRACT

21.1

The Society shall have the rights set out in clause 21.3 where the Producer:-

- (a) commits a material breach of this Agreement which is capable of remedy and fails to remedy such breach within 14 clear days after receipt by the Producer of a formal notice served by registered post specifying in reasonable detail the breach on which the Society relies;
- (b) commits a material breach of this Agreement which is not capable of remedy, or commits fraud, in which event the Society shall specify in reasonable detail the fraud or material breach on which the Society relies, by notice to the Producer.

21.2

No notice served under clause 21.1 in respect of any failure to comply with clause 16 may require remedy other than with effect from the first subsequent repressing or reprinting of the item in respect of which the relevant obligation under clause 16 applied, unless there has been a previous failure in relation to the same information and the same Disc by Catalogue Number.

21.3

In such circumstances, the Society shall have the right to terminate this Agreement forthwith, without prejudice to any rights which have already accrued to the Society or its members under this Agreement or to the Producer.

21.4

The Society shall in addition have the right referred to in clause 21.3 where there has been a material change in the factors on the basis of which the Society granted the Producer this Agreement provided that:-

- (a) the Society shall have given the Producer 28 days notice in writing specifying the material changes relied on;

(b) the Producer may within 7 days of such notice elect to have the matter reviewed by the Joint Record Agreement Committee by notice in writing to the Company Secretary of the Society.

21.5 Upon the Society validly terminating this Agreement in accordance with the above provisions, the royalties as calculated under this Agreement shall become due on the total number of Discs remaining in the possession, power, custody or control of the Producer.

21.6 Without prejudice to any other right or remedy of the Society or its relevant member(s), where the Producer fails to pay any sum arising under this Agreement by the date on which it should have been paid, the Society shall be entitled to require daily interest to be paid from the date on which payment should have been made to the date when payment is made, calculated at a rate of 3% above the base rate of National Westminster Bank plc for that day, or, in the absence of such base rate, such equivalent rate as the Society shall determine within its reasonable discretion.

21.7 If the Producer shall cease to trade, or have a winding-up Petition presented against it which is not dismissed or withdrawn within 21 days, or goes into voluntary liquidation (other than for the purposes of reconstruction or amalgamation), or makes any composition with its creditors, or if a Trustee, or Receiver or Administrative Receiver is appointed to take over all or a substantial part of its assets and undertaking and such appointment is not discharged within 21 days, or, being a subsidiary company, its parent suffers such an event, then the Society is entitled to terminate this Agreement immediately. In such an event, any invoices which have not yet become payable shall become payable forthwith.

21.8 The Producer shall have the right to terminate this Agreement on giving at least 3 calendar months notice in writing not to expire except on the last day of a calendar month.

21.9 Upon termination of this Agreement, the terms and conditions of this Agreement shall, save where otherwise expressly stated, continue to have effect as regards Discs in relation to which royalties have already been paid.

21.10 Upon the Society properly giving notice of termination in accordance with clauses 21.3, 21.4 or 21.7, the Society may deduct from any deposit or advance paid to the Society such amount as is required to pay any sums payable under this Agreement.

21.11 After termination of this Agreement (other than by the Society under clause 21.3 or 21.7) the Producer may place at the disposal of a third party which has signed an agreement with an Associated Society to pay mechanical royalties any Recording Matrix which has been lawfully made and/or exploited provided that such third party reaches agreement with such Society that the terms of its agreement with that Society will govern the exploitation of such Recording Matrix. Subject thereto, the Producer shall not exploit the relevant Recording Matrix or authorise such exploitation or supply the Recording Matrix for the purposes of such exploitation without the consent of the Society or the Society's relevant member.

22. FINAL CLAUSES

22.1 This Agreement shall come into effect on the Commencement Date.

22.2 Save for the purposes of complying with its obligations to the Producer or to its members or to any Associated Society and save for disclosure to its professional advisers, the Society shall not, without the Producer's written consent, disclose any confidential information (so long as it remains confidential) supplied by the Producer hereunder to any other person or Society.

22.3 For the purpose only of calculating interest under this Agreement where any payment or statement is sent by first class post:- (a) the postmark shall be sufficient proof of the date the payment or statement was sent; and (b) such payment or statement shall be deemed to have been received before close of business on the second working day after posting.

22.4 This Agreement shall be subject to the laws of the United Kingdom and both parties agree to submit to the jurisdiction of the High Court of England and Wales.

Mechanical Copyright Protection Society Limited
Elgar House, 41 Smeetham High Road, London SW16 1ER

Tel: 020 8664 4583/4618 Fax: 020 8677 4614

E-mail: ap.info@mcps.co.uk

mcps

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BIEM-IFPI
STANDARD CONTRACT FOR
THE PHONOGRAPHIC INDUSTRY 1975
(DISCS, TAPES AND CASSETTES)

Doc. N° 98/1490 - English

30 June 1998

The text hereafter includes the following amendments :

- Amendment No. 1 signed on 9 October 1980 with effect from 1st July 1980
- Amendment No. 2 signed on 28 February 1985 with effect from 1st January 1985
- Amendment No. 3 signed on 14 September 1988 with effect from 1st January 1988
- Amendment No. 4 signed on 19 June 1989 with effect from 1st January 1989
- Amendment No. 5 signed on 31 December 1989 with effect from 1st January 1990
- Amendment No. 6 signed on 12 December 1992 with effect from 1st October 1992
- Amendment No. 7 signed on 30 June 1998 with effect from 1st July 1997 until 30 June 2000

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BETWEEN THE UNDERSIGNED

(1) (The Society)

whose registered office is at
hereinafter called "the Society", represented by Mr

of the one part

AND

(2)

hereinafter called "the Producer", represented by Mr

of the other part

IT HAS BEEN AGREED AS FOLLOWS:

ARTICLE I - REPERTOIRE OF THE SOCIETY

(1) The repertoire of the Society consists of those works in which the management of the right of phonographic reproduction has been handed over or will be handed over to it, in its capacity as a member Society of BIEM (see Annex I), to the extent that such management is entrusted to the Society.

(2) The definition of the rights of management entrusted to the Society in the field of phonographic reproduction is annexed to the present contract (see Annex II) and the Society undertakes to keep it up to date.

(3) If an owner of phonographic reproduction rights has a current contract with the Producer at the moment he comes to be represented by the Society within the meaning of paragraph (1) above, such contract shall be replaced by the present contract, it being understood that the Society shall bind the said owner vis-a-vis the Producer for a period equal to that of the duration of the present contract. The same provision applies in the case of a Society managing the rights of phonographic reproduction for all members of such Society. At the request of the Producer, the Society shall supply to the latter proof of the adherence of the owner concerned to the conditions of the present contract. If the contracts referred to above have a duration longer than that of the present contract, they shall be suspended only for the duration of the latter.

ARTICLE II - OBJECT OF THE CONTRACT

Rights granted

(1) The Society grants to the Producer, under the terms and within the limits fixed by the present contract, the non-exclusive right to proceed to the making of sound recordings of the works of the Society's repertoire, to make copies of these recordings by way of discs, tapes and cassettes produced and presented for aural use only, and to put such discs, tapes and cassettes in circulation under his mark or marks with a view to their sale to the public for private use.

(1bis) The rights granted to the Producer under the terms of the present contract do not include the right to rent, but it is understood, however, that whenever the Society or the Producer is aware of a third party's intention to use legally produced sound carriers for the purposes of rental, notice of this must be given to the other party which is not in possession of this information. Av. N°4

The Producer may give his consent to the rental of legally produced recordings, provided that this authorization does not affect the financial interests of the right-owners represented by the Society and allows them to collect the appropriate remuneration.

In the event that the Producer forbids rental, the Society undertakes not to issue a rental licence for those sound carriers.

This paragraph (1bis) shall be considered null and void in territories where national legislation or any other regulations applicable in the said country prevents its application.

(2) The object of the present contract is expressly limited to discs, tapes and cassettes listed in the Producer's catalogues, supplements to catalogues and lists of new issues which are made available to the public in accordance with the usual practice of the retail trade.

(3) Agreements to be concluded between the Society and the National Group of IFPI in application of Annex III of the present contract shall be considered as forming an integral part of this contract one month after being submitted to BIEM and IFPI for examination.

(4) The present contract applies exclusively to the following discs, tapes and cassettes as known and exploited on 1 July 1997:

- Vinyl discs (45 rpm-33 rpm)
- Compact Discs singles of 3 or 5 inches
- Normal Compact Discs of 5 inches only
- Analogue cassettes
- Digital Compact Cassettes (DCC)
- Mini Discs (MD)

DAT and DVD are excluded from this Contract. Every other form of mechanical reproduction shall be subject to a separate contract. Av. N° 7

Special uses

(5) In the case of the secondary use of discs, tapes and cassettes either directly (for broadcasting and public performance) or indirectly (by way of re-recording), the Society shall not raise any obstacle to the absolute freedom of the Producer to exercise his rights in regard to the artistic and/or technical recorded performance, it being understood that the copyright owners preserve intact their rights in the work recorded.

Exceptions

(6) In exceptional cases and for well founded reasons, the Society reserves the right to forbid or defer the phonographic exploitation of one or more specified works of its repertoire as defined in Article I (1) throughout the territory controlled by the member societies of BIEM, such works not having been already reproduced in phonographic recordings lawfully made in or imported to the said territory.

However, where it is a question of the full reproduction of a work originally created for theatrical representation or of large extracts giving a complete idea of such a work, the prohibition may be limited to one part of the said territory. These measures shall be applied to all producers having a contract similar to the present contract with a member Society of BIEM and they shall be withdrawn under the same conditions. The Society shall inform the Producer of the lifting of the prohibition fifteen days before the date on which it is to take effect. As soon as the Society shall be advised of such measures by its members, it shall inform the National Group of IFPI.

In the case of geographically limited prohibitions, the Society shall also make known to the broadcasting organisations in its territory that any disc, tape or cassette reproducing the work in question shall constitute an infringement.

Previous authorizations

(7) Recording matrices and discs, tapes and cassettes lawfully exploited by the Producer by virtue of authorizations previously granted by the Society or by BIEM shall be subject to the provisions of the present contract.

Most favoured party clause

(8) The Society may claim with immediate effect the benefit of any provision contained in contracts or agreements which the Producer may have concluded with authors or copyright owners, non-members of the Society, for the phonographic exploitation of their works, if it considers that such provision is more advantageous for itself than the corresponding provision of the present contract or if the said provision constitutes for the non-member authors or copyright owners of the Society an advantage not provided for in the present contract.

(9) Reciprocally, the Producer may claim with immediate effect the benefit of any provision in contracts or agreements which the Society may conclude with other producers for the phonographic exploitation of works of its repertoire if he considers that such provision is more advantageous to him than the corresponding provision in the present contract or if the same provision constitutes for these other producers an advantage not provided for in the present contract.

(10) In the application of the two preceding paragraphs, it is understood that any provision considered as more advantageous will be considered in conjunction with any compensating provision.

(10 bis) If national legislation stands in the way of the application of the three preceding paragraphs, the Society and the National Group of IFPI may agree on provisions to be substituted for them to conform with such legislation.

(11) The Producer undertakes to bring to the notice of the National Group of IFPI any more advantageous terms which he may agree with copyright owners, non-members of the Society, it being the responsibility of the National Group of IFPI to inform the Society. Reciprocally, the Society shall inform the National Group of IFPI of any more advantageous terms which it may agree with other phonographic producers.

(11bis) If national legislation and/or the regulations of the European Union prevent the application of paragraphs (8), (9), (10) and (11), these provisions shall be deemed null and void.

ARTICLE III - MORAL RIGHT

(1) Any modifications to a work which the Producer considers necessary to apply in order to satisfy the requirements of recording shall not have the effect of altering the character of the work and the Society expressly reserves the moral right of the authors. In particular, no alteration shall be made to the musical or literary text of literary, dramatic, dramatico-musical and symphonic works.

(2) The Producer who, at the time of recording, shall have modified a work as mentioned in the preceding paragraph, shall not be entitled to participate in the mechanical rights or performing rights derived from the exploitation of the work recorded.

ARTICLE IV - MARKS EXPLOITED

(1) The right defined in Article II is granted only for the marks declared by the Producer, namely:

.....

(2) The same right shall be extended to any new marks which the Producer may issue or exploit, provided he informs the Society in advance of his intention in this regard. If the mark in question has already been declared by a national producer who is signatory to a contract similar to the present contract, the Society shall inform the latter producer of this.

(3) If the Producer declares any existing marks, the same right shall only be extended to them following the fulfilment of any obligations to the Society, or to another member Society of BIEM, which might arise as a result of the previous exploitation of these marks, it being understood that this provision shall not apply where the Producer acquires the mark only and not the catalogue.

(4) The declarations referred to in paragraphs (1), (2) and (3) above are made on the sole responsibility of the Producer who guarantees the Society against all claims relating to the marks declared by him.

(5) In cases where one or more of the Producer's marks, as declared above, are exploited by another producer, each producer shall only be responsible to the Society in respect of that mark or marks for his own production on condition that such production is easily identifiable.

(6) In so far as it has knowledge thereof, the Society shall be bound to inform the Producer of the importation of discs, tapes and cassettes bearing the marks that he has declared, such discs, tapes and cassettes having been supplied to third parties.

ARTICLE V - BASIS OF ROYALTY**Protection**

(1) The royalty shall apply to every work graphically protected in its country of origin, the country of origin for unpublished works being the country of nationality of the author and for published works either the country of nationality of the author or the country of first publication of the work according to the legislation which affords the longer period of protection. The relevant period of protection is that accorded by the law of the country of sale of the disc, tape and cassette provided always, and subject to bilateral or multilateral conventions between the countries, that such protection shall not exceed the period of protection accorded by the law of the country of origin of the work. Where the law of the country of sale of the disc, tape and cassette does not protect literary and musical works, the law of the country of manufacture of the disc, tape and cassette shall apply.

Arrangements or adaptations

(2) Where the Society claims from the Producer payment of a royalty for an arrangement or adaptation under the control of the Society, the original and lawful character of such arrangement or adaptation shall be sufficiently established by the fact of its publication as such in print, showing the name of the arranger. In the case of an unpublished arrangement or an unpublished adaptation, its original and lawful character shall be presumed, unless proved to the contrary, by the fact of its deposit or declaration, depending on the competent Authors' Society's rules, prior to the date of recording provided that such deposit or declaration shall have been accepted.

Calculation of royalty

(3) The Producer shall pay to the Society for each disc, tape and cassette reproducing one or more works of the repertoire of the Society a royalty the rate of which and the domain of application of which are fixed in Annex IV of the present contract.

(4) Subject to paragraph (5) below, the royalty shall be calculated on the highest price appropriate to the copy in question as published by the Producer (PPD) with a view to retail sale on the day of outgoing from the depot in the list mentioned in Article VII (4)c). The price defined above (PPD) shall be subject to a flat rate adjustment of 9% warranted by invoiced discounts which are usually applied.

Av. N° 7

(5) If the Producer has fixed or suggested retail prices in the national territory and such prices are generally paid by the public, the corresponding royalty shall be calculated on those prices as they appear on the list mentioned in Article VII (4)c) on the day of outgoing from the depot.

Av. N° 2

(6) If the Producer is not in a position to furnish the Society with any of the lists mentioned in Article VII (4)c), the royalty shall be fixed by the Society on the basis of the price most generally practised by other national producers for each type of disc (rotation speed, diameter and configuration), similarly for each configuration of tape and cassette.

Exports

(7) In respect of exports to non-European countries, other than U.S.A. and Canada, the royalties shall be calculated and paid in accordance with the prices applicable and all the terms agreed in the country of destination, including in particular those relating to minimum royalties.

(7 bis) Nevertheless, the National Group of IFPI and the Society may agree to apply to such exports a royalty calculated and paid in accordance with the prices applicable and all the terms agreed in the country of origin.

(8) In respect of exports to European countries, except shipments within the EU, where the Producer supplies an importer who is not a licensee nor an affiliate, the royalties shall be calculated and paid in accordance with the prices applicable and all the terms agreed in the country of destination, including in particular those relating to minimum royalties.

In respect of shipments within the European Union, where the Producer supplies a distributor who is not a licensee or an affiliate, the royalties shall be calculated and paid in accordance with the prices applicable and all the terms agreed in the country of origin, including in particular those relating to minimum royalties.

(9) In the case of exports to European countries not belonging to the European Union, where the Producer is supplying an importer who is a licensee or an affiliate, statements of outgoings relating to such exports may, unless the Producer chooses to exercise the option provided for in Article V(10), be made by the Producer by deducting from the number of discs, tapes and cassettes issued from his depot, the number of discs, tapes and cassettes remaining in stock in the depot of the importer at the end of each accounting period, it being understood that the outgoings of the importer shall be treated in accordance with the prices applicable and all the terms agreed in the country of destination between the National Group of IFPI and the national collecting Society.

Av. N° 7

In the case of exports from European countries outside the European Union to countries belonging to the European Union, where the Producer is supplying an importer who is a licensee or an affiliate, statements of outgoings relating to such shipments may, unless the Producer chooses to exercise the option provided for in Article V(10), be made in the manner described above.

In the case of shipments within the European Union, where the Producer is supplying an importer who is a licensee or an affiliate, statements of outgoings relating to such shipments may, unless the Producer chooses to exercise the option provided for in Article V(10), be made in the manner described above, but the outgoings shall be treated in accordance with all the terms agreed in the country of origin, except that the prices applicable shall be those of the licensee or affiliate in the country of destination, as defined in Article V(4).

In order to benefit from the provisions of the present paragraph (9) the Producer must be able to show that the consignee is a signatory of a contract with a member Society of BIEM similar to the present contract and these shipments will be subject to the right of control by the two societies concerned.

(9bis) The National Group of IFPI and the Society may agree to substitute a flat rate deduction for the above-mentioned system of deductions and for exports under paragraph (7) above, it being understood that national provisions for returns will not apply to outgoings for which a flat rate deduction has already been applied. Av. N° 5

(10) Nevertheless, subject to prior notice having been given by the Producer to the two societies concerned and in the absence of a joint objection being made for well-founded reasons by those societies notified within four weeks of such notice, the statements of outgoings and the corresponding royalties which relate to shipments coming within paragraph (9) above shall be rendered and paid by the consignee to the Society and/or the copyright owner or the copyright owner's authorised representative in the country of destination, provided that the consignee is a signatory of a contract similar to the present contract with that Society and/or the copyright owner or the copyright owner's authorised representative, in accordance with the prices applicable and all the terms in force in the country of destination.

The Society in the country of destination is entitled to exercise control, as provided for in Article XIII of the present contract, with respect to such shipments of imported discs, tapes or cassettes. Av. N° 7

(10 bis) The application of the preceding paragraph may be terminated at the end of any accounting period if the societies in both countries jointly raise objection for well-founded reasons by giving at least four weeks' advance notice to the Producer.

(10 ter) The dispositions of Article V(10) and V (10 bis) may also apply to exports into non-European countries, where the phonographical right in the repertoire is not exclusively represented by a BIEM member Society. If the Producer is unable to provide reasonable evidence that the correct royalty has been paid to the copyright owner or the copyright owner's authorised representative, then the Producer shall pay the royalty calculated in accordance with the current export provisions, to the Society.

(11) The Producer is authorized to bring together in a single statement outgoings not exceeding a number which shall be fixed by mutual agreement between the Society and the National Group of IFPI, it being understood that such outgoings shall be assimilated to sales in the national territory. The number of copies thus agreed shall not be less than thirty nor more than one hundred per country, per catalogue number and for each accounting period.

Mixed Copies

(12) Where a disc, tape or cassette reproduces works of the Society's repertoire together with works not belonging to the Society's repertoire, the Society agrees to accept, when such works are of roughly equal playing time, a share of the royalty in the proportion which the number of works of its repertoire bears to the total number of works reproduced on that disc, tape or cassette.

(13) Where the works reproduced are of appreciably different playing times, the Society's share of the royalty shall be in the proportion which the playing time of each of the works of its repertoire, rounded off to the minute above, bears to the total playing time of the disc, tape or cassette in question. Where fragments of works of the Society's repertoire are involved, if the playing time is less than one minute it shall be rounded off to one minute and if the playing time is more than one minute but less than one minute forty-five seconds, it shall be rounded off to one minute forty-five seconds.

(14) The share of royalty thus attributed to a work or to a fragment of a work of the Society's repertoire shall never be less than the fraction corresponding to the number of works or fragments of works indicated in Article VI (5) and VI (5 bis) of the present contract.

(15) Where in a protected work comprising music and words, the words only or the music only belong to right-owners represented by the Society, the share administered by the Society shall be determined in accordance with agreements made by the Society and/or by the right-owners which it represents with the other right-owners. In the absence of such agreements the share administered by the Society shall not be less than one-half of the full royalty.

Returns

(16) The royalty is due at the moment of the despatch of the disc, tape or cassette from the depot or depots of the Producer. Nevertheless, the royalty shall not be paid if the disc, tape or cassette is returned to such depots and entered as a return in the relevant accounting documents, it being understood that the present provision applies only to discs, tapes and cassettes returned as part of transactions which do not involve any kind of payment to the Producer for such discs, tapes and cassettes.

(17) The total returns for one accounting period should never exceed the total outgoings for the same period for the same disc, tapes and cassettes involving the same copyright owners. In applying this provision, the excess of returns over outgoings may be carried forward to succeeding accounting periods.

(18) Royalties on new issues, that is to say discs, tapes and cassettes put into circulation under a new catalogue number and appearing as such in the Producer's publications, if any, shall be discharged in accordance with the following conditions:

a) at the end of each accounting period falling within a period of twelve months from the commencement of the accounting period in which the original outgoings were made, the Producer is entitled to account for 90% of the outgoings, determined in accordance with paragraphs (16) and (17) above;

b) at the end of the accounting period coinciding with the expiration of a period of six months following the twelve months referred to in the preceding paragraph, the Producer shall, if necessary, account for the balance of 10% taking into account any returns not hitherto deducted;

c) the provisions of the present paragraph shall not apply if the Producer's system of distribution does not take account of returns either for national sales or for exports.

(18 bis) The Society and the National Group of IFPI may by agreement substitute for the provisions of paragraph (18) above a system of fixed percentage deduction or any other appropriate system of deduction.

Article V
Bargain sales

(19) Notwithstanding the provision of paragraph (4) above, the royalty for discs, tapes and cassettes of symphonic, dramatico-lyric and chamber music deleted from the Producer's catalogue and sold in bargain sales not less than two years after the date of first release and offered to the public expressly as a bargain, shall be calculated at 10% (ten per cent) of the Producer's gross invoice price with no deduction other than that of the duties and taxes provided for in paragraph (20) below.

For pop LP discs, compact discs and cassettes, the above period shall be reduced to six months and for pop singles to three months.

The number of phonograms which may benefit from the application of this provision must not exceed:

for 45rpm, CD singles of 7 or 12 cm and single cassettes	10%	
for all other configurations referred to in Article VI (5) and VI (5 bis)	5%	Av. N° 4

of the number of phonograms sold by the Producer and regulated by the Society during the preceding year.

For phonograms falling lawfully within the application of the provision concerning bargain sales, minimum royalties are applicable amounting to 20% of the normal minimum royalty.

Deductions for returns in the case of bargain sales are not permitted.

It is stipulated that the Producer is not authorized to manufacture solely for the purpose of benefiting from the present provisions concerning bargain sales.

Taxes

(20) In the calculation of royalties, VAT, purchase tax, sales tax, luxury tax and any other identical or similar tax shall be deductible.

(21) The deduction of any other tax which may be established in the country of the Producer during the term of the present contract shall be subject of an agreement between the Society and the National Group of IFPI.

(22) If the national law requires that the Producer shall pay, through the intermediary of the Society, a tax on the total of royalties payable under the present contract, the said tax shall be paid over to the Society over and above such royalties.

Deductions

(23) The royalty shall be calculated on the dealer price (PPD) as adjusted according to Article V(4) and after deduction of a flat rate of 10% in the case of the highest price resulting from Article V(4). A flat rate deduction of 7.5% shall apply to the retail price referred to in Article V(5). These deductions are granted in consideration of the superior quality of the covers designed individually for the record which they enclose (packaging). Av. N° 3

(23 bis) In the case of cassettes, the royalty shall be calculated on the dealer price (PPD) after deduction of the adjustment referred to in Article V(4) and of the flat rate deduction referred to in Article V(23). No other deduction is applicable by reason of this clause to other tapes.

(23 ter) Complementary to the deductions referred to in Article V(4) and V(23) here-above, a transitory deduction will apply to Digital Compact Cassettes and Mini Discs for the duration of the standard agreement, subject to review on 30 June 2000. The deduction will be 25% and is allowed taking into consideration the evolution of DCC and MD in terms of their respective market penetration and other circumstances. The royalty rate resulting from this transitory deduction will be 6.757% on the PPD or 5.55% in case the royalties are calculated on the Retail Price.

Av. N° 7

Exempt copies

(24) First pressings of new issues as defined in Article V(18) shall be exempt from royalty payments up to copies intended by the Producer for national and international promotion purposes and for submission to critics. Such copies, which must not be distributed commercially and must be free of charge, shall appear in the statements of outgoings of the Producer for audit purposes. On each copy there shall be non-removable and non-erasable notice carrying words agreed between the Society and the National Group of IFPI indicating that they are not for sale.

Av. N° 5

TV Advertising

(25) Discs, tapes and cassettes which are subject to TV advertising campaigns may benefit from special terms and conditions to be fixed by mutual agreement between the Society and the National Group of IFPI.

Av. N° 6

ARTICLE VI- ROYALTIES**Minimum royalties**

(1) In Continental Europe, including Turkey, the minimum royalty shall be equal to two-thirds of the royalty fixed by the first paragraph of Annex IV of the present Contract and calculated on the PPD or the retail price, as the case may be, most generally practised by the members of IFPI in each country for each type of sound carrier (rotation speed, diameter or configuration).

Av. N° 3

(1 bis) In the case of discs, tapes and cassettes which have been re-released not less than 1 year after the original date of release and which are priced at 35% below the original price or less, the minimum royalty shall be equal to 57% of 66.66% of the royalty fixed in accordance with the present Contract and calculated on the PPD or the retail price, as the case may be, most generally practised by the members of IFPI in each country for each type of sound carrier (rotation speed, diameter or configuration).

Av. N° 7

However, no royalty payment shall be less than 9.009% of the PPD, or as the case may be 7.4% of the retail price, applicable to the re-released disc, tape or cassette recording to which it relates. In the case of discs, tapes or cassettes which qualify for a transitory deduction under Article V (23 ter) no royalty rate shall be less than the net rate resulting from application of this clause.

(2) The prices serving as the basis of calculation of the minimum as provided above shall be fixed by mutual agreement between the Society and the National Group of IFPI with the right of revision each year commencing from the date of entry into force of the present contract, such revision to be requested at the latest two months after the date on which it is to take effect.

(3) In case of disagreement, the minimum royalty provided for above shall be equal to two-thirds of the average royalty paid for the type of sound carriers in question by the two national producers who shall have paid to the Society or to other societies of BIEM directly or indirectly the highest amount of royalties in respect of the previous year's exploitation. This average royalty shall be arrived at by dividing the total amount of royalties paid for the type of sound carrier in question (rotation speed, diameter or configuration) by the number of copies reproducing protected works issued in that same type of sound carrier. Where there is only one national producer, the average royalty mentioned above shall be calculated on that producer's exploitation. Av. N° 3

(4) The minimum royalty provided for above shall not apply if by virtue of a reduction in prices imposed by governmental or other authority, such minimum results in a figure higher than the normal royalty calculated on the new prices. Av. N° 2

Number of works and fragments

(5) The number of complete protected works or fragments of protected works which may be reproduced on the same disc having regard to its playing time and its type is as follows:

I	45 rpm 17 cm Single	(up to 8mins)	2 works	or	6 fragments
II	45 rpm 17 cm EP	(up to 16mins)	4 works	or	12 fragments
III	45 rpm Maxi-single	(up to 16mins)	4 works	or	12 fragments
IV	33 rpm 17 cm EP	(up to 20mins)	6 works	or	18 fragments
V	33 rpm 25 cm LP	(up to 30mins)	10 works	or	24 fragments
VI	33 rpm 30 cm LP	(up to 60mins)	16 works	or	28 fragments
VII	CD Single of 3 or 5 inches	(up to 23mins)	5 works	or	12 fragments
VIII	Normal CD of only 5 inches	(up to 80mins)	20 works	or	40 fragments

(5 bis) The number of complete protected works or fragments of protected works which may be reproduced on the same tape or cassette having regard to its playing time and its type is as follows:

I	Single cassette	(up to 8mins)	2 works	or	6 fragments
II	Maxi cassette	(up to 16mins)	4 works	or	12 fragments
III		(up to 16mins)	4 works	or	12 fragments
IV		(up to 30mins)	10 works	or	24 fragments
V		(up to 60mins)	16 works	or	28 fragments
VI		(up to 120mins)	32 works	or	56 fragments

(5 ter) 24 protected works or 48 fragments of protected works may be reproduced in a compilation album on CD, DCC or MD provided its contents comprise at least 50% re-released recordings of protected works.

(5 quater) The number of protected works and/or fragments that may be reproduced on an analogue cassette when this cassette contains the same recordings as a CD, DCC or MD album or compilation album referred to in Article VI (5 or 5ter), shall be the same as the number of protected works and/or fragments, that may be reproduced on the equivalent digital carrier. The same limitations as to the maximum playing time will apply to the cassette as to the digital equivalent in this case. Av. N° 7

(6) If the Producer wishes to reproduce on the same disc, tape or cassette a number of protected works or protected fragments exceeding that mentioned above, the total royalty due for the disc, tape or cassette in question shall be increased in the same proportion, except in the case of repeated reproduction of the same work, involving the same copyright-owners, or fragments involving the same copyright owners on the same sound carrier, which shall be regarded as one fragment or work as the case may be. In addition, original works of short duration, with the exception of songs known as popular, may be reproduced without limitations as to number on a 45 rpm 17 cm single or on a tape cassette of category I, if such disc, tape or cassette contains exclusively works of this type. Av. N° 7

(7) If the playing time of a disc, tape or cassette exceeds the playing time fixed above by more than sixty seconds, the total royalty due for the disc, tape or cassette shall be increased in the same proportion.

(8) Where the same disc, tape or cassette reproduces complete protected works and protected fragments, each work shall count as two points and each fragment one point. The total number of points permitted is equal to the number of fragments indicated in paragraph (5) and (5bis) above. Graphically published pots-pourris shall be regarded as complete works. Reproductions of fragments involving the same right-owners, and repeated reproduction of the same work involving the same right-owners as meant in paragraph (6) above will equally be regarded as one complete work or fragment as the case may be. Av. N° 7

(9) Any reproduction not exceeding one minute forty-five seconds shall be considered as a fragment of a work, as long as the whole work has not thus been reproduced.

(10) Any fragmentary reproduction of a work of the Society's repertoire shall only take place with the prior authorization of the latter after consultation with the owner of the mechanical rights in the said work. If, within a period of three months following the date of receipt by the Society of a request from the Producer of authority for fragmentary reproduction, the Society shall not have informed him that the owner of the right of mechanical reproduction in the work in question has refused his consent, such consent shall be deemed to have been given.

ARTICLE VII - OBLIGATIONS OF THE PRODUCER

Compulsory notices

(1) All recorded discs, tapes, and cassettes reproducing a work or fragments of a work in the Society's repertoire must bear:

- for normal pressings the facsimile of the Society granting the licence;
- for group pressings (under a "central licence") the facsimile of BIEM followed by that of the Society granting the licence;
- for pressing and duplication carried out by producers by way of centralised manufacture for the benefit of their affiliated companies, the facsimile of BIEM followed by that of the Society which collected the highest amount of royalties in comparison with other authors' societies from the national affiliate of this group in the course of the preceding year. The facsimile of this Society may be used for all subsequent manufacture of relevant sound carriers. Av. N° 4

The facsimile must not be used for the purpose of preventing or restricting the free circulation of sound carriers from one country to another in Europe, nor to demand the collection of a royalty or payment in addition to the sums already paid.

(2) The following notice shall appear on the label of each side of the disc, tape or cassette in the language of the country of manufacture or sale:

"ALL RIGHTS OF THE PRODUCER AND OF THE OWNER OF THE WORK REPRODUCED RESERVED. UNAUTHORIZED COPYING, HIRING, LENDING, PUBLIC PERFORMANCE AND BROADCASTING OF THIS DISC (TAPE OR CASSETTE) PROHIBITED".

(2 bis) If national legislation stands in the way of the application of the preceding provision, the Society and the National Group of IFPI shall agree on a notice to be substituted for it to conform with such legislation.

(3) Labels of discs, tapes and cassettes shall mention, in addition to the title of the work or works reproduced, the name of the composer, that of the author, that of the arranger of the words and/or music where appropriate, and that of the publisher who owns the phonographic reproduction rights in the country of manufacture at the time of the first issue of the disc, tape or cassette; where this is duly established to be technically impossible and subject to the legal provisions in force, such details shall be placed on the covers or boxes where these are individual to the sound carriers concerned. If the Producer does not know the name of the above-mentioned publisher at the moment of the first issue of the disc, tape or cassette, he shall include it on the next re-printing of the labels or, where applicable, of the covers or boxes.

(3 bis) The Society and the National Group of IFPI may agree that the details provided for in paragraph (3) above should also appear in the Producer's catalogues, supplements to catalogues and lists of new issues where such documents are intended for issue to the public.

Catalogues and supplements - List of prices - Labels

(4) The Producer is bound to send to the Society free of charge within the shortest possible time:

- a) copies of labels of all his discs, tapes and cassettes;
- b) copies of all his catalogues, supplements to catalogues and lists of new issues;
- c)..... copies of the list of retail prices, whether fixed or suggested, of discs, tapes and cassettes bearing his various marks or, in the absence of such list, a list of (PPD) prices, kept up to date per mark and per country.

(5) At the request of the Society, the Producer shall furnish it free of charge with one copy, which shall be exempt from royalty payment, of one or more particular discs, tapes or cassettes and also the cover of one or more particular EP or LP discs, or the box of one or more particular tapes or cassettes.

(6) The Producer is bound to notify the Society immediately of the discs, tapes and cassettes which he deletes from his catalogue.

ARTICLE VIII – PRODUCER ACTING AS A MANUFACTURER FOR THIRD PARTIES

(1) If the Producer custom manufactures discs, tapes or cassettes for other producers, whether these producers are third parties, licensees or affiliates, he shall be bound in all cases to inform the Society thereof and provided he does so he shall not be responsible for the payment of royalties with respect to such discs, tapes or cassettes.

(2) With regard to the exploitation of the Society's works, the Producer shall not act as a custom manufacturer for a third party who has no contract with the Society, unless the Society has given him in each case express authorization with the consent, where appropriate, of the BIEM Society in the country of the third party. Such authorization shall not be withheld without sufficient justification. The Producer acknowledges that he is jointly responsible with the third party in question for any manufacture made in contravention of the preceding provision.

(3) In all cases the Producer shall ensure that the Society has every facility for checking manufacture carried out for the third parties and where the works reproduced form part of the repertoire of the Society, shall send to it a copy of his delivery or despatch notes indicating by catalogue number the quantities delivered.

ARTICLE IX – CO-EXPLOITANTS OF THE PRODUCER

(1) For the purposes of the present contract, the co-exploitants of the Producer are those firms or persons who take part in any way in the manufacture (recording, pressing or duplication) of discs, tapes or cassettes bearing the Producer's mark, and the exclusive distributors of such discs, tapes or cassettes.

(2) The Producer contracts with the Society not only in his own name but also in the name and on behalf of his co-exploitants. At the request of the Society he shall be bound to submit to the Society a declaration by his co-exploitants confirming that they undertake for their part to respect the provisions of Article XIII of the present contract.

(3) The undertaking made by the Producer extends to the manufacture of discs, tapes or cassettes of his mark or marks made by a third party unless the latter is a producer having signed a contract with the Society similar to the present contract in respect of his own marks.

(4) If the Producer engages the services of a third party, a licensee or an affiliate, for custom manufacture on his behalf, he shall in all cases be bound to inform the Society thereof and he shall be responsible for payment of royalties with respect to such records, tapes or cassettes in accordance with the terms of the present contract.

(5) The Producer shall not be permitted to engage as a custom manufacturer where exploitation of the Society's works is concerned, a third party not having a contract with the Society unless the Society shall have given him express authorization with the consent, where appropriate, of the BIEM Society in the country of the manufacturer.

(6) The Producer undertakes, at the request of the Society, to bring to the knowledge of his wholesalers and retailers the geographical extent of the authorization granted in respect of the discs, tapes or cassettes he supplies to them. The detailed application of the present provision shall be fixed by mutual agreement between the Society and the National Group of IFPI.

(6 bis) As the rules of the European Union do not permit the application of the preceding paragraph, it shall be null and void in the countries of the European Union.

(7) At the written request of the Society, the Producer is bound to provide, in respect of all recordings produced either in his own studios or in independent studios or in any other place whatsoever, all necessary information, in default of which the present contract shall be immediately terminated; if the contract shall have expired, the Producer shall forfeit the benefit of the provision of Article XVI (2) (d).

(8) In the application of the provision of paragraph (7) above, the Society's notification must reproduce the terms of that paragraph and indicate its desire to avail itself of such terms.

ARTICLE X - STATEMENTS OF RECORDINGS

(1) The Producer is bound to submit, within as short a time as possible and in any case, except for a duly justified reason, before the outgoing of the discs, tapes or cassettes, lists of works which he is recording or which he proposes to exploit by means of matrices legally furnished to him by third parties. He must also furnish such lists in respect of recordings already authorized which he wishes to exploit under a new catalogue number. The Society shall indicate to the Producer as soon as possible the works of its repertoire which appear in such lists. The authorization granted under Article II (1) of the present contract is confirmed to the Producer when the Society on the strength of the information contained in these lists has indicated to him that the works declared form part of its repertoire and the Producer has accepted this indication. It is to be understood that the annotations PM (Non-member), SAI (Status not known at present) and PAI (Owner not known at present) do not in any sense constitute an authorization by the Society.

(2) The form of presentation of statements of recordings shall be established by mutual agreement between the Producer and the Society. In default of agreement, five copies of the statements shall be submitted in the form set out in Annex V of the present contract.

(3) The Producer shall indicate to the Society the catalogue number of each recordings as soon as he knows it in addition to the corresponding matrix number. In no case may discs, tapes or cassettes or recordings of different content bear the same numbers.

ARTICLE XI - STATEMENTS OF OUTGOINGS

(1) A statement of the quantities of discs, tapes or cassettes reproducing works subject to royalty payment and issued from the depot or depots of the Producer shall be submitted to the Society by the Producer within one month of the end of the accounting period for sales in the national territory and within two months of the end of the said period for export sales. The Producer shall nevertheless have the right, after agreement with the Society, to submit to it the whole of his statements of outgoings within the two months following the end of the accounting period.

(2) The Society may require the submission of separate statements for discs, tapes or cassettes imported by the Producer which have not been authorized at their source in accordance with the provisions of the present contract.

(3) The form of presentation of the statements referred to above shall be established by mutual agreement between the Producer and the Society. In default of agreement, three copies of the statements shall be prepared in the form set out in Annex VI of the present contract.

(4) In cases where the Producer authorizes a distributor to export or re-export discs, tapes or cassettes he must take account of such exports or re-exports in preparing his statements of outgoings or inform the Society of them within the shortest possible time.

ARTICLE XII - FINANCIAL OBLIGATIONS OF THE PRODUCER**Accounting period and settlements**

(1) The period of account is six months, unless otherwise agreed between the Producer and the Society.

(2) Payments relating to each accounting period, or the balance due for the period where applicable, shall be made in the month following the submission to the Producer by the Society of an account prepared on the basis of the statement of outgoings relating to the said period.

(3) Nevertheless, the Society may agree that payments relative to each accounting period or the balance due, where applicable, shall be made on the basis of an account prepared by the Producer himself and sent to the Society with the statement of outgoings relating to the said period.

Permanent Deposit

(4) The Producer shall pay into the funds of the Society by way of a permanent deposit against the payment of royalties and the performance of all clauses of the present contract, a sum the amount of which shall be fixed by the Society and which shall not be more than the approximate total royalties due for one quarter's exploitation. The amount of this deposit shall be reviewed every six months with the object of maintaining it from half year to half year at a fixed amount. If on a half-yearly review it is revealed that the amount of the deposit is too low, the Producer shall be required to make up the difference due within three days from the receipt by him of a notification from the Society by registered letter and acknowledgement of receipt. If on a half-yearly review it is revealed that the amount of the deposit is too high, the excess shall be placed to the credit of the Producer's account in the Society's books. The permanent deposit shall amount initially to not less than the equivalent of one thousand US dollars.

(5) The Society shall pay interest to the Producer on the amount of the permanent deposit provided for above calculated at the rate fixed by the national Bank in the country of the Producer's domicile for one-year deposits.

Monthly advances

(6) Before the tenth day of each month the Producer shall pay a sum on account equal to the monthly average of royalties for the same accounting period of the preceding year.

Changes in information

(7) In the relations between the Society and the Producer, changes in information shall operate from the beginning of the accounting period during which such changes were notified.

Adjustments

(8) The period with respect to which applications for adjustment by the Society, and application for reimbursement by the Producer, shall be admitted, shall be limited to three years preceding the beginning of the accounting period during which such applications have been presented where such application are the result of an error by the party making the application. Application for adjustment, however, involving a new member and relating to a period prior to his membership shall not be subject to any time limit other than that prescribed by law. Such applications for adjustment shall be subject to the terms of the present contract including those provided in Article I (3). In all cases the Society shall indicate to the Producer the changes in information or other facts which give rise to the applications for adjustment.

(9) If within a period of three months from the date of despatch by registered letter of an application for an adjustment by the Society, the Producer shall not have expressly challenged the application, it shall be considered to have been accepted.

Claims by third parties

(10) If the Society and a third party not being a member of the Society claim from the Producer all or part of the rights in the same work, the Producer shall pay the Society royalties relating to the work if the Society submits to the Producer a title prior to that of the third party, the Society guaranteeing the Producer in such a case against all claims which might be brought against him by the third party.

(11) Where the third party claims rights in a work which has previously been annotated SAI (Status not known at present) or PAI (Owner not known at present) by the Society, the Producer may notify the Society of this claim and the latter will be bound to provide a definitive annotation within three months commencing from the date of reception of the Producer's notification in default of which the work shall be deemed PM (Non-Member). When such a work shall have been annotated or deemed to have been annotated PM and the Producer shall have paid the third party, the Society shall renounce the right to make any later claim on the Producer if he confirms that the third party had a good title to the rights.

ARTICLE XIII - CONTROL BY THE SOCIETY

(1) The Producer is bound to make known to the Society the situations of his manufacturing facilities and stocks of discs, tapes or cassettes. If the warehouse is situated apart from the place of manufacture, agreed arrangements shall be made between the Producer and the Society to enable the latter to carry out checks without inconvenience or extra expense.

(2) If the Producer has several depots, he shall be responsible for centralising the documents required to account for incomings and outgoings in a form which will enable the Society to carry out accurate and convenient checking operations.

(3) The Society shall have the right of fullest control over all the operations of the Producer affected by the present contract, including the date of recording and the date of first manufacture. Consequently, the Society's inspectors shall have the right of access to the factories, depots and offices of the Producer and this right of access shall not be refused or delayed on any pretext by the Producer. The latter shall be bound to provide them with all documents enabling them to check the information relating to the recording and to verify by cross-checking the manufacture, incomings and outgoings, and stocks of discs, tapes or cassettes. Further, the Producer shall grant the Society all facilities for checking the operations of his co-exploitants, especially custom manufacturers.

(4) The Producer shall maintain a clear and precise accounting system which will permit the preparation of accurate statements to the Society and allow the latter to check such statements. The functioning of the control and the maintenance of documents necessary for its exercise shall be regulated by agreement between the Producer and the Society.

(5) The agents of the Society concerned with control work in the factories, depots and offices of the Producer shall have no interest directly or indirectly in any phonographic business or trade. Moreover, it is understood that neither the Society nor its staff, its agents or inspectors shall impart any information to third parties relating to the business or trade of the Producer which they may acquire in the course of their operations connected with the performance of the present contract.

(6) If inspection by the Society gives rise to a supplementary result of at least 5% in comparison with the accounts presented by the Producer during or for the period in question as they existed at the date of the announcement of the control, the costs of the control are payable by the Producer, provided that the adjustments is the result of mistake by the Producer.

Av. N° 4

ARTICLE XIV - CIRCULATION OF RECORDING MATRICES

(1) By recording matrix shall be understood any contrivance from which discs, tapes or cassettes may be manufactured or from which a re-recording can be made.

Supply of matrices of the Producer to third parties

(2) The Producer shall not by whatever means or for any reason place at the disposal of a third party any matrix of a recording of a work belonging to the Society's repertoire in the country of destination, unless the prior written consent of the Society has been received.

(3) However, the matrix may be freely placed at the disposal of the third party:

a) if the work is not protected in the country of destination and if that country is member of the Bern Convention or of the Universal Copyright Convention;

b) if the matrix is addressed to a producer, not being domiciled in the U.S.A. or Canada having a general contract with a member Society of BIEM similar to the present contract;

c) if the matrix is addressed to a producer domiciled in the U.S.A. or Canada who has agreed to pay to the Society or its representative the royalty provided for in paragraph (2) of Annex No. IV.

(4) Apart from cases covered by paragraph (3) above, the matrix may be delivered without restriction where the recipient is domiciled in a country where there is a member Society of BIEM on condition that the Producer is bound by a prior agreement to pay the said Society royalties due on the discs/tapes and cassettes pressed from such matrix in default of payment by the recipient. Such royalties shall be calculated in accordance with the provisions laid down in Article V (7) and (8) of the present contract on the basis of statements of manufacture furnished to the Producer by the recipient of the matrix, the Society reserving the right to verify the accuracy of such statements.

(5) If the work is protected in the country of destination but does not belong to the Society's repertoire, the despatch of the matrix may only be undertaken on the Producer's own responsibility.

(6) Every despatch of a recording matrix of a work belonging to the Society's repertoire in the country of destination shall be notified to the Society by the Producer at the same time as the despatch is made.

(7) The Society reserves the right to forbid the Producer to send matrices to any producer domiciled in the U.S.A. or Canada who might pass on any matrix received by him under the terms of the present contract to a third party not having a contract similar to the present contract with a member Society of BIEM.

(8) For the purpose of this Article, a work is considered protected in the U.S.A. if unpublished or if published on or after 1st July 1909 in the form required for protection under U.S. law.

(9) The export of a matrix to a country where the authorization of the copyright owner is required by law only for first reproduction of a work shall in no case confer on the importer authorization for the first recording where this is necessary, and if the matrix is used without authorization reproductions from the matrix shall be unlawful.

Use by the Producer of recordings produced by third parties

(10) The right defined in Article II above extends to discs, tapes and cassettes which the Producer manufactured under his mark and which are derived from recordings made by third parties on condition that the manufacture and, where applicable, the importation of the recordings have been authorized by the Society. Such recordings shall be treated in all respects in the same way as recordings made by the Producer himself and their exploitation shall be subject to the provisions of the present contract.

(11) Upon signature of the present contract, the Producer shall send to the Society a complete and detailed list of the firms from which he habitually receives and those to which he sends matrices under the above provisions. The Producer undertakes to keep this list up to date.

ARTICLE XV - SANCTIONS AND CANCELLATION OF THE CONTRACT

(1) Where the Producer:

- 1° - fails to comply with any one of the financial obligations contained in the present contract, without prejudice to the contents of paragraph (3) below;
- 2° - fails to comply with any one of the conditions of the present contract relating to custom manufacture for third parties;
- 3° - fails to comply with any one of the provisions of the present contract relating to the use of matrices made by third parties and/or the provision of his own matrices to third parties;
- 4° - does not offer the Society the facilities for exercising its control in conformity with the provisions of the present contract;
- 5° - fails repeatedly, in spite of warning from the Society, to comply with any of the other requirements of the present contract, and in particular:
 - does not indicate on the statements of recordings all works which ought to be listed or does not give complete and correct information as required by the contract,
 - does not take account, upon receipt, of alterations to previous annotations duly notified to him,
 - does not state the title of works and the names of right owners on labels, covers or boxes as provided in the contract;
- 6° - provides statements admitting serious gaps or delay with regard to the agreed time limits:

the Society shall have the right, fifteen clear days after the receipt by the Producer of a formal notice in the form of a registered letter addressed to him by the Society and duly acknowledged and upon which no action is taken:

- a) either to demand payment of royalties on discs, tapes or cassettes on their entry into the depot or depots of the Producer;
- b) or to submit the Producer to the prepaid adhesive royalty stamp system and the system of authorization work by work;
- c) or to cancel the present contract without such cancellation giving rise to any compensation to the Producer and without prejudice to any damages arising in favour of the Society.

(2) The Society may, as from the date of the coming into operation of the above formal notice, deduct from the total of the permanent deposit provided for in Article XII (4) the amount required to make up the royalties due. Further, on termination of the contract, royalties shall become due on the total copies in stock.

(3) Where the Producer fails to fulfil any of the following obligations, he shall pay to the Society daily interest the rate of which shall be fixed by mutual agreement between the Society and the National Group of IFPI and which shall not in any case be less than the rate provided in Article XII (5):

- a) for non-observance of the time limit agreed under Article XI (1) interest shall be chargeable on the total royalties included in the statements or accounts not submitted within the prescribed time limit;
- b) for omissions of titles or copies from statements of outgoings or accounts, interest shall be chargeable on the royalties relating to the titles or copies omitted;
- c) in the case of delay or underpayment of the monthly advances provided for in Article XII (6) interest shall be chargeable on the total advances remaining due;
- d) any sum not paid within the time prescribed in Article XII (2) shall give rise to payment of the same daily rate of interest.

(4) Furthermore, if at the end of fifteen days following the expiration of the time limits laid down in paragraph (3) above, the Producer has not regularised the position and paid the interest due, the Society shall have the right to terminate the present contract in accordance with the provisions of paragraph (1) above, except where it is the first case of proven underpayment of monthly advances.

Other cases of cancellation

(5) If any of the conditions of the present contract are modified by governmental authority in such a way that the law expressly forbids contracting out of legislation, the present contract shall be terminated automatically.

(6) By reason of the general right of exploitation of its entire repertoire which the Society grants to the Producer, the present contract shall be cancelled automatically:

- a) if the Producer, being the owner or assignee of exclusive rights of phonographic reproduction seeks to exercise such rights by way of a monopoly as against any other producer who is a signatory of the Standard Contract for the Phonographic Industry 1975 (Discs, Tapes and Cassettes), as amended by amendments N° 1 to 7.
- b) if the Producer exploits works the phonographic reproduction of which is denied to any other signatory of the Standard Contract for the Phonographic Industry 1975 (Discs, Tapes and Cassettes), as amended by amendments N°1 to 7.

(7) In the case of bankruptcy or similar judicial process, the Society is entitled, notwithstanding the preceding clauses, to cancel the contract immediately without notice and to demand payment of all royalties due under the present Contract.

The means of application of these procedures and the conditions under which the Society may assert its rights as regards collecting royalties due shall be determined by the laws in force at national level.

ARTICLE XVI - FINAL CLAUSES**Duration**

(1) The present contract shall come into effect on 1 July 1997 and shall terminate on 30 June 2000. Av. N°7

Termination of contract - New recordings

(2) After the date of termination of the contract:

a) No recording shall be made of works belonging wholly or in part to the Society's repertoire in the country of the Producer.

Termination of contract - Exploitation of matrices

b) No matrices shall be placed at the disposal of a third party if the work reproduced belongs wholly or in part to the Society's repertoire in the country of destination, unless the Producer has received the authorization of the Society in this regard.

c) Nevertheless, the Producer may place recordings legally made and exploited during the course of the three months preceding the expiration of the present contract at the disposal of another producer signatory of a contract similar to the present contract with a member Society of BIEM and which has also expired, on condition that such other producer agrees to submit the said recordings to the terms of the said contract.

d) The Producer shall have the right, during the two years following the date of expiration of the present contract, to exploit matrices he has legally produced during the period of the contract under the terms of contract.

e) The Producer shall not take advantage of the provisions of Article XIV (10) above in order to exploit matrices made by third parties unless such matrices were received and exploited before the date of expiration of the present contract, or unless such matrices were received in accordance with paragraph (c) above.

f) In accordance with the meaning of Article XIV (1), the preceding paragraphs (b), (c), (d) and (e) shall apply not only to matrices properly so called but also to any contrivance from which discs, tapes or cassettes may be manufactured or a re-recording made.

g) The provisions which are the subject of paragraphs (c), (d) and (e) above shall not be applicable where the present contract shall have been terminated under the provisions of Article XV (1).

Jurisdiction

(3) Disagreements as to the interpretation or performance of the present contract shall be brought before the Courts in the place of domicile of the defendant.

(4) However, disagreements relating to the interpretation of the present contract or of agreements made between the Society and the National Group of IFPI within the framework of this contract shall be submitted to the conciliation procedure laid down in Annex VII of the present contract before proceeding to any legal action.

Costs

(5) Costs of stamping and registration of the present contract shall be borne by the Producer.

Signed in

on

ANNEX No. I
(As at 1 July 1998)

List of Member Societies of BIEM

1) Voting Societies:

ACUM

Société d'Auteurs, Compositeurs et Editeurs de Musique en Israel
Acum House, Rothschild Bld. 118/120, 61140 Tel Aviv (Israel)

AEPI

Société Anonyme Hellénique pour la Protection de la Propriété Intellectuelle
Rue Fragoklissias & Samou 51, 151 25 Athens (Greece)

ARTISJUS

Bureau Hongrois pour la Protection des Droits d'Auteur
Vörösmarty ter 1, H-1364 Budapest (Hungary)

AUSTRO-MECHANA

Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH
Baumannstrasse 10, A - 1031 Vienna (Austria)

GEMA

Gesellschaft für musikalische aufführungs-und mechanische Vervielfältigungsrechte
Rosenheimer Strasse 11, D-81667 München (Germany)

HARRY FOX AGENCY

The Harry Fox Agency Inc.
711 Third Avenue - 8th Floor New York, NY 10017 (U.S.A.)

HDS

Croatian Composers' Society
Ulica baruna Trenka 5 - PP 959, 41001 Zagreb (Croatia)

JASRAC

Japanese Society for Rights of Authors, Composers and Publishers
3-6-12, Uehara, Shibuya-ku, Tokyo 151 (Japan)

MCPS

Mechanical-Copyright Protection Society Ltd.
Elgar House, 41 Streatham High Road, London SW16 1ER (United Kingdom)

NCB

Nordisk Copyright Bureau
Frederiksgade 17, DK- 1021 Copenhagen K (Denmark)

OSA

Ochranny Svaz Autorsky
Trida Cs. Armady 20, 160 56 Prague 6, Bubenec (Czech Republic)

SABAM

Société Belge des Auteurs, Compositeurs et Editeurs
Rue d'Arlon 75-77, B-1040 Brussels (Belgium)

SACEM

Société des Auteurs, Compositeurs et Editeurs de Musique
225, avenue Charles-de-Gaulle, F-92521 Neuilly-sur-Seine (France)

SACERAU

Société des Auteurs, Compositeurs et Editeurs de la République Arabe d'Egypte
10, rue Elfi Bey, Cairo (Egypt)

SADAIC

Sociedad Argentina de Autores y Compositores de Musica
Lavalle 1547, 1048 Buenos Aires (Argentina)

SARRAL

South African Recording Rights Association Ltd.
506 Heerengracht - 87 De Korte Street 2001 Braamfontein (South Africa)

SCD

Sociedad Chilena del Derecho de Autor
Casilla 51270, Correo Central, Santiago (Chile)

SDRM

Société pour l'Administration du Droit de Reproduction Mécanique des Auteurs, Compositeurs et Editeurs
Cité de la Musique - 16 Place de la Fontaine aux Lions, BP 11593 - 75920 Paris Cedex 19 (France)

SGAE

Sociedad General de Autores de Espana
Apartado 484, Fernando VI-4, 28080 Madrid (Spain)

SIAE

Società Italiana degli Autori ed Editori
Viale della Letteratura 30, I-00100 Rome (EUR) (Italy)

SODRAC

Société du Droit de Reproduction des Auteurs, Compositeurs et Editeurs au Canada Inc.
759 Victoria Square, Bureau 420, Montréal (Québec) H2Y 2J7 (Canada)

SOKOJ

Savez Organizacija Kompozitora Jugoslavije
Misarska 12/14, YU-11000 Belgrade (Serbia)

SOZA

Slovensky Ochranny Zväz Autorsky
Rastislavova 3, 821 08 Bratislava (Slovak Republic)

SPA

Sociedade Portuguesa de Autores
Av. Duque de Loulé 31, 1098 Lisbon (Portugal)

STEMRA

Stichting STEMRA
Prof. E.M. Meijerslaan 3, 1183 AV Amstelveen (The Netherlands)

SUISA

Société suisse pour les Droits des Auteurs d'oeuvres musicales
Bellariastrasse 82, CH-8038 Zurich (Switzerland)

ZAIKS

Stowarzyszenie Autorow
Ul. Hipoteczna 2, 00-092 Warsaw (Poland)

2) Non voting Societies:**AGADU**

Asociacion General de Autores del Uruguay
Canelones 1122, C.P. 11100 Montevideo (Uruguay)

ALBAUTOR

Société Albanaise des droits d'auteur et des droits voisins
Lidhja e Shkrimtarëve, Bruga e kavajës, nr 4, Tirana, (Albania)

AMCOS

Australian Mechanical Copyright Owners Society Ltd.
14th Floor, 56 Berry Street, North Sydney, Private Box 2135, NSW 2059 (Australia)

CASH

Composers and Authors Society of Hong Kong Ltd.
18/F Universal Trade Center, 3 Arbuthnot Road, Central (Hong Kong)

CMRRA

Canadian Musical Reproduction Rights Agency Ltd.
56 Wellesley Street West, Suite 320, Toronto, Ontario M5S 2S3 (Canada)

COTT

Copyright Organisation of Trinidad and Tobago Ltd.
45C Jerningham Avenue, Belmont, Port of Spain, W.I. (Trinidad and Tobago)

KCI

Yayasan Karya Cipta Indonesia
Kartika chandra Office Bldg., 6th Floor Jl. Jend Gatot Subroto, Jakarta 12060 (Indonesia)

KOMCA

Korea Music Copyright Association
2,3,4,5 F Sam Jeon Bldg, 236.3 Nonhyeon, Dong Kangnam -Gu, Seoul (Korea)

MCSN

Musical Copyright Society (Nig.) Ltd
1st Floor, 565 Ikorodu Road, Ketu Lagos, P.O. Box 5904 Surelere, Lagos (Nigeria)

MUSICAUTOR

Bulgarian Society of Authors and Composers for Performing and Mechanical Rights
63, Tsar Assen Str., 1463 Sofia, (Bulgaria)

SACM

Sociedad de Autores y Compositores de Musica
Mayorazgo N° 129, Col Xoco, 03330 Mexico, D. F (Mexico)

UCMR-ADA

Uniunea Compozitorilor si Muzicologilor din Romania
Calea Victoriei 141, 71102 Bucharest (Romania)

Annex N°II
(on January 1, 1997)

Rights of management entrusted to the Society in the field of mechanical reproduction

The rights of management entrusted to the Society in the field of mechanical reproduction are defined as follows :

1) Voting Societies

Societies	Categories of works ¹	Reservations ²
ACUM	Literary works	)From July 1989 prior authorisation of (right-owners for works of a duration of)more than 5 mins and for works of a) single author when they exceed 20% (of the total duration of a disc.
	Dramatic works	
	Dramatico-musical works		None
	Musical works with or without words	None
AEPI	Dramatico-musical works	None
	Musical works with or without words	None
ARTISJUS	Literary works	None
	Extract from dramatico-musical works	None
	Musical works with or without words	None
AUSTRO-MECHANA	Complete dramatico-musical works ³	Prior authorisation of right-owners
	Musical works with or without words	None
GEMA	Dramatico-musical works	None
	Musical works with or without words	None
HARRY FOX AGENCY	Musical works with or without words	Prior authorisation of right-owners
HDS	Literary works	None
	Musical works with or without words	Based on right owners' Power of Attorney
JASRAC	Dramatico-musical works	None

¹ For categories of works not mentioned, the Producer should consult the right-owners direct.

² Notwithstanding the use of the words "prior authorisation of right-owners" such authorisation shall be compulsorily applied for and granted (if such be the case) through the intermediary of the Society.

³ Idem for abridged version of complete dramatico-musical works, complete acts and extracts extending over more than one long-playing record or cassette.

Societies	Categories of works ¹	Reservations ²
MCPS	Dramatico-musical works ⁴	
	Musical works with or without words	) Prior authorisation of authors for (unpublished works and prior) authorisation of right-owners for the first (recording of published works.
NCB	Literary works	) Danish and Swedish works, subject to (prior permission from right owners
	Dramatico-musical works	(Danish, Finnish, Norwegian and) Swedish works subject to prior (permission from right owners
	Musical works with or without words	) The first recordings of works are (subject to prior permission from) rights owners
OSA	Musical works with or without words	None
SABAM	Literary works	(1. The right owner can express
	Dramatic works	) reservation on some rights and/or for
	Dramatico-musical works	(certain territories.
	Musical works with or without words)
	Audio-visual works	(2. The author's moral right
	Choreographic works)
	Plastic arts works	(
Photograph and graphic works)	

⁴ The following reservations apply in relation to any dramatico-musical work (which expression shall have the same meaning as is set out in the Articles of Association of the Performing Right Society Ltd) :-

(a) The Licence shall not apply where the Disc(s) reproduce the whole or substantially the whole dramatico-musical work unless :-

(i) The producer has specifically notified MCPS that it wishes to reproduce the whole or substantially the whole work, and

(ii) MCPS has notified the producer that all its relevant members consent to such reproduction.

(b) For these purposes, the expression « dramatico-musical work » shall include any version of such work (with or without cuts, additions, interpolations or the like) which has been publicly performed. Also, for the avoidance of doubt, substantially the whole work shall be deemed to be reproduced where all or nearly all the individual songs or other music included in the work are reproduced.

(c) Even where consent is granted under sub-clause (a) above, the consent shall only relate the relevant music and lyrics (or other words sung or spoken with the music) contained in the work. By way of example only, it shall not constitute a licence to reproduce the whole or any substantial part of any dramatic or literary work which forms part of the work or which the work is based on.

Societies	Categories of works ¹	Reservations ²
SDRM	Literary works	)Prior authorisation of certain right-owners
	Dramatic works	(Prior authorisation of right-owners for reproduction of complete works or large extracts
	Dramatico-musical works	)Prior authorisation of authors for (reproduction of complete works or large extracts of unpublished works
	Musical works with or without words	None
SACERAU	Musical works with or without words	None
SADAIC	Musical works with or without words	None
	Literary works set to music	None
SARRAL	Extracts from dramatico-musical works	)Prior authorisation of right-owners (through SARRAL for the first recording
	Musical works with or without words	)of works
SCD	Musical works	None
SGAE	Literary works	(Prior authorisation of right-owners
	Dramatic works)
	Dramatico-musical works	Prior authorisation of right-owners for complete reproduction and, in any event, for first recording
	Musical works with or without words	Prior authorisation of right-owners for first recording
SIAE	Literary works	
	Dramatic works Dramatico-musical works	)Prior authorisation of right-owners
	Musical works with or without words	)Prior authorisation of right-owners (for the first recording and for records made during the following (four months ⁵ .
SODRAC	Dramatico-musical works	(None, except when works are used for
	Musical works with or without words	)promotional purposes, which require the prior approval of right owners

⁵ Reservation limited to entirely new works, that is to say the original version declared since 1st January 1970 and in respect of which right-owners have asked to be consulted.

Societies	Categories of works ¹	Reservations ²
SOKOJ	Literary works	None
	Dramatic works	None
	Dramatico-musical works	None
	Musical works with or without words	None
SOZA	Musical works with or without words	None
SPA	Literary works	() Prior authorisation of right-owners
	Dramatic works	
	Dramatico-musical works	
	Musical works with or without words	None
STEMRA	Literary works	() (Prior authorisation of right-owners)
	Dramatic works	
	Dramatico-musical works	
	Musical works with or without words	None
SUISA	Musical non theatrical works with or without words	() None
ZAIKS	Literary works	() (Prior authorisation of right-owners for the first recording or the use of works in advertising.)
	Dramatic works	
	Dramatico-musical works	
	Musical works with or without words	

2) Non voting Societies

Societies	Categories of works ¹	Reservations ²
AGADU		
ALBAUTOR		
AMCOS		
CASH	Musical works with or without words	) Before 1 st July 1997, statutory recording (licence applies, after that, none except) works controlled by music publishers
CMRRA	Musical works with or without words	(On the basis of instructions provided by) the right-owners
COTT		
KCI	Musical works with or without words	) Repertoire of BIEM and Repertoire of (the Harry fox Agency
KOMCA		
MCSN		
MUSICAUTOR	Literary works Musical works with or without words	(Prior authorisation of right-owners for)the first recording and in case of use of (works for the purpose of adaptation,)synchronisation or advertising
SACM		
UCMR-ADA		

ANNEX N° III**National Agreements.**

In accordance with the terms of Article II (3), the following provisions of the contract may be the subject of special agreements between the Society and the National Group of IFPI:

Article II (10bis)

Modification of the provisions relating to the most favoured party clause if they do not conform with national legislation.

Article V (7 bis)

Application of the royalty in force for sales in the national territory to exports to non-European countries, other than the U.S.A. and Canada.

Article V (9 bis)

Substitution of a flat rate deduction for exports provided for in Article V (7) and exports and shipments provided for in Article V (9).

Article V (11)

Single statement of outgoings assimilated to sales in the national territory.

Article V (18 bis)

Substitution of a fixed percentage deduction or any other appropriate system of deduction for the system agreed for returns of new issues.

Article V (21)

Deduction of tax.

Article V (24)

Quantity of copies exempt from royalty for promotional needs and the notice indicating that they are not for sale.

Article V (25)

Mutual agreement on special terms and conditions which may benefit to TV advertised products.

Article VI (2)

Prices to form the basis for the calculation of minimum royalties.

Article VII (2 bis)

Modification of the notice appearing on labels if it does not conform with national legislation.

Article VII (3bis)

Details appearing on labels or covers to appear also on the Producer's documents intended for issue to the public.

Article IX (6)

Method of bringing to the notice of dealers the geographical extent of the authorisation granted.

Article XV (3)

Daily interest rate when Producer fails to fulfil certain obligations.

ANNEX N° IV**Royalties**

The royalty provided for in Article V(3) is as follows:

(1) In Continental Europe, including Turkey, the rate of royalty per copy is 11% (eleven percent) of the price determined in accordance with Article V(4).

In the same territories, the rate of royalty per copy is 8% (eight percent) of the price determined in accordance with Article V(5).

(2) In countries where the royalty is fixed by law, works of the Society's repertoire shall enjoy in all respects the conditions which are or shall be accorded to works of the national repertoires by the producers in those countries.

Discs, tapes, cassettes and matrices manufactured in these countries but exported outside them shall be subject to the conditions laid down in paragraphs (1) and (3) of the present Annex.

(3) In Latin America, the rate of royalty shall be that which is agreed between the Society or its representative and the national producers in those countries.

(4) Discs, tapes, cassettes and matrices exported to countries not mentioned in the present Annex shall be subject to conditions agreed between the Society or its representative and the national producers in those countries; in countries where there is no national producers, the royalty applicable is that fixed by paragraph (1) of the present Annex.

ANNEX N° V**Statements of Recordings**

In default of agreement between the Producer and the Society, five copies of statements of recordings shall be submitted by the Producer and must mention:

- the mark of the disc, tape or cassette;
- the number of the matrix and the origin of the matrix, where the latter shall not have been manufactured by the Producer;
- the original title of the work or, in respect of pots-pourris and discs, tapes or cassettes containing several titles, the titles of the works used;
- the name of the composer, of the author, and in addition the name of the publisher if known to the Producer;
- where applicable, the name of the adapter of the text and/or music, the title of the arrangement, version or fragment, and the name of the original composer;
- the type of reproduction (song, with indication of language, orchestra, etc.);
- the rotation speed and diameter of the discs, the category of tapes and cassettes and in addition the duration of the works reproduced whenever necessary for the application of the present contract.

ANNEX N° VI**Statements of Outgoings**

In the absence of agreement between the Producer and the Society, three copies of statements of outgoings shall be prepared by the Producer according to mark and series, the discs, tapes and cassettes being grouped according to the number of works subject to royalty reproduced per copy; they shall indicate for each copy and separately per category of disc, tape and cassette in numerical order:

- the catalogue number;
 - the original title of the work and, if necessary, that of the version and, for discs, tapes and cassettes containing several titles, the titles of works or fragments of works of the repertoire of the Society used, indicating the percentage paid per work or per fragment;
 - the composer, the lyric writer and, where applicable, the adapter of the text and/or music;
 - the country of sale indicating the royalty paid per work or fragment of work, calculated in the currency of the country of manufacture;
 - the number of copies for each work;
 - where applicable, the percentage of royalty paid;
 - where necessary, whether the outgoings are new issues as defined in paragraph (18) of Article V.
-

ANNEX N° VII**Conciliation Commission**

1. The Society and the National Group of IFPI agree to form a Conciliation Commission composed as follows:

.....

2. If, within three months following the opening of negotiations relating to any provision of the present contract which provides for an agreement between the Society and the National Group of IFPI, the two parties have not reached such an agreement, the matter shall be referred to the Commission for decision on the initiative of either party.

3. If, three months after such reference, the Commission has not given a decision, or, if having given it the society and/or the National Group of IFPI refuse to conform to it, the matter shall be referred to the BIEM/IFPI Conciliation Committee for decision on the initiative of either party.

4. If, one month after such reference, the BIEM/IFPI Conciliation Committee has not given its decision or, if having given it the Society and/or the National Group of IFPI refuse to conform to it, they may resort to ordinary legal proceedings.

5. The above-mentioned procedure is equally applicable to differences arising from the interpretation of agreements concluded between the Society and the National Group of IFPI within the framework of the present contract.

6. Furthermore, any difference relating to the interpretation of any provision whatsoever in the present contract shall be referred to the Commission for decision, but in every such case its decision must be submitted for ratification to the BIEM/IFPI Conciliation Committee.

E



Copyright Board
Canada



Commission du droit d'auteur
Canada

**Collective Administration in Relation to
Rights Under Sections 3, 15, 18 and 21**

**Gestion collective relative aux droits visés aux
articles 3, 15, 18 et 21**

Copyright Act, subsection 70.15(1)

Loi sur le droit d'auteur, paragraphe 70.15(1)

File: Reproduction of Musical Works

Dossier : Reproduction d'œuvres musicales

STATEMENT OF ROYALTIES TO BE
COLLECTED BY CMRRA/SODRAC INC. FOR
THE REPRODUCTION OF MUSICAL WORKS, IN
CANADA, BY ONLINE MUSIC SERVICES IN
2005, 2006 AND 2007

TARIF DES REDEVANCES À PERCEVOIR PAR
CMRRA/SODRAC INC. POUR LA
REPRODUCTION D'ŒUVRES MUSICALES, AU
CANADA, PAR LES SERVICES DE MUSIQUE
EN LIGNE EN 2005, 2006 ET 2007

DECISION OF THE BOARD

DÉCISION DE LA COMMISSION

Reasons delivered by:

Motifs exprimés par :

Mr. Justice William J. Vancise
Mr. Stephen J. Callary
Mrs. Francine Bertrand-Venne

M. le juge William J. Vancise
M. Stephen J. Callary
M^e Francine Bertrand-Venne

Date of Decision

Date de la décision

March 16, 2007

Le 16 mars 2007

Ottawa, March 16, 2007

Ottawa, le 16 mars 2007

File: Reproduction of Musical Works

Dossier : Reproduction d'œuvres musicales

Reproduction of Musical Works by Online Music Services (2005-2007)

Reproduction d'œuvres musicales par les services de musique en ligne (2005-2007)

Reasons for the decision

Motifs de la décision

I. INTRODUCTION

I. INTRODUCTION

[1] Online services are changing the way we listen to and use music. More than ever, music listening is moving from the home or car to the street, to the metro, to the jogging track or to the office. Everywhere one looks, young people, old people and people in-between are going about their business hooked up by ear buds to iPods or MP3 players.

[1] Les services en ligne modifient notre façon d'écouter et d'utiliser la musique. L'écoute se fait de moins en moins chez soi ou en voiture et de plus en plus sur la rue, dans le métro, en joggant ou au bureau. Partout, jeunes, vieux ou entre deux, vaquent à leurs occupations, écouteurs aux oreilles, branchés à un iPod ou à un lecteur MP3.

[2] Online services are also changing the way people buy music. CDs still hold the lion's share of the market, but paid downloads are growing at an exponential rate. In 2005, permanent downloads represented \$28.6 million or 3.6 per cent of Canadian retail music sales; this more than doubled in 2006. Apple sold more than 20 million iPods over the 2006 holiday season. One market research firm predicts that worldwide revenues from mobile full-track downloads will increase by more than 600 per cent between 2006 and 2011.¹

[2] Les services en ligne influencent tout autant la façon d'acheter la musique. Les CD dominent toujours le marché mais le nombre de téléchargements payants croît à une vitesse exponentielle. En 2005, les Canadiens ont acheté pour 28,6 millions de dollars de téléchargements permanents; c'est 3,6 pour cent des ventes au détail de musique. En 2006, ce montant a plus que doublé. Apple a vendu plus de 20 millions d'iPod durant les fêtes de fin d'année 2006. D'après une entreprise spécialisée en études de marché, les revenus mondiaux provenant des téléchargements sans fil de musique pleine piste augmenteront de plus de 600 pour cent entre 2006 et 2011.¹

[3] On March 31, 2004, CMRRA/SODRAC Inc. (CSI) filed, pursuant to subsection 70.13 of the *Copyright Act* (the "Act"), a statement of the royalties it proposes to collect for the reproduction, in Canada, by online music services in 2005, 2006 and 2007, of musical works in the combined repertoires of the Canadian Musical Reproduction Rights Agency (CMRRA) on the one hand, and of the *Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada* and SODRAC 2003 Inc. (SODRAC) on the other. The statement was

[3] Le 31 mars 2004, CMRRA/SODRAC inc. (CSI) déposait, conformément à l'article 70.13 de la *Loi sur le droit d'auteur* (la « Loi »), un tarif des redevances qu'elle propose de percevoir pour la reproduction, au Canada, par les services de musique en ligne en 2005, 2006 et 2007, d'œuvres musicales faisant partie des répertoires combinés de l'Agence canadienne des droits de reproduction musicaux (CMRRA) d'une part, et de la Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada et SODRAC 2003 inc. (SODRAC) d'autre part. Le

published in the *Canada Gazette* on May 1, 2004. Potential users and their representatives were notified of their right to file an objection no later than June 30, 2004.

[4] Apple Canada Inc. (Apple), Napster LLC (Napster), Bell Canada (Bell), the Canadian Association of Broadcasters (CAB), the Canadian Broadcasting Corporation (CBC), the Canadian Cable Telecommunications Association (CCTA), the Canadian Recording Industry Association (CRIA), CHUM Ltd., EMI Music Canada (EMI), Archambault Group Inc., Moontaxi Media Inc., MusicNet Inc., RealNetworks Inc., Sirius Canada, Sony BMG Music Canada (Sony), TELUS, Universal Music Canada (Universal), Warner Music Canada (Warner) and Yahoo! Canada filed timely objections. *L'Association québécoise de l'industrie du disque, du spectacle et de la vidéo* (ADISQ) and Rogers Communications Inc./Rogers Wireless Partnership (Rogers) were granted leave to intervene. Before the hearings started, ADISQ, Archambault Group Inc., CCTA, CHUM Ltd., Moontaxi Media Inc., MusicNet Inc., RealNetworks Inc., Sirius Canada and Yahoo! Canada withdrew from the proceedings, while CBC and TELUS withdrew their objections but applied for leave to intervene; these applications were denied.

[5] The hearings started on September 6, 2006 and extended over ten days. Those who participated in the hearings were CSI on the one hand, and Apple, Bell, Rogers, CRIA and its Class A members (EMI, Sony, Universal and Warner), as well as CAB (collectively "the Objectors") on the other. The record of the proceedings was closed on September 29, 2006, when CSI and the Objectors filed their written arguments.

II. BACKGROUND

A. *The Target of the Tariff*

[6] The development of the technology used to store sounds in a digital format began in the late

tarif a été publié dans la *Gazette du Canada* le 1^{er} mai 2004. Les utilisateurs potentiels et leurs représentants ont été informés de leur droit de s'opposer au projet au plus tard le 30 juin 2004.

[4] Apple Canada Inc. (Apple), Napster LLC (Napster), Bell Canada (Bell), l'Association canadienne des radiodiffuseurs (ACR), la Société Radio-Canada (SRC), l'Association canadienne de télécommunications par câble (ACTC), l'Association de l'industrie canadienne de l'enregistrement (CRIA), CHUM Ltée., EMI Music Canada (EMI), Groupe Archambault inc., Moontaxi Media Inc., MusicNet Inc., RealNetworks Inc., Sirius Canada, Sony BMG Music Canada (Sony), TELUS, Universal Music Canada (Universal), Warner Music Canada (Warner) et Yahoo! Canada ont déposé en temps opportun des avis d'opposition. L'Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ) et les sociétés Rogers Communications Inc. et Rogers Wireless Partnership (Rogers) ont obtenu l'autorisation d'intervenir. Avant le début des audiences, l'ADISQ, Groupe Archambault inc., l'ACTC, CHUM Ltée, Moontaxi Media Inc., MusicNet Inc., RealNetworks Inc., Sirius Canada et Yahoo! Canada se sont désistés. La SRC et TELUS ont retiré leurs oppositions et demandé l'autorisation d'intervenir; ces demandes ont été rejetées.

[5] Les audiences ont débuté le 6 septembre 2006 et ont duré dix jours. Ont participé aux audiences CSI d'une part, et de l'autre, Apple, Bell, Rogers, la CRIA et ses membres de la classe A (EMI, Sony, Universal et Warner), de même que l'ACR (collectivement « les opposantes »). Le dossier a été complété le 29 septembre 2006, lorsque CSI et les opposantes ont déposé leur argumentation écrite.

II. CONTEXTE

A. *L'objet du tarif*

[6] Le développement de la technologie de stockage des sons sous forme numérique a débuté

1970s. The first digital musical product, the prerecorded CD, was launched in 1983. Over the next decade or so, it radically changed the music business. We are now in the midst of experiencing the next radical change: the authorized download over the Internet of digital files containing sound recordings of musical works. These reasons deal with three types of online music offerings: permanent downloads, limited downloads and on-demand streaming.

[7] A permanent music download is a file that contains a sound recording of a musical work. That file is generally sent to and stored on the device (computer, cell phone) used to purchase it. The purchaser is then authorized to copy the recording onto MP3 players or other devices, such as a computer or digital audio recorder, or onto a blank CD. The number and kind of copies that can be made is determined by the terms of purchase and controlled through the digital rights management (DRM) software attached to the file.

[8] Limited downloads are generally offered with on-demand streams, as part of a subscription service. From a technical point of view, limited and permanent downloads are identical. The difference lies in what the DRM software allows the user to do. The subscriber may copy the recording onto other computers, sometimes even onto a portable music player. The DRM software allows the use of the original file and copies as long as the subscription is maintained; if it expires, the user will retain the file and copies but the DRM will prevent the user from listening to the recording or from making further copies of it. The DRM also prevents the user from putting the recording onto a blank CD at any time, since that would thwart the limited nature of the download.

[9] On-demand streams are not downloads. The service's server never sends the complete file

à la fin des années 70. Le premier produit musical numérique, le CD préenregistré, a été lancé en 1983. Il a radicalement modifié le marché de la musique au cours de la décennie qui a suivi. Nous assistons maintenant au prochain changement radical : le téléchargement autorisé sur Internet de fichiers numériques d'enregistrements sonores d'œuvres musicales. Les présents motifs visent trois types de produits musicaux offerts en ligne : les téléchargements permanents, les téléchargements limités et les transmissions sur demande.

[7] Un téléchargement permanent de musique est un fichier renfermant l'enregistrement sonore d'une œuvre musicale. En général, ce fichier est reçu et stocké sur l'appareil (ordinateur, téléphone cellulaire) utilisé pour l'acheter. L'acheteur peut ensuite copier l'enregistrement sur un lecteur MP3 ou un autre appareil, comme un ordinateur ou un enregistreur audionumérique, ou sur un CD vierge. Le nombre et le genre de copies autorisées sont déterminés par les modalités d'achat et contrôlés par le logiciel de gestion des droits numériques (GDN) joint au fichier.

[8] On offre généralement les téléchargements limités avec les transmissions sur demande dans le cadre d'un même abonnement. Sur le plan technique, les téléchargements limités et permanents sont identiques. La différence se situe au niveau de ce que le logiciel de GDN permet de faire. L'abonné peut copier l'enregistrement sur d'autres ordinateurs, parfois même sur un lecteur portable de musique. Le logiciel de GDN permet d'utiliser le fichier original et les copies aussi longtemps que dure l'abonnement; si ce dernier prend fin, l'utilisateur conserve le fichier et les copies, mais le logiciel empêche qu'on écoute l'enregistrement ou qu'on en fasse d'autres copies. Le logiciel empêche aussi l'utilisateur de transférer en tout temps l'enregistrement sur un CD vierge, ce qui irait à l'encontre du caractère limité du téléchargement.

[9] Les transmissions sur demande ne sont pas des téléchargements. Le serveur du service

containing the sound recording. It only transmits or streams enough data to allow the user to listen to the recording seamlessly at the time of transmission; that data is erased from the device used to receive it as the recording is played. The DRM software prevents the user from copying the recording onto a recording medium or device.

B. The Canadian and American Online Music Markets

[10] Online music services developed in the United States much earlier than in Canada and in most other countries. MusicNet was founded in 1999 and launched two years later, with investment from EMI, BMG, Real Networks and AOL Time Warner. Pressplay was launched as a joint venture of Sony and Vivendi Universal. It was subsequently purchased by Roxio Inc. and is the vehicle that launched Napster as a legitimate online supplier of music.

[11] The American market did not expand rapidly until Apple launched its *iTunes Music Store* in 2003 (iTunes). Until then, online services focused on offering subscription packages that provided on-demand streams and limited downloads. iTunes changed the landscape in at least three ways. It offered permanent downloads, as single tracks for 99¢ or as albums for \$9.99. The number of titles it made available was much larger and it made possible the use of downloads in many more ways.

[12] In Canada, PureTracks launched its online music service in October 2003, offering permanent downloads of sound recordings from the major record companies (or "labels") as well as a number of independent Canadian labels. It is currently the second largest player in the Canadian market. In January 2004, Archambault Group Inc. launched *Archambaultzik*; this Quebec-based online service offers a wide range of French language and Quebec sound

n'envoie jamais le fichier complet renfermant l'enregistrement sonore. Il ne transmet que suffisamment de données pour permettre à l'utilisateur d'écouter l'enregistrement sans interruption à ce moment-là; les données sont effacées de l'appareil qui les reçoit au fur et à mesure de l'écoute. Le logiciel de GDN empêche l'utilisateur de copier l'enregistrement sur un support ou un appareil.

B. Les marchés canadien et américain de la musique en ligne

[10] Les services de musique en ligne se sont développés beaucoup plus tôt aux États-Unis qu'au Canada ou dans la plupart des autres pays. MusicNet a été fondé en 1999 et lancé deux ans plus tard; EMI, BMG, Real Networks et AOL Time Warner y ont investi. Pressplay, coentreprise de Sony et de Vivendi Universal, a été achetée ultérieurement par Roxio Inc. et est le véhicule qui a lancé Napster en tant que fournisseur légitime de musique en ligne.

[11] C'est lorsque Apple a lancé son *iTunes Music Store* en 2003 (iTunes) que le marché américain s'est vraiment développé. Jusque-là, les services en ligne proposaient surtout des abonnements offrant des transmissions sur demande et des téléchargements limités. iTunes a changé la donne d'au moins trois façons. Il a offert des téléchargements permanents de pistes individuelles pour 99 ¢ ou d'albums pour 9,99 \$. Il a offert un bien plus large éventail de titres et a rendu possible une utilisation beaucoup plus variée des téléchargements.

[12] Au Canada, PureTracks a lancé son service de musique en ligne en octobre 2003, en offrant des téléchargements permanents d'enregistrements sonores des grandes maisons de disques et de plusieurs maisons canadiennes indépendantes. C'est actuellement le deuxième acteur en importance sur le marché canadien. En janvier 2004, Groupe Archambault inc. a lancé *Archambaultzik*, service en ligne québécois qui offre une vaste gamme d'enregistrements sonores

recordings. Napster began operating in Canada in May 2004. iTunes followed in December of that year and quickly came to dominate the Canadian market.

[13] Subscription services, offering only limited downloads and on-demand streams, have not grown as rapidly as services that offer permanent downloads. The fact that originally, it was not possible to transfer music to portable players no doubt contributed to this lack of success. Those restrictions disappeared with the introduction of *Yahoo! Music Unlimited To Go* and *Napster To Go*. Time will tell how this market will grow.

[14] Most online services, including those offered through the Internet service providers or wireless carriers of Bell, TELUS and Rogers, rely on technology operated by others such as PureTracks or MusicNet for a number of back-room operations that must be performed in order to offer music to consumers. These include software management, maintenance of digital track libraries, digital rights management and reporting issues. These "white label" services may also perform other functions, such as clearing the right to use the record labels' master recordings or to communicate and reproduce the musical works embedded in the recording. Bell, TELUS and AOL use PureTracks while Rogers-Yahoo! relies on MusicNet.

III. THE PARTIES

[15] CMRRA sometimes refers to itself as a music reproduction licencing agency but it is a collective society as defined in the *Act*. CMRRA only acts for publishers. Those publishers who wish to be represented by it sign an affiliation agreement appointing CMRRA as their licencing agent for some or all of various types of

en français et du Québec. Napster est devenu actif au Canada en mai 2004. iTunes a suivi en décembre de la même année et a réussi en peu de temps à dominer le marché canadien.

[13] Les services d'abonnement, en n'offrant que des téléchargements limités et des transmissions sur demande, n'ont pas connu une expansion aussi rapide que les services offrant des téléchargements permanents. Le fait qu'au départ, il était impossible de transférer de la musique à des lecteurs portatifs a sans nul doute contribué à ce moindre succès. Cette restriction a disparu avec l'entrée en scène de *Yahoo! Music Unlimited To Go* et de *Napster To Go*. Le temps dira si ce marché se développera.

[14] La plupart des services en ligne, y compris ceux qui sont offerts par l'entremise des fournisseurs de service Internet ou des entreprises de télécommunications sans fil de Bell, de TELUS et de Rogers, comptent sur une technologie exploitée par d'autres, comme PureTracks ou MusicNet, pour un certain nombre d'opérations d'appoint nécessaires pour offrir de la musique aux consommateurs. Ces opérations incluent la gestion de logiciels, la maintenance de bibliothèques de pistes numériques, la gestion des droits numériques et la production de rapports. Ces services « sans nom » peuvent remplir d'autres fonctions, comme l'obtention de licences pour utiliser les enregistrements sonores des maisons de disques ou pour communiquer et reproduire les œuvres musicales qu'ils contiennent. Bell, TELUS et AOL ont recours à PureTracks, tandis que Rogers-Yahoo! utilise MusicNet.

III. LES PARTIES

[15] La CMRRA se décrit parfois comme une agence autorisant la reproduction d'œuvres musicales; aux termes de la *Loi*, c'est une société de gestion. Elle ne représente que des éditeurs. Ceux qui lui demandent d'agir pour leur compte signent un contrat d'affiliation la désignant à titre d'agent pour autoriser une partie ou la totalité de

reproduction activities, including those targeted in the tariff under examination. Other publishers have signed "stand-alone" agreements dealing specifically with online licensing. In these proceedings, CMRRA represents all or part of 38,240 publishing catalogues. In approximately 80 per cent of instances, CMRRA acts as exclusive agent.²

[16] SODRAC is a collective society whose objects include the collective administration of the right to reproduce musical works. SODRAC 2003 Inc. has been progressively taking over the rights, assets and activities of SODRAC since 2003. Authors and publishers represented by SODRAC assign to it the right to authorize or prohibit all forms of reproduction of their musical works throughout the world. SODRAC currently acts for more than 4,100 authors and 1,600 publishers. It also represents in Canada the interests of a vast number of foreign authors and publishers, through its reciprocal agreements with a number of foreign collective societies.

[17] CSI is a corporation created in 2002 by CMRRA and SODRAC for the purpose of collecting royalties on their behalf for the reproduction of musical works by commercial radio stations. CSI now has an exclusive mandate from CMRRA and SODRAC to licence the reproduction of musical works in their respective repertoires for uses targeted in the tariff under examination.

[18] CSI has entered into licencing agreements with all the online services currently operating in Canada as well as a number of those who are contemplating to do so. CSI requires a tariff because the agreements only provide for interim payments. The final royalties are to be set by the Board, in the tariff.

[19] Apple, Bell, CAB, CRIA, EMI, Rogers, Sony, Universal and Warner are, or represent,

divers types d'activités de reproduction, y compris celles qui sont visées dans le tarif à l'étude. D'autres éditeurs ont signé des ententes autonomes portant expressément sur la concession de licences pour les droits en ligne. Dans la présente affaire, la CMRRA représente en tout ou en partie 38 240 catalogues d'édition. Elle agit à titre exclusif dans environ 80 pour cent des cas.²

[16] La SODRAC est une société de gestion qui s'occupe notamment de gérer collectivement le droit de reproduire des œuvres musicales. SODRAC 2003 inc. prend progressivement à sa charge les droits, actifs et activités de la SODRAC depuis 2003. Les auteurs et éditeurs que la SODRAC représente lui cèdent le droit d'autoriser ou d'interdire partout dans le monde toute forme de reproduction de leurs œuvres musicales. La SODRAC agit actuellement pour le compte de plus de 4100 auteurs et 1600 éditeurs. Elle représente également au Canada les intérêts d'un grand nombre d'auteurs et d'éditeurs étrangers, en vertu d'ententes de réciprocité avec plusieurs sociétés de gestion étrangères.

[17] CSI est une société créée en 2002 par la CMRRA et la SODRAC, afin de percevoir en leur nom des redevances pour la reproduction d'œuvres musicales par les stations de radio commerciales. La CMRRA et la SODRAC lui ont confié le mandat exclusif d'autoriser la reproduction d'œuvres musicales de leurs répertoires aux fins d'utilisations visées par le présent tarif.

[18] CSI a conclu des ententes de licence avec tous les services en ligne faisant actuellement affaire au Canada et avec certains autres qui envisagent de le faire. Elle a besoin d'un tarif parce que les ententes ne prévoient que des versements provisoires. La Commission doit fixer les redevances finales, par voie de tarif.

[19] Apple, Bell, l'ACR, la CRIA, EMI, Rogers, Sony, Universal et Warner sont, ou représentent,

corporations that offer, purport to offer or intend to offer some form of online music service. As such, all require a licence to reproduce musical works onto their servers and to authorize their customers to make their own reproductions onto personal computers, portable music players and recordable CDs.³

IV. POSITIONS AND EVIDENCE

A. CSI

[20] CSI's original proposal asked for the greater of: (a) 7.5 per cent of gross revenue or 75¢ per month per subscriber for services that only offer on-demand streams; (b) 10 per cent of gross revenue or one dollar per month per subscriber for services that offer limited downloads, with or without on-demand streams; and (c) 15 per cent of gross revenue or 10¢ per permanent download of a single musical work.

[21] In its statement of case, CSI modified its proposal in two respects. For category (a), CSI asked for 5.8 per cent of gross revenue or 45¢ per month per subscriber. For category (b), it asked for 8 per cent of gross revenue or 60¢ per month per subscriber if the service does not allow reproductions onto portable devices and \$1.40 if it does. Originally, category (b) targeted only limited downloads that could not be reproduced further on other readable media. Some subscription services now allow subscribers to make "portable limited downloads", that is to copy music tracks onto portable devices. CSI proposed to amend the definition of limited downloads to reflect this. In final argument, CSI again modified its proposals to 6.7 per cent and 45¢ for category (a), and to 9.8 per cent, 72¢ and \$1.75 for category (b), to reflect a change in the way to account for the use of works that are not in CSI's repertoire.

des sociétés qui offrent, disent offrir ou entendent offrir une forme quelconque de service de musique en ligne. Toutes ont donc besoin d'une licence pour reproduire des œuvres musicales sur leurs serveurs et pour autoriser leurs clients à faire eux-mêmes des reproductions sur des ordinateurs personnels, des lecteurs portatifs de musique et des CD enregistrables.³

IV. POSITIONS ET PREUVE

A. CSI

[20] Au départ, CSI demandait le plus élevé de : a) 7,5 pour cent des revenus bruts ou 75 ¢ par mois par abonné pour un service n'offrant que des transmissions sur demande; b) 10 pour cent des revenus bruts ou un dollar par mois par abonné pour un service offrant des téléchargements limités, avec ou sans transmissions sur demande; c) 15 pour cent des revenus bruts ou 10 ¢ par téléchargement permanent d'une seule œuvre musicale.

[21] Dans son énoncé de cause, CSI a modifié deux aspects de sa proposition. Pour la catégorie a), elle a demandé 5,8 pour cent des revenus bruts ou 45 ¢ par mois par abonné. Pour la catégorie b), elle a demandé 8 pour cent des revenus bruts ou 60 ¢ par mois par abonné si le service n'autorise pas de reproductions sur des appareils portatifs et 1,40 \$ s'il les autorise. Au départ, la catégorie b) ne visait que les téléchargements limités ne pouvant être reproduits par la suite sur d'autres supports lisibles. Certains services d'abonnement permettent maintenant aux abonnés d'effectuer des « téléchargements limités portables », c'est-à-dire de copier une piste musicale sur un appareil portatif. CSI a proposé de modifier la définition de téléchargement limité pour refléter cette nouvelle réalité. Dans son argumentation finale, CSI a encore une fois modifié ses propositions à 6,7 pour cent et 45 ¢ pour la catégorie a); et 9,8 pour cent, 72 ¢ et 1,75 \$ pour la catégorie b), pour refléter un changement dans la façon de rendre compte de l'utilisation d'œuvres qui ne font pas partie de son répertoire.

[22] CSI called several persons involved with CMRRA and SODRAC as well as a number of experts to support its proposed tariff.

[23] Mrs. Claudette Fortier, President of CSI, described its corporate structure and that of its shareholders. She explained the differences in the way CMRRA and SODRAC secure their repertoire generally, and for the purposes of the tariff under examination specifically. She emphasized that the licences they grant to record labels do not allow them to use their repertoire in connection with the operation of an online music service. She also explained the practical reasons behind the collectives' practice to mostly deal with the person who actually uses a musical work, and not with an intermediary.

[24] Mr. David Basskin, President of CMRRA and Vice-President of CSI, described Canadian online services and the ways in which they offer music to consumers. He dealt at some length with the terms of the Mechanical Licencing Agreement (MLA) entered into between CMRRA and CRIA, which licences record labels to reproduce musical works onto prerecorded CDs; in particular, he discussed the various discounts the agreement allows in respect of promotional products, budget goods and the like.

[25] Mr. Basskin and Mrs. Fortier testified on the operation of the so-called controlled composition clause (CCC) in the music industry. The CCC originated in the United States in the 1970s, and is more prevalent there than in Canada. This clause is found in agreements between a record label and a performing artist. It allows the label to obtain a mechanical licence at a reduced rate when the artist owns or controls some or all of the copyright in the works the artist records. Typically, it reduces the rate per track by 25 per cent, freezes royalties at the rate in effect at the time of entering into a contract,

[22] CSI a fait appel à plusieurs personnes associées à la CMRRA et à la SODRAC ainsi qu'à certains experts pour appuyer le tarif qu'elle a proposé.

[23] M^{me} Claudette Fortier, présidente de CSI, a décrit la structure organisationnelle de la société et celle de ses actionnaires. Elle a expliqué les différences entre les façons dont la CMRRA et la SODRAC acquièrent leur répertoire en général, et aux fins du tarif à l'étude en particulier. Elle a souligné que les droits que concèdent ces sociétés aux maisons de disques ne permettent pas à ces dernières d'utiliser leur répertoire dans le cadre de l'exploitation d'un service de musique en ligne. Elle a aussi expliqué les raisons pratiques qui sous-tendent l'habitude des sociétés de gestion de traiter principalement avec la personne qui utilise réellement une œuvre musicale, et non pas avec un intermédiaire.

[24] M. David Basskin, président de la CMRRA et vice-président de CSI, a décrit les services en ligne canadiens et leurs façons d'offrir de la musique aux consommateurs. Il a traité longuement des modalités de l'entente de licence de reproduction mécanique (MLA) conclue entre la CMRRA et la CRIA, qui autorise les maisons de disques à reproduire des œuvres musicales sur des CD préenregistrés. Il a parlé, en particulier, des divers escomptes que l'entente accorde pour les produits promotionnels, articles bon marché et autres produits du genre.

[25] M. Basskin et M^{me} Fortier ont témoigné au sujet de l'application de ce qui est communément appelé la clause de composition contrôlée (CCC) dans l'industrie de la musique. La CCC a pris naissance aux États-Unis dans les années 70 et y est plus répandue qu'au Canada. On la trouve dans des ententes entre maisons de disques et interprètes. Elle permet à la maison d'obtenir une licence de reproduction mécanique à un taux réduit lorsque l'artiste possède ou contrôle tout ou partie des droits sur les œuvres qu'il enregistre. La clause réduit habituellement le taux par piste de 25 pour cent, gèle les

caps the number of tracks for which royalties must be paid and treats up to 15 per cent of CDs as "free goods" for which no royalties are payable.

[26] The MLA limits the impact of the CCC in Canada through a number of mechanisms. Its influence with respect to SODRAC's repertoire is much less significant. SODRAC has never included the CCC in its agreements with Quebec independent record producers and has refused since 1995 to renew its contract with CRIA precisely to avoid the application of such a clause.

[27] A panel representing the Canadian music publishing industry consisted of Messrs. Mark Jowett of Nettwerk One, Daniel Lafrance of *Éditorial Avenue* and Jodie Ferneyhough of Universal Music Publishing Canada. They provided an overview of the industry and of the role it plays in talent development.

[28] Mr. Paul Audley, President, Paul Audley and Associates Ltd., reviewed a study he prepared with others regarding the Canadian music publishing industry. The study documented, among other things, that sales of prerecorded albums declined by 25 per cent between 1998 and 2003 and that revenues decreased by 24 per cent over the same period.

[29] Mr. Audley also prepared with Professor Douglas Hyatt of the Rotman School of Management, Centre for Industrial Relations, at the University of Toronto and Division of Management, University of Toronto at Scarborough, a report that proposed a method to determine the royalties payable for the uses targeted in the tariff under examination. They testified that the market for mastertones⁴ was in effect part of the same digital market as online

redevances au taux en vigueur au moment de la conclusion du contrat, plafonne le nombre de pistes pour lesquelles il faut verser des redevances et traite jusqu'à 15 pour cent des CD comme des « biens gratuits » pour lesquels aucune redevance n'est exigible.

[26] La MLA limite les répercussions de la CCC au Canada au moyen d'un certain nombre de mécanismes. L'impact de la CCC sur le répertoire de la SODRAC est beaucoup moins important. Cette dernière n'a jamais inclus cette disposition dans ses ententes avec des producteurs de disques indépendants du Québec et refuse depuis 1995 de renouveler son contrat avec la CRIA précisément pour éviter l'application d'une telle clause.

[27] Le panel représentant l'industrie de l'édition de musique canadienne se composait de MM. Mark Jowett de Nettwerk One, Daniel Lafrance d'*Éditorial Avenue* et Jodie Ferneyhough de Universal Music Publishing Canada. Ils ont offert un survol de l'industrie et du rôle qu'elle joue dans le développement des artistes.

[28] M. Paul Audley, président de Paul Audley and Associates Ltd., a passé en revue un rapport qu'il a préparé avec d'autres sur l'industrie de l'édition de musique canadienne. Ce rapport indique entre autres que les ventes d'albums préenregistrés ont diminué de 25 pour cent entre 1998 et 2003 et que les revenus en découlant ont baissé de 24 pour cent au cours de la même période.

[29] De concert avec le professeur Douglas Hyatt de la *Rotman School of Management, Centre for Industrial Relations* de l'Université de Toronto et de la *Division of Management* de l'Université de Toronto à Scarborough, M. Audley a aussi préparé un rapport proposant une façon d'établir les redevances exigibles pour les utilisations visées dans le tarif à l'étude. Les auteurs ont conclu que, dans les faits, le marché des sonneries authentiques⁴ fait partie du même

music and proposed to derive a rate for permanent downloads by comparing the prices paid for copyright protected inputs in both markets. Their fundamental assumption was that, given the similarities between mastertones and permanent downloads, the ratio between the royalties paid for the reproduction of musical works and of sound recordings should be the same for both. The New Digital Media Agreements (or NDMA) between American record labels and American music publishers set the price to be paid to reproduce the musical work and the sound recording into a mastertone.⁵ The witnesses applied the ratio between those prices to what online services pay to labels for the use of their sound recordings, to arrive at a rate to be paid for the reproduction of musical works. The resulting rate is higher than what CSI is seeking. Messrs. Audley and Hyatt then used the rate they developed for permanent downloads to derive the royalties to be paid for limited downloads and on-demand streams.

[30] In their reply evidence, Messrs. Audley and Hyatt looked at three other ways of deriving a tariff for permanent downloads. The first was based on information provided by CRIA on the breakdown of the cost of a CD purchased in Canada, the second on information on the breakdown of revenues from CD sales in Quebec and the third on the income record labels receive from pressing and distribution agreements. All started from the existing mechanical royalty rate for the reproduction of musical works onto a physical medium. All were based on comparing the percentage of retail price that record labels receive in a variety of transactions involving prerecorded CDs to the equivalent percentage that labels receive in the online market. The fundamental assumption in those instances was that if the remuneration of labels increases in the

marché numérique que la musique en ligne et ont proposé d'établir le tarif pour les téléchargements permanents en comparant les prix payés pour les intrants protégés par le droit d'auteur dans les deux marchés. Suivant leur hypothèse de base, compte tenu des similarités entre les sonneries authentiques et les téléchargements permanents, le rapport entre les redevances versées pour la reproduction d'œuvres musicales et celles payées pour la reproduction d'enregistrements sonores devrait être le même pour les deux. Les *New Digital Media Agreements* (NDMA ou ententes sur les nouveaux médias numériques) entre les maisons de disques américaines et les éditeurs de musique américains fixent le prix à payer pour reproduire l'œuvre musicale et l'enregistrement sonore dans une sonnerie authentique.⁵ Les témoins ont appliqué le rapport entre ces prix à ce que les services en ligne paient aux maisons de disques pour l'utilisation de leurs enregistrements sonores, afin d'en arriver à un taux à verser pour la reproduction d'œuvres musicales. Le taux obtenu est plus élevé que ce que CSI demande. MM. Audley et Hyatt ont ensuite utilisé le taux qu'ils ont mis au point pour les téléchargements permanents afin de calculer les redevances à verser pour les téléchargements limités et les transmissions sur demande.

[30] Dans leur contre-preuve, MM. Audley et Hyatt ont examiné trois autres façons d'en arriver à un tarif pour les téléchargements permanents. La première reposait sur des renseignements fournis par la CRIA au sujet de la ventilation du coût d'un CD acheté au Canada, la deuxième, sur des données relatives à la ventilation des revenus découlant des ventes de CD au Québec et la troisième, sur les revenus que les maisons de disques touchent dans le cadre des ententes de pressage et de distribution. Toutes avaient pour point de départ le taux actuel de redevance pour la reproduction mécanique d'œuvres musicales sur un support matériel. Toutes reposaient également sur une comparaison du pourcentage du prix de détail que les maisons de disques touchent dans le cadre de diverses opérations concernant des CD

online market, the remuneration of authors should increase at the same rate. These alternative approaches resulted in rates between 13 and 15 per cent.

[31] Mr. Marcel Boyer is Bell Canada Professor of industrial economics, Department of Economics, *Université de Montréal* and Fellow of the Centre for Interuniversity Research and Analysis on Organizations, of the *Centre interuniversitaire de recherche en économie quantitative* and of the C.D. Howe Institute. He reviewed the valuation evidence offered by CSI and the Objectors. He discussed issues such as the notion of option value, patent pools and sharing of benefits. He testified that the relative value of the reproduction rights of labels and authors should be similar between mastertones and permanent downloads, and that, since the music market seems to be expanding, this should result in equal pressure to increase the cost of all of these input prices in the permanent download market.

[32] Mr. Clark Miller, General Counsel Worldwide, EMI Publishing and Mr. Frank P. Scibilia, Partner at Pryor Cashman Sherman & Flynn LLP testified about the content and impact of various agreements that license the use of EMI's repertoire of musical works, including the NDMA's that allow the use of that repertoire in mastertones. They described section 115 of the U.S. Copyright Act, which provides for a compulsory licence for the mechanical reproduction of music onto sound recordings and explained in detail the operation of CCCs in the United States.

[33] Ms. Caroline Rioux, Vice-President Operations, CMRRA, testified on the extent of

préenregistrés au pourcentage équivalent que ces maisons touchent sur le marché en ligne. L'hypothèse de base dans ces cas est que si les revenus des maisons augmentent sur le marché en ligne, ceux des auteurs devraient augmenter au même rythme. Ces différentes méthodes donnaient des taux variant entre 13 et 15 pour cent.

[31] M. Marcel Boyer est titulaire de la Chaire Bell Canada en économie industrielle au Département de sciences économiques de l'Université de Montréal et *fellow* du Centre interuniversitaire de recherche en analyse des organisations, du Centre interuniversitaire de recherche en économie quantitative et de l'Institut C.D. Howe. Il a examiné la preuve sur l'évaluation présentée par CSI et les opposantes. Il a traité de questions comme la notion de valeur d'option, les communautés de brevets et le partage des bénéfices. Il a déclaré que la valeur relative des droits de reproduction des maisons de disques et des auteurs devrait être la même pour les sonneries authentiques et les téléchargements permanents et que cela, étant donné que le marché de la musique semble en pleine expansion, devrait entraîner des pressions égales en faveur d'une augmentation de tous les prix de ces intrants sur le marché des téléchargements permanents.

[32] M. Clark Miller, conseiller juridique international chez EMI Publishing, et M. Frank P. Scibilia, associé chez Pryor Cashman Sherman & Flynn LLP, ont parlé du contenu et des répercussions de diverses ententes qui autorisent l'utilisation du répertoire d'œuvres musicales d'EMI, y compris les NDMA qui permettent l'emploi de ce répertoire pour les sonneries authentiques. Ils ont décrit l'article 115 de la loi américaine sur le droit d'auteur, qui prévoit une licence obligatoire pour la reproduction mécanique de musique dans un enregistrement sonore et expliqué en détail l'application des CCC aux États-Unis.

[33] M^{me} Caroline Rioux, vice-présidente aux opérations de la CMRRA, a témoigné à propos

the CSI repertoire, the extent of its use and the challenges created by the delivery of musical works in the digital environment generally, and through online services particularly. The CMRRA and SODRAC databases, which were consolidated in 2005, list approximately 1.1 million musical works. The consolidated database is updated daily, to add new compositions and to reflect the fact that publishers' catalogues are regularly bought and sold. In 2005, CSI began issuing licences to eight online services. Ms. Rioux described the licensing process, noting that CSI has invested over a million dollars to design and implement a computerized system to expeditiously assess the applications of services and to grant them licences. She stated that in the first 18 months of operations, 1.5 million licences were issued, which is more than the total number of licences issued for prerecorded media (vinyl, cassettes and CDs) since the creation of CMRRA some 30 years ago. At the time of the hearings, online services had filed some 5.7 million applications.

[34] A panel consisting of Ms. Rioux, Mr. Joël Martin, Project Manager, SODRAC and Mr. Benoît Gauthier, President, *Réseau Circum*, explained the analysis that was performed to determine the relative share of Canadian air play of the CSI repertoire. For reasons that will become clear, this analysis is now irrelevant and as a result, there is no need to set out the evidence in detail.

[35] CSI contends that the offering of music on line increases the value of its repertoire and that right holders are entitled to a share in the value of this new economic activity. The right to reproduce musical works and to authorize subscribers to make their own copies is essential to online services. Indeed, without it, they could not operate. The use made of the reproduction right is much more extensive here than in the

de l'étendue du répertoire de CSI, de l'ampleur de son utilisation et des défis que pose la distribution d'œuvres musicales dans l'environnement numérique en général et par l'intermédiaire des services en ligne en particulier. Les bases de données de la CMRRA et de la SODRAC, qui ont été groupées en 2005, comptent environ 1,1 million d'œuvres musicales. Une mise à jour quotidienne est effectuée pour y intégrer de nouvelles compositions et pour rendre compte du fait qu'on transige régulièrement les catalogues d'éditeurs. CSI a entrepris en 2005 de délivrer des licences à huit services en ligne. M^{me} Rioux a décrit le mécanisme de délivrance de licences et souligné que CSI a investi jusqu'ici plus d'un million de dollars pour la conception et la mise en œuvre d'un système informatisé permettant d'évaluer rapidement les demandes des services et de leur délivrer des licences. Elle a déclaré qu'au cours des 18 premiers mois d'activité, CSI a délivré 1,5 million de licences, ce qui est plus que le nombre total de licences délivrées pour des supports préenregistrés (vinyles, cassettes et CD) depuis la création de la CMRRA il y a une trentaine d'années. Au moment des audiences, les services en ligne avaient déposé quelque 5,7 millions de demandes.

[34] Un panel composé de M^{me} Rioux, de M. Joël Martin, chef de projet, SODRAC, et de M. Benoît Gauthier, président de Réseau Circum, a expliqué l'analyse effectuée pour déterminer le temps d'antenne que le répertoire de CSI occupe sur les ondes canadiennes. Pour des raisons qui deviendront évidentes, cette analyse n'est plus pertinente. Il n'est donc pas nécessaire d'exposer en détail la preuve s'y rattachant.

[35] CSI prétend qu'offrir de la musique en ligne accroît la valeur de son répertoire et que les titulaires ont droit à une part de la valeur de cette nouvelle activité économique. Les services en ligne ont absolument besoin du droit de reproduire des œuvres musicales et d'autoriser leurs abonnés à en faire eux-mêmes des copies. En effet, sans ce droit, les services ne pourraient fonctionner. L'utilisation qu'on fait du droit de

market for prerecorded CDs. For example, online services allow subscribers to make multiple copies. That ability to make additional copies gives services a competitive edge and provides added value to consumers. Rights holders should benefit from that added value.

[36] CSI proposes: that the tariff set minimum rates; that the rate for limited downloads be one-third lower than for permanent downloads; and that the rate for on-demand streams be somewhere between what is set for limited downloads and what pay audio services have agreed to. Finally, it proposes that the licences be issued only to online services and opposes the possibility of allowing record labels to obtain a licence from CSI and then sub-licence the use of CSI's repertoire by those services.

B. Objectors

[37] The Objectors filed a joint statement of case. They propose royalties of 5.3 per cent for permanent downloads, 3.5 per cent for limited downloads and 0.5 per cent for on-demand streaming. They ask that the rate base be what subscribers pay, not gross income. They propose minimum rates of 3.85¢ for permanent downloads; for services that allow limited downloads and on-demand streaming, they propose a minimum of 21¢ per month per subscriber if a service does not authorize reproductions onto portable devices and 33¢ if it does. They propose either that no minimum be applied to downloads of albums or that the minimum price be reduced so as to avoid excessive royalties in the case of albums containing a large number of tracks. Finally, they seek the right for record labels to be allowed to apply for the licence so as to then sub-licence the right to reproduce the musical work to online services.

reproduction est beaucoup plus étendue dans ce cas que sur le marché des CD préenregistrés. Les services en ligne autorisent, par exemple, leurs abonnés à faire plusieurs copies. Cette faculté de faire des copies additionnelles donne aux services un avantage concurrentiel et fournit aux consommateurs une valeur ajoutée dont les titulaires de droits devraient tirer profit.

[36] CSI propose qu'on fixe des taux de redevances minimales, que le taux pour les téléchargements limités soit inférieur d'un tiers à celui pour les téléchargements permanents et que le taux pour les transmissions sur demande se situe entre les taux établis pour les téléchargements limités et ceux de l'entente avec les services sonores payants. Enfin, CSI propose de délivrer la licence uniquement aux services en ligne et s'oppose à ce qu'on permette aux maisons de disques d'obtenir une licence de CSI pour ensuite autoriser les services, au moyen d'une sous-licence, à utiliser son répertoire.

B. Les opposantes

[37] Les opposantes ont déposé un énoncé de cause conjoint. Elles proposent des redevances de 5,3 pour cent pour les téléchargements permanents, de 3,5 pour cent pour les téléchargements limités et de 0,5 pour cent pour les transmissions sur demande. Elles demandent que la base tarifaire corresponde à ce que paient les consommateurs et non pas au revenu brut. Elles proposent un minimum de 3,85 ¢ pour les téléchargements permanents, de 21 ¢ par mois par abonné pour les services qui permettent les téléchargements limités et les transmissions sur demande si la reproduction sur un appareil portatif est interdite et de 33 ¢ si elle est permise. Elles proposent également de n'appliquer aucun minimum aux téléchargements d'albums ou de réduire ce minimum de façon à éviter des redevances excessives dans le cas des albums renfermant une grande quantité de pistes. Enfin, elles cherchent à ce que les maisons de disques puissent demander la licence pour ensuite délivrer aux services en ligne une sous-licence de reproduction des œuvres musicales.

[38] The Objectors called several witnesses in support of their proposed approach.

[39] Mr. Alistair Mitchell, CEO and co-founder of PureTracks, described the development of this, the first online music service in Canada. He testified that PureTracks used the traditional physical music market as its business model, and considers online music as simply an extension of that market. In his opinion, there is a lack of understanding about the resources required to operate an online service. It requires a very costly infrastructure, which must be updated continually. It also involves the (sometimes costly) need to deal with a large number of credit card micro-transactions.

[40] Mr. Graham Henderson, President of CRIA, Mr. Mark Jones, Vice-President, Finance and Information Technology, Universal Music, and Ms. Christine Prudham, Vice-President, Legal and Regulatory Affairs, SONY BMG Music (Canada) Inc., testified on behalf of CRIA. They outlined the difficulties of growing the online music market in Canada, which they attribute to the negative effect of unauthorized downloads. They quoted figures according to which as few as 6 per cent of Canadians who download music obtain it from authorized services and that there are 14 unauthorized downloads for every authorized one.

[41] The panel outlined the significant costs that record labels have incurred to enter the digital market. These include not only the development of infrastructures and systems to manage the information, but also the digitization of the back catalogue, which requires re-mastering hundreds of thousands of sound recordings made before the advent of digital technology. It is also necessary in most instances to transform those recordings into the various formats adopted by those who retail mastertones and full-track downloads.

[38] Les opposantes ont fait appel à plusieurs témoins pour appuyer leur approche.

[39] M. Alistair Mitchell, président-directeur général et co-fondateur de PureTracks, a décrit le développement de ce premier service de musique en ligne au Canada. Il a déclaré que PureTracks a utilisé le marché matériel traditionnel de la musique comme modèle d'entreprise et considère la musique en ligne simplement comme un prolongement de ce marché. À son avis, on connaît mal les ressources nécessaires à l'exploitation d'un service en ligne. Cela exige une infrastructure très coûteuse, qu'il faut continuellement moderniser, ainsi que l'obligation (parfois onéreuse) de traiter un grand nombre de micro-opérations par carte de crédit.

[40] M. Graham Henderson, président de la CRIA, M. Mark Jones, vice-président aux finances et à la technologie de l'information chez Universal Music, et M^{me} Christine Prudham, vice-présidente aux affaires juridiques et réglementaires chez SONY BMG Music (Canada) Inc., ont témoigné au nom de la CRIA. Ils ont fourni un aperçu des problèmes de croissance du marché de la musique en ligne au Canada, qu'ils attribuent à l'effet négatif des téléchargements non autorisés. Ils ont cité des chiffres selon lesquels à peine 6 pour cent des Canadiens qui téléchargent de la musique l'obtiennent de services autorisés et qu'il y a 14 téléchargements non autorisés pour chaque téléchargement autorisé.

[41] Le panel a fourni un aperçu des coûts substantiels qu'encourent les maisons de disques pour entrer sur le marché numérique. Ces coûts incluent non seulement le développement d'infrastructures et de systèmes pour gérer l'information, mais également la numérisation du catalogue existant, qui exige le rematriçage de centaines de milliers d'enregistrements sonores réalisés avant l'avènement de la technologie numérique. Dans la plupart des cas, il faut aussi convertir ces enregistrements selon les divers formats adoptés par les détaillants de sonneries authentiques et de téléchargements pleine piste.

[42] The panel also testified about the money and resources that record labels expend on finding and developing artists and producing master recordings that can then be marketed as prerecorded CDs and music downloads. These costs are not expected to drop simply because recordings will now be offered online. The panel contrasted the role of publishers and labels, arguing that labels spend far more than publishers on finding and developing new talent.

[43] The CRIA panel outlined what they believe to be the distinctions between mastertones and online music. Mastertones are fashion statements; downloads are not. Differences in buying patterns are significant: consumers tend to buy less than two mastertones per month, as opposed to more than twenty downloads of music per month.

[44] Finally, the panel explained why it wished that record labels be allowed to purchase the licence from CSI and then deal with the online services. This would be both cost effective and administratively more efficient, and would take into account the fact that CSI does not represent all of the repertoire offered by the labels.

[45] Mr. Steven Globerman is Kaiser Professor of International Business, Western Washington University, College of Business and Economics and Adjunct Professor at the Faculty of Business Administration, Simon Fraser University. He was asked to assess which, of the mastertone and prerecorded CD markets, constitutes a better proxy for permanent downloads. He was not asked to suggest an appropriate price or rate.

[42] Le panel a aussi parlé des sommes d'argent et autres ressources que les maisons de disques consacrent à la découverte et à la mise en valeur d'artistes et à la production d'enregistrements originaux qu'on peut ensuite commercialiser sous forme de CD préenregistrés et de téléchargements. Ces coûts ne devraient pas chuter simplement parce qu'on offrira désormais des enregistrements en ligne. Le panel a comparé le rôle des éditeurs à celui des maisons de disques et soutenu que ces dernières dépensent beaucoup plus que les premiers pour découvrir et pour développer de nouveaux talents.

[43] Le panel de la CRIA a fourni un aperçu de ce qu'ils croient être les distinctions entre les sonneries authentiques et la musique en ligne. Contrairement aux téléchargements, les sonneries authentiques sont des formes d'expression à la mode. Les différences sur le plan des habitudes d'achat sont importantes : les consommateurs ont tendance à acheter moins de deux sonneries authentiques par mois, comparativement à plus de vingt téléchargements de musique.

[44] Enfin, le panel a expliqué pourquoi il faudrait qu'on permette aux maisons de disques d'acheter la licence de CSI, puis de traiter avec les services en ligne. Cela serait à la fois rentable et plus efficace, sur le plan administratif, et tiendrait compte du fait que CSI ne représente pas l'ensemble du répertoire qu'offrent les maisons de disques.

[45] M. Steven Globerman est professeur titulaire de la Chaire Kaiser de commerce international au *College of Business and Economics* à l'Université Western Washington et professeur adjoint à la Faculté d'administration des affaires de l'Université Simon Fraser. On lui a demandé d'évaluer quel marché, celui des sonneries authentiques ou celui des CD préenregistrés, représente une meilleure référence pour les téléchargements permanents. On ne lui a pas demandé de suggérer un prix ou un taux approprié.

[46] Professor Globerman began by examining what makes the price paid for a factor of production fair and equitable. That price should be equal to the value of the input's marginal product, which is the marginal productivity of the input weighted by the price of the product.⁶ He then stated that intellectual property has characteristics that make it difficult, if not impossible, to apply to it notions that are valid when dealing with ordinary goods. For example, contrary to what Professor Boyer stated, it is difficult, if not impossible, to conceive of such a thing as marginal consumption of intellectual property. When using a divisible capital asset, it is possible to influence the end result by increasing the use of the input: thus, for example, one can use more fertilizer to increase the yield of a crop. Intellectual property is an indivisible capital asset. Either one uses it or one does not. As a result, the notion that one can use a little more or a little less of intellectual property in order to determine its value is not realistic. However, assimilating the reproduction right to a capital asset makes it possible to define a fair and equitable input price in a similar way as for ordinary goods.

[47] Professor Globerman then explained how he compared permanent downloads to other potential proxy markets. Based on his notion of a fair and equitable input price, he identified three characteristics he considered helpful to determine whether a market constitutes an appropriate proxy. Those are the price for which the good is sold (output price), the costs incurred to produce and offer the good (input prices), and the seller's discount rate. Since no information was available to determine the discount rate, Professor Globerman chose to ignore that factor, adding that this did not affect his analysis.

[48] With respect to the first characteristic, Professor Globerman stated that the closer the

[46] Le professeur Globerman a d'abord examiné ce qui fait que le prix payé pour un facteur de production est juste et équitable. Ce prix devrait être égal à la valeur du produit marginal d'un intrant, qui est la productivité marginale de l'intrant pondérée par le prix du produit.⁶ Il a ensuite précisé que la propriété intellectuelle a des caractéristiques rendant difficile, sinon impossible, d'y appliquer des notions qui sont valables lorsqu'on a affaire à des biens ordinaires. Par exemple, contrairement à ce que le professeur Boyer a déclaré, il est difficile, sinon impossible, de parler en termes de consommation marginale de la propriété intellectuelle. Lorsqu'on utilise un actif immobilisé divisible, on peut influencer le résultat final en accroissant l'utilisation de l'intrant : on peut, par exemple, répandre plus d'engrais pour accroître le rendement d'une récolte. La propriété intellectuelle est un actif immobilisé indivisible, dont on se sert ou pas. La notion suivant laquelle on peut utiliser un peu plus ou un peu moins de propriété intellectuelle afin d'en déterminer la valeur est donc irréaliste. Cependant, en assimilant le droit de reproduction à un actif immobilisé, il est possible de définir le prix d'intrant juste et équitable de la même façon que pour des biens ordinaires.

[47] Le professeur Globerman a ensuite expliqué comment il a comparé les téléchargements permanents à d'autres marchés de référence potentiels. En se fondant sur sa notion du prix juste et équitable d'un intrant, il a identifié trois caractéristiques qu'il juge utiles pour déterminer si un marché représente une référence appropriée. Ces caractéristiques sont le prix auquel le bien est vendu (le prix de l'extrait), les coûts encourus pour produire et offrir le bien (les prix des intrants) et le taux d'escompte du vendeur. En l'absence de toute information permettant de déterminer ce taux d'escompte, le professeur Globerman a décidé de ne pas en tenir compte, ajoutant que cela n'influçait pas son analyse.

[48] En ce qui concerne la première caractéristique, le professeur Globerman a

output prices are in two markets, the more likely one is to constitute an appropriate proxy for the other. Conversely, when prices in two markets differ significantly, one probably does not constitute an appropriate proxy for the other. He then observed that the retail price for mastertones is three times that for permanent downloads. By contrast, the per-track retail price of a prerecorded CD is more or less the same as the price of a single permanent download. Using data provided in Messrs. Audley and Hyatt's reply evidence, Professor Globerman calculated the average price per track for both CDs and permanent downloads. He concluded that the per unit price was more similar between CDs and permanent downloads than between mastertones and permanent downloads.

[49] Professor Globerman then described the notion of "value chain", which is a set of activities carried out by a business to create a commercially valuable output. It is typically comprised of primary activities (logistics, operations, marketing, sales and customer services) and support activities (planning, research, human resources management). Using that notion, he disagreed with the conclusion of Messrs. Audley and Hyatt to the effect that input costs are very different between the prerecorded CD and permanent download markets. He stated that, once costs were properly accounted for, they were closely comparable.

[50] Professor Globerman's overall conclusion was that these similarities between the input and output prices of prerecorded CDs and permanent downloads confirm that the former probably constitute the best available proxy to set the tariff for the latter.

[51] Mr. Ted Cohen, former Senior Vice-President, Digital Development and Distribution

précisé que plus le prix d'extrants sur deux marchés se rapprochent, plus il est probable que l'un constitue une référence appropriée pour l'autre. Le contraire est vrai lorsque les prix sur deux marchés diffèrent énormément. Il a ensuite observé que le prix de détail des sonneries authentiques est le triple de celui des téléchargements permanents. À l'opposé, le prix de détail par piste d'un CD préenregistré est plus ou moins le même que le prix du téléchargement permanent d'une piste simple. À l'aide de données fournies dans la contre-preuve de MM. Audley et Hyatt, le professeur Globerman a calculé le prix moyen par piste pour les CD et les téléchargements permanents. Il a conclu que le prix à l'unité était plus similaire entre les CD et les téléchargements permanents qu'entre les sonneries authentiques et les téléchargements permanents.

[49] Le professeur Globerman a ensuite décrit la notion de « chaîne de valeur », soit l'ensemble d'activités que réalise une entreprise pour créer un extrant ayant une valeur commerciale. Cette chaîne se compose habituellement d'activités principales (logistique, opérations, commercialisation, ventes et services aux clients) et d'activités de soutien (planification, recherche, gestion des ressources humaines). Invoquant cette notion, il s'est déclaré en désaccord avec la conclusion de MM. Audley et Hyatt selon laquelle il y avait une très grande différence, sur le plan des coûts des intrants, entre les marchés des CD préenregistrés et celui des téléchargements permanents. Il a précisé que ces marchés étaient étroitement comparables une fois les coûts correctement comptabilisés.

[50] Le professeur Globerman a conclu globalement que ces similarités entre les prix des intrants et ceux des extrants des CD préenregistrés et des téléchargements permanents confirment que les premiers représentent probablement la meilleure référence disponible pour fixer le tarif des seconds.

[51] M. Ted Cohen, ex-premier vice-président au développement numérique et à la distribution

for EMI Music, has played a key role in the development of a number of online services. He described the costs associated with the delivery of a sound recording as a prerecorded CD and as a download. He admitted that there may be significant differences between the value chains in the physical and digital environments, but maintained that the business model used to market prerecorded CDs remains the closest to digital downloads. In his opinion, mastertones will cease to exist as a stand-alone business within two years and will be bundled with permanent downloads. If only for that reason, he considers that the mastertone market is not an appropriate business model to use as a proxy. Mastertones, in his opinion, are personalization products, not music products.

[52] Mr. Stephen Stohn, Partner at Stohn Hay Cafazzo Dembroski Richmond LLP and expert in the music business, was commissioned to summarize the typical contractual provisions and agreements in the music industry relevant to the reproduction right and to suggest the most appropriate proxy in the Canadian music market to determine an appropriate royalty rate.

[53] Mr. Joseph Salvo, special counsel, Weil, Gotshal & Manges LLP, and as former counsel for SONY, one of the negotiators of the NDMA, testified about the genesis, content and impact of the NDMA and on the relevance of the mechanical compulsory licence and of CCCs in the digital environment in the United States.

[54] Messrs. Terry Canning, Vice-President and General Manager of the Rogers Hi-Speed Internet Service, Patrick McLean, General Manager of Consumer Internet Services at Bell Canada, and Kerry Munro, General Manager of Yahoo! Canada, described the development and

chez EMI Music, a joué un rôle clé dans la mise sur pied d'un certain nombre de services en ligne. Il a décrit les coûts se rattachant à la distribution d'un enregistrement sonore sous forme de CD préenregistré et de téléchargement. Il a reconnu qu'il peut exister d'importantes différences entre les chaînes de valeur d'un environnement matériel et d'un environnement numérique, mais a soutenu que le modèle d'entreprise utilisé pour commercialiser les CD préenregistrés reste celui qui se rapproche le plus de celui des téléchargements numériques. À son avis, d'ici deux ans, les sonneries authentiques ne constitueront plus une branche d'activité indépendante et seront vendues avec les téléchargements permanents. Ne serait-ce que pour cette raison, il considère que le marché des sonneries authentiques ne représente pas un modèle d'entreprise approprié à utiliser comme référence. Les sonneries authentiques sont, à son avis, des produits de personnalisation, pas des produits musicaux.

[52] M. Stephen Stohn, associé chez Stohn Hay Cafazzo Dembroski Richmond LLP et spécialiste de l'industrie de la musique, a été engagé pour résumer les dispositions et les ententes contractuelles types dans l'industrie portant sur le droit de reproduction et pour suggérer la référence la plus appropriée sur le marché canadien de la musique afin de déterminer un taux de redevance convenable.

[53] M. Joseph Salvo, conseiller spécial chez Weil, Gotshal & Manges LLP et ex-conseiller pour SONY, l'un des négociateurs des NDMA, a témoigné au sujet de la genèse, du contenu et des répercussions de ces ententes et de la pertinence de la licence obligatoire de reproduction mécanique et des CCC dans l'environnement numérique aux États-Unis.

[54] MM. Terry Canning, vice-président et directeur général des services Internet haute vitesse de Rogers, Patrick McLean, directeur général des services Internet aux consommateurs chez Bell Canada, et Kerry Munro, directeur général de Yahoo! Canada, ont décrit le

operations of the online music services provided by their companies. They testified to the precarious financial environment in which they currently operate and to the time that it is expected to take before these businesses can show a profit.

[55] Mr. Eddy Cue, Vice-President of Apple's iTunes, was responsible for the development and implementation of the *iTunes Music Stores*, which now operate in 22 countries. He described the development of the *iTunes Music Store*, which offers over 2 million tracks in Canada and over 3.4 million in the United States, and now include audio books, videos, movies and television shows.

[56] Mr. Cue testified that Apple established its 99¢ price point in the United States having regard to its competition, which it viewed as coming from two sources: free, unauthorized downloads and prerecorded CDs. The CD market was important in determining a price and business model because most people purchase their music on CDs and that creates an expectation of what an album is worth. When Apple opened its Canadian online music service, it looked at all those factors, as well as considering the added advantage of not having to change the North American price, and maintained the 99¢ price.

[57] Mr. Cue acknowledged that some of the costs incurred in delivering prerecorded CDs are not incurred in delivering music online, but added that the online delivery of music involves other costs that make the overall expense of delivering a sound recording as significant in one as in the other. He rejected comparisons between mastertones and permanent downloads. In his opinion, mastertones are a different product that uses music in a different way and targets a different market.

développement et le fonctionnement des services de musique en ligne fournis par leurs sociétés. Ils ont fait état du cadre financier précaire dans lequel ces sociétés font actuellement des affaires et traité du temps qu'il faudra, d'après les prévisions, avant que ces entreprises ne puissent déclarer des bénéfices.

[55] M. Eddy Cue, vice-président d'iTunes chez Apple, a piloté le développement et la mise sur pied des *iTunes Music Stores*, qui sont maintenant actifs dans 22 pays. Il a décrit la mise sur pied du magasin, qui offre plus de 2 millions de pistes au Canada et plus de 3,4 millions aux États-Unis, y compris des livres parlés, des vidéos, des films et des émissions de télévision.

[56] M. Cue a déclaré que la société Apple a établi son niveau de prix à 99 ¢ aux États-Unis eu égard à la concurrence, qui, selon elle, venait de deux sources : les téléchargements gratuits, non autorisés et les CD préenregistrés. Le marché des CD était important pour déterminer un prix et un modèle d'entreprise, parce que la plupart des gens achètent leur musique sur ces supports, ce qui crée des attentes vis-à-vis de la valeur d'un album. Lorsqu'elle a inauguré son service canadien de musique en ligne, Apple a examiné ces facteurs et tenu compte de l'avantage supplémentaire de ne pas avoir à modifier le prix établi pour l'Amérique du Nord, et a maintenu son prix de 99 ¢.

[57] M. Cue a reconnu que pour la distribution de la musique en ligne, on ne supporte pas certains des coûts encourus pour assurer la distribution de CD préenregistrés. Il a cependant ajouté que distribuer de la musique en ligne entraîne d'autres coûts qui font que les dépenses globales de distribution d'un enregistrement sonore sont aussi importantes dans un cas que dans l'autre. Il a rejeté les comparaisons entre les sonneries authentiques et les téléchargements permanents. Les sonneries authentiques constituent, à son avis, un produit différent qui fait appel à la musique de façon différente et qui vise un marché différent.

[58] Mr. Cue compared the way in which iTunes clears rights in Canada, the United States and Europe. In the United States, record labels generally provide all necessary rights for one fee, having secured the right to reproduce the musical work. In Europe, iTunes must purchase the rights for the sound recording and for the musical work separately, but is able to purchase the right to reproduce and communicate the work in a single transaction. In Canada, iTunes must licence separately the right to reproduce the musical work, the right to communicate the musical work and the right to reproduce the sound recording.

[59] The final panel consisted of Messrs. Upinder Saini, Vice-President, New Products and Content Development, Rogers Wireless, Andrew Wright, Director of Business Development, Bell Mobility, and Nauby Jacob, Director, Browser and Messaging Services, TELUS. Rogers, Bell and TELUS offer both mastertones and permanent music downloads to their subscribers. In Canada, ringtone services were launched in 2001 and mastertones were first offered in 2003. Permanent music downloads only became available in 2005. In their opinion, mastertones and downloads are separate products and are marketed differently. Mastertones are not a music product, but a personalization tool.

[60] The Objectors contend that prerecorded CDs are the appropriate proxy for permanent downloads and, all things being equal, the price paid for the right to reproduce a musical work should be the same for both. In their submission, CDs and downloads are simply different delivery mechanisms for the same product – sound recordings of musical works. In Canada, the price paid to copy musical works onto a prerecorded medium has varied over time, but has always been the same whether the format was vinyl, cassette or CD. In the Objectors'

[58] M. Cue a comparé la façon dont iTunes affranchit les droits au Canada, aux États-Unis, et en Europe. Aux États-Unis, les maisons de disques offrent généralement tous les droits nécessaires pour un même prix, ayant obtenu le droit de reproduire l'œuvre musicale. En Europe, iTunes doit acheter les droits pour l'enregistrement sonore et pour l'œuvre musicale séparément, mais peut acheter le droit de reproduire et de communiquer l'œuvre dans le cadre d'une seule opération. Au Canada, iTunes doit acheter séparément le droit de reproduire l'œuvre musicale, le droit de la communiquer et le droit de reproduire l'enregistrement sonore.

[59] Le dernier panel se composait de MM. Upinder Saini, vice-président aux nouveaux produits et au développement de leur contenu chez Rogers Wireless, Andrew Wright, directeur du développement des entreprises chez Bell Mobilité, et Nauby Jacob, directeur des services de navigation et de messagerie chez TELUS. Rogers, Bell et TELUS offrent des sonneries authentiques et des téléchargements permanents de musique à leurs abonnés. Au Canada, les services de sonneries ont été lancés en 2001 et les sonneries authentiques ont fait leur apparition en 2003. Les téléchargements permanents de musique n'ont été offerts qu'en 2005. Les sonneries authentiques et les téléchargements sont, d'après eux, des produits séparés et sont commercialisés différemment. Les sonneries authentiques ne sont pas tant des produits musicaux que des outils de personnalisation.

[60] Les opposantes prétendent que les CD préenregistrés représentent le marché de référence approprié pour les téléchargements permanents et que, toutes choses égales, le prix payé pour le droit de reproduire une œuvre musicale devrait être le même dans les deux cas. Elles soutiennent que les CD et les téléchargements sont simplement des mécanismes différents de distribution du même produit : l'enregistrement sonore d'une œuvre musicale. Au Canada, le prix payé pour copier une œuvre musicale sur un support préenregistré a varié au fil du temps,

submission, there is no reason for this to change in the digital environment.

[61] Consequently, the Objectors submit that the appropriate way to derive a rate for permanent downloads is to start from the MLA and then adjust it so as to determine the average net compensation paid in Canada for the reproduction of a single track onto a prerecorded CD. They then ask that this amount be converted into a percentage of the price of a download. The Objectors disagree with CSI's argument that the value of the reproduction right has increased simply because it is now possible to copy music to a hard drive or portable music player.

C. Observations

[62] Pursuant to the Board's directive on procedure, the *Union des artistes* and ArtistI filed written observations dealing primarily with the nature of, and limits to, the rights of performers to authorize the reproduction of their performances generally and in a digital environment. The remarks outlined the difficulties that may arise if record labels are allowed to act as intermediaries for the licensing of performers' rights. The letter also argued for the importance, where performers' rights do exist, of ensuring that fixed performances are not used "for a purpose other than that for which the performer's authorization was given" as is provided in subparagraph 15(1)(b)(ii) of the *Act*.

V. ANALYSIS

[63] To set a tariff in this instance, we must perform the following tasks. The first is to determine the proxy that will be used to establish

mais a toujours été le même, indépendamment du format : vinyle, cassette ou CD. Les opposantes soutiennent qu'il n'y a aucune raison pour que cela change dans l'environnement numérique.

[61] Par conséquent, les opposantes sont d'avis que la bonne façon d'établir un taux pour les téléchargements permanents consiste à se fonder sur la MLA, puis à l'ajuster de façon à déterminer la rémunération nette moyenne payée au Canada pour la reproduction d'une piste individuelle sur un CD préenregistré. Elles demandent ensuite qu'on convertisse ce montant en un pourcentage du prix d'un téléchargement. Les opposantes sont en désaccord avec l'argument de CSI, selon lequel la valeur du droit de reproduction a augmenté simplement parce qu'il est maintenant possible de copier de la musique sur un disque dur ou un lecteur portatif de musique.

C. Observations

[62] Conformément à la directive sur la procédure de la Commission, l'Union des artistes et ArtistI ont déposé des observations écrites portant principalement sur la nature et les limites des droits qu'ont les artistes-interprètes d'autoriser la reproduction de leurs prestations en général et dans un environnement numérique en particulier. Leurs remarques esquissent les difficultés qui pourraient survenir si l'on permettait aux maisons de disques de jouer le rôle d'intermédiaires pour l'utilisation des droits de ces artistes. Elles soutenaient également dans leur lettre qu'il est important, lorsqu'un artiste-interprète a des droits, de s'assurer que les exécutions fixées ne servent pas à une fin autre que celle pour laquelle l'artiste-interprète a donné son autorisation, comme il est prévu au sous-alinéa 15(1)(b)(ii) de la *Loi*.

V. ANALYSE

[63] Pour établir le présent tarif, nous devons effectuer cinq tâches : déterminer le prix de référence qui servira à établir le tarif pour les

the tariff for permanent downloads. The second is to adapt that proxy to the online music market and establish the tariff for permanent downloads. The third is to determine the tariff for limited downloads and on-demand streams. The fourth is to select the rate base that will be used to calculate royalties. Finally, it will be necessary to examine what role, if any, the record labels can and should play in the context of the tariff we are certifying.

A. The Appropriate Proxy

[64] Throughout this process, CSI and the Objectors adopted the same approach. First, they both contended that there is a readily available proxy that should be used to set the tariff. Second, the proxy selected should be used to set a price for permanent downloads and that price can then be used to determine royalties for limited downloads and on-demand streams. We agree with this approach.

[65] While CSI and the Objectors agree on the approach, they differ on what the appropriate proxy should be. CSI favours mastertones, but also offered some alternatives. The Objectors argue that the price paid in the online market should be derived from what record labels pay to reproduce music on prerecorded CDs.

1. The Mastertone Market

[66] CSI argues that the mastertone market is the appropriate starting point. Mastertones and permanent downloads form part of the same, broad digital market. Both involve the sale of digital files of music that are delivered electronically to consumers. Though they are not substitutes for each other, the business models are very similar. We disagree, for the following reasons.

téléchargements permanents; adapter ce prix au marché de la musique en ligne et établir le tarif; déterminer le tarif pour les téléchargements limités et les transmissions sur demande; choisir la base tarifaire servant au calcul des redevances; enfin, examiner la nature du rôle que les maisons de disques pourraient et devraient jouer dans le contexte du tarif que nous homologuons.

A. Le prix de référence approprié

[64] Pendant tout ce processus, CSI et les opposantes ont adopté la même approche. Elles affirment qu'il existe un prix de référence évident à utiliser pour fixer le tarif. Elles avancent que ce prix devrait servir à fixer un tarif pour les téléchargements permanents. Elles estiment que ce tarif peut ensuite servir à établir les redevances pour les téléchargements limités et les transmissions sur demande. Nous partageons leur point de vue.

[65] Même si elles s'entendent sur l'approche, CSI et les opposantes divergent d'opinion au sujet du choix d'un prix de référence. La première préfère les sonneries authentiques, tout en offrant d'autres solutions. Les secondes soutiennent qu'il faut établir le prix pour la musique en ligne à partir du montant que les maisons de disques versent pour reproduire de la musique sur des CD préenregistrés.

1. Le marché des sonneries authentiques

[66] CSI affirme que le marché des sonneries authentiques constitue le point de départ approprié. Ces sonneries et les téléchargements permanents font partie du même vaste marché numérique. Les unes et les autres impliquent la vente de fichiers numériques de musique distribués par voie électronique aux consommateurs. Les modèles d'entreprise sont très similaires, même s'ils ne constituent pas des substituts les uns pour les autres. Nous ne sommes pas d'accord, pour les motifs suivants.

[67] First, mastertones are not a substitute for permanent downloads. Downloads compete with CDs, not mastertones. Mastertones are not priced as a function of downloads, or vice-versa. Both products may be delivered through similar modes, but that hardly is sufficient to justify a choice of proxy. We agree with the many witnesses who testified that mastertones are a different product that serves a different purpose. They are a personal identification medium, a fashion statement. Consumers purchase permanent downloads to listen to them; no one purchases a mastertone to listen to it on a computer or an iPod.

[68] Second, we agree with Professor Globerman that mastertones do not have the required characteristics of a good proxy for permanent downloads. Simply put, the input and output prices in these markets are too different for one to be helpful in the other. Permanent downloads sell for as little as one-third of the price of mastertones. This is a strong signal that each product may exhibit different characteristics. CSI simply failed to account for that difference.

[69] Finally, in our opinion, the mastertone market is not mature enough, and its future too uncertain, for it to serve as a reliable proxy. The industry's revenues and expenses have not yet reached a stable level of growth. Mastertones may not last as a stand-alone business. It would be inappropriate to establish a tariff using a proxy based on such uncertain grounds.

2. Other Proxies Proposed by CSI

[70] The three alternative proposals offered in the reply evidence of Messrs. Audley and Hyatt

[67] Premièrement, une sonnerie authentique n'est pas un substitut pour un téléchargement permanent. Les téléchargements font concurrence aux CD, pas aux sonneries. Le prix d'une sonnerie authentique n'est pas fonction des téléchargements, ni vice-versa. Le fait que les deux produits sont distribués par des moyens similaires ne suffit pas à justifier le choix d'un prix de référence. Nous sommes d'accord avec les nombreux témoins qui ont déclaré qu'une sonnerie authentique constitue un produit différent servant à une fin différente. C'est un moyen d'identification personnelle, une forme d'expression à la mode. Le consommateur achète un téléchargement permanent pour l'écouter; personne n'achète une sonnerie authentique pour l'écouter sur un ordinateur ou sur un iPod.

[68] Deuxièmement, nous sommes d'accord avec l'affirmation du professeur Globerman selon laquelle les sonneries authentiques ne possèdent pas les caractéristiques requises d'un bon prix de référence pour les téléchargements permanents. Tout simplement, les prix des intrants et des extrants sur ces marchés sont trop différents pour que l'un soit utile pour l'autre. Un téléchargement permanent se vend pour aussi peu que le tiers du prix d'une sonnerie authentique, ce qui indique bien que chaque produit peut afficher des caractéristiques différentes. CSI n'a simplement pas tenu compte de cette différence.

[69] Enfin, à notre avis, le marché des sonneries authentiques n'est pas suffisamment établi et son avenir est trop incertain pour qu'il serve de référence fiable. Les revenus et les dépenses de l'industrie n'ont pas encore atteint un niveau stable de croissance. Ce marché risque de ne pas survivre en tant que branche d'activité indépendante sur Internet. Il serait inapproprié d'établir un tarif à l'aide d'un prix de référence reposant sur des fondements aussi incertains.

2. Autres prix de référence proposés par CSI

[70] Les trois propositions de rechange soumises dans la contre-preuve de MM. Audley et Hyatt

suffer from a number of common problems. All are based on approximations; at best, they can only be used as validation measures. All compare percentages, when comparisons of actual amounts seem preferable. Finally, we agree with Professor Globerman that when the actual net amounts received by a record label are compared, all seem to confirm, not contradict, his conclusions.

3. The Prerecorded CD Market

[71] The Objectors offer four reasons to argue that the amount paid for the right to reproduce a musical work onto a prerecorded CD is a good starting point. First, permanent downloads compete with prerecorded CDs and are priced accordingly. Second, as Professor Globerman demonstrated, the value chains for the two products, as well as their input and output prices, are sufficiently close to justify using one to set the amount for the other. Third, permanent downloads are just another form of sound recording. The media onto which a recording is reproduced has changed over time, but the price paid to reproduce a musical work has always been the same at any given time irrespective of the type of medium onto which the work has been put.⁷ Fourth, online services view physical CDs as a substitute product, and CD retailers as their competitors. We agree with the Objectors.

[72] CSI puts forth three main arguments to support its submission that the prerecorded CD market is not an appropriate starting point. We are not persuaded by these arguments.

[73] CSI argues that the use made of the reproduction right in the online market is very

comportent un certain nombre de problèmes communs. Toutes reposent sur des approximations. Au mieux, elles pourraient servir de mesures de validation. Toutes ont pour point de comparaison des pourcentages, alors que des comparaisons de montants réels paraissent préférables. Enfin, nous sommes d'accord avec l'affirmation du professeur Globerman, qui indique que lorsque l'on compare les montants nets réels que touche une maison de disques, tous paraissent confirmer, non pas contredire, ses conclusions.

3. Le marché des CD préenregistrés

[71] Les opposantes soutiennent que le montant payé pour le droit de reproduire une œuvre musicale sur un CD préenregistré constitue un bon point de départ, et ce, pour quatre raisons. Premièrement, les téléchargements permanents font concurrence aux CD préenregistrés et leurs prix sont établis en conséquence. Deuxièmement, comme le professeur Globerman l'a démontré, les chaînes de valeur pour les deux produits, de même que les prix de leurs intrants et extrants, se rapprochent suffisamment pour justifier qu'on en utilise un afin de fixer la valeur de l'autre. Troisièmement, le téléchargement permanent est simplement une autre forme d'enregistrement sonore. Le support auquel on l'incorpore a changé au fil du temps, mais le prix payé pour reproduire l'œuvre musicale a toujours été le même, indépendamment du type de support sur lequel elle est copiée.⁷ Quatrièmement, les services en ligne considèrent que le CD matériel est un produit de substitution et que les vendeurs au détail de CD sont leurs concurrents. Nous sommes d'accord avec les opposantes.

[72] CSI avance trois arguments principaux pour expliquer pourquoi elle considère que le marché des CD préenregistrés ne constitue pas un point de départ approprié. Ces arguments ne nous convainquent pas.

[73] CSI soutient que l'utilisation qu'on fait du droit de reproduction sur le marché en ligne est

different, and much more extensive, than in the prerecorded CD market. The delivery of a prerecorded CD involves only two copies: the master recording and the CD itself. The delivery of a permanent download involves at least the creation of a digital master file and its reproduction onto the online service's server, in addition to the downstream copies made by the service's customers on any number of media and devices. Insofar as this is either correct⁸ or relevant, this can be taken into account through an adjustment in the rate and therefore, does not reduce the usefulness of the MLA as a proxy.

[74] CSI also argues that online music services use the reproduction right in a manner that allows them to create a consumer experience that differs substantially from what occurs when a consumer purchases and uses a prerecorded CD. For example, online consumers enjoy a greater variety and choice of music, the ability to purchase individual tracks, to create their own playlists, to sample excerpts before making a purchase and to research their purchases at their leisure, much more effectively and thoroughly than in a record store. Again, be that as it may, it does not deter from the usefulness of the MLA as a proxy. Over the years, record stores have changed the way they sell sound recordings. Many times, the industry has even changed the format in which sound recordings are offered: singles have come and gone, and now appear poised to make a comeback in the digital world. And yet, the MLA has always set the same price for a track, whether sold as a single or as part of an album.

[75] Finally, CSI points out that record labels do not play the same role in the digital and physical worlds. Labels no longer manufacture or distribute finished goods. Instead, they licence their sound recordings to online services, who

très différente, et beaucoup plus importante, que celle qu'on en fait sur le marché des CD préenregistrés. La distribution d'un CD préenregistré ne nécessite que deux copies : la bande maîtresse et le disque compact lui-même. La distribution d'un téléchargement permanent nécessite au moins la création d'un fichier maître numérique et sa reproduction sur le serveur du service en ligne, en plus des copies en aval faites par le client du service sur un certain nombre de supports et d'appareils. Dans la mesure où cela est exact⁸ ou pertinent, on peut en tenir compte en ajustant le taux, ce qui ne réduit donc pas l'utilité de la MLA en tant que référence.

[74] CSI affirme aussi que les services de musique en ligne utilisent le droit de reproduction d'une façon qui leur permet d'offrir au consommateur une expérience très différente de ce qui se passe quand on achète et utilise un CD préenregistré. Les consommateurs en ligne, par exemple, ont accès à une plus grande variété et un plus grand choix de musique, peuvent acheter des pistes individuelles, créer leurs propres listes d'écoute, écouter des extraits avant d'acheter et effectuer des recherches pour leurs achats quand bon leur semble, et ce, beaucoup plus efficacement et minutieusement que chez un disquaire. Encore une fois, quoi qu'il en soit, cette affirmation ne réduit pas l'utilité de la MLA comme référence. Au fil des ans, les disquaires ont modifié leur façon de vendre des enregistrements sonores. L'industrie a même souvent modifié le format sous lequel elle offre ses enregistrements; le disque simple, qui a connu ses heures de gloire, semble maintenant prêt à resurgir dans l'univers numérique. Et pourtant, on a toujours fixé dans la MLA le même prix pour une piste, qu'elle soit vendue individuellement ou qu'elle fasse partie d'un album.

[75] Enfin, CSI fait remarquer que la maison de disques ne joue pas le même rôle dans les univers numérique et matériel. Elle ne fabrique plus et ne distribue plus de produits finis. Elle octroie des licences pour ses enregistrements sonores à des

then reproduce them for distribution and authorize their subscribers to make further copies. This is not relevant. From an economic perspective, prerecorded CDs and permanent downloads simply are different ways of marketing sound recordings that are meant to be listened to by the same consumer in the same manner.⁹ The price paid to reproduce a musical work embedded onto a sound recording should be the same, irrespective of the way in which that recording is marketed.

[76] On a related point, we reject the position developed by CSI on the differences in the respective value chains. When the Internet is used to deliver recorded music, it remains necessary to carry out important stages of the value chain such as production, distribution and inventorying. Though the input mixes may be different, marketing the product still requires performing every specific stage. For example, inventory costs will involve renting or buying server space rather than warehouse space, while distribution will require bandwidth instead of trucks.

[77] We therefore find that the price for permanent downloads should be determined using the price currently paid to reproduce a musical work onto a prerecorded CD. This rate has been set at 7.7¢ per track, plus 1.54¢ per minute or fraction thereof over 5 minutes, since 2002. Even though the latest MLA expired at the end of June 2006, that rate continues to be used while the parties renegotiate the agreement. We will therefore use that rate as a starting point even though the effective rate may be slightly higher due to the existence of sound recordings lasting more than 5 minutes. We do not see the need to make the correction, which would probably be marginal at best.

services en ligne, qui ensuite les reproduisent afin de les distribuer et autorisent leurs abonnés à en faire d'autres copies. Cela n'est pas pertinent. D'un point de vue économique, les CD préenregistrés et les téléchargements permanents sont simplement des moyens différents de commercialiser des enregistrements sonores destinés à être écoutés de la même façon par les mêmes consommateurs.⁹ Le prix payé pour reproduire l'œuvre musicale incorporée à un enregistrement sonore devrait être le même, indépendamment du moyen de commercialisation de cet enregistrement.

[76] Dans le même ordre d'idées, nous rejetons la position de CSI au sujet des différences à l'intérieur de chacune des chaînes de valeur. Lorsqu'on utilise Internet pour distribuer de la musique enregistrée, il faut quand même passer par les étapes importantes de la chaîne de valeur comme la production, la distribution et l'établissement de l'inventaire. Même si les combinaisons d'intrants peuvent être différentes, la commercialisation du produit exige encore la réalisation de chacune des étapes. Par exemple, les coûts de stockage impliqueront la location ou l'achat d'un espace sur un serveur, plutôt que d'un espace dans un entrepôt, tandis que la distribution exigera de la bande passante plutôt que des camions.

[77] Nous concluons donc qu'il faut déterminer le prix des téléchargements permanents à partir du prix actuellement payé pour reproduire une œuvre musicale sur un CD préenregistré. Ce taux est fixé depuis 2002 à 7,7 ¢ la piste, plus 1,54 ¢ la minute ou fraction de minute au-delà de 5 minutes. Même si la plus récente MLA a pris fin à la fin de juin 2006, ce taux continue d'être utilisé pendant que les parties renégocient le contrat. Nous utiliserons donc ce taux comme point de départ, bien que le taux effectif puisse être légèrement supérieur en raison de l'existence d'enregistrements durant plus de 5 minutes. Nous ne voyons pas la nécessité d'effectuer la correction, qui serait probablement minime dans le meilleur des cas.

B. Deriving a Rate for Permanent Downloads

1. A Percentage Rate

[78] In Canada, the price paid to reproduce musical works onto sound recordings has always been expressed as a number of cents per track. Attempts were made recently to harmonize Canadian practice with that of most foreign jurisdictions and set the rate as a percentage of wholesale or retail. This has not occurred to date.

[79] In these proceedings, both sides request that the rate be expressed as a percentage. The Board has alluded to the merits of this approach many times over the years. Setting the rate as a percentage permits the royalty to vary according to the value the market attributes to the final product and to the business cycles of an industry. It also avoids the need for repeated adjustments to take into account the effect of inflation.

[80] Several agreements between record labels and online services contain rates expressed in cents. Setting a rate in percentage for the use of musical works will result in variations in the relative remuneration of authors, performers and makers as the price of online music varies. This could eventually become an issue the parties will have to deal with. It does not, however, take away from the inherent merits of using a percentage in this tariff.

2. Adjusting the MLA Rate

[81] Before deriving a rate, it is necessary to examine the various adjustments to the MLA rate proposed by CSI and the Objectors.

[82] The Objectors proposed two adjustments that are based on Mr. Stohn's analysis. His stated objective was to ensure that the rate for

B. Calcul d'un taux pour les téléchargements permanents

1. Établissement d'un pourcentage

[78] Au Canada, le prix payé pour reproduire une œuvre musicale sur un enregistrement sonore a toujours été exprimé en cents par piste. On a récemment tenté d'harmoniser la pratique en usage au Canada avec celle de la plupart des marchés étrangers et de fixer le taux sous forme de pourcentage du prix de gros ou de détail, mais jusqu'ici sans succès.

[79] Dans la présente affaire, tous demandent d'exprimer le taux sous forme de pourcentage. Au fil des ans, la Commission a souvent fait allusion aux mérites de cette méthode. Fixer le taux sous forme de pourcentage permet à la redevance de varier suivant la valeur que le marché attribue au produit final et les cycles économiques d'une industrie. Cette façon de procéder évite également d'avoir à faire des ajustements à répétition pour tenir compte de l'effet de l'inflation.

[80] Plusieurs ententes entre maisons de disques et services en ligne renferment des taux exprimés en cents. Le fait de fixer un taux en pourcentage pour l'utilisation d'œuvres musicales entraînera des variations de la rémunération relative des auteurs, artistes-interprètes et producteurs, en fonction des fluctuations de prix de la musique en ligne. Cela pourrait devenir un enjeu que les parties auront à régler, mais n'enlève rien aux mérites inhérents de l'utilisation d'un pourcentage dans le présent tarif.

2. Ajustement du taux de la MLA

[81] Avant de calculer un taux, il faut examiner les divers ajustements que CSI et les opposantes proposent d'apporter au taux de la MLA.

[82] Les opposantes ont proposé deux ajustements reposant sur l'analyse de M. Stohn. L'objectif déclaré de ce dernier consistait à

permanent downloads correspond to the effective average rate being paid for the reproduction of musical works onto prerecorded CDs. Both adjustments seek to account for discounts that result from the application of CCCs. Their combined effect would be to reduce the rate by approximately 32 per cent.

[83] These adjustments are either unnecessary or irrelevant. First, Mr. Stohn admitted that not all sound recordings are subject to CCCs and that no available information would allow him to estimate the proportion of those that are. Second, though the evidence was contradictory in this respect, it would appear that the impact of CCCs in the market for permanent downloads is significantly less than in the prerecorded CD market. For example, in the United States, where CCCs originated, provisions in a record deal signed after June 22, 1995 that purport to allow a record label to obtain a mechanical licence at a reduced rate for a "digital phonorecord delivery" are in effect inoperative.¹⁰ Third, CCCs are designed first and foremost for the physical world: it is difficult to conceive of "free goods", as this expression is used in CCCs, on iTunes. Finally, and most importantly, CCCs exist because labels designed them and ask for them. As a result, they are most able to lead cogent and convincing evidence about the relevance and role of these provisions in the digital environment. They did not. Absent such evidence, the prudent course is simply to ignore CCCs.

[84] The Objectors submit that the tariff, for the reproduction of musical works, should be discounted to reflect the value of the right to communicate these same works. The submission is based on two false assumptions. The first is that this decision will establish the price for all rights. This is simply not the case.¹¹ The second

veiller à ce que le taux pour les téléchargements permanents corresponde au taux moyen en vigueur payé pour la reproduction d'une œuvre musicale sur un CD préenregistré. Les deux ajustements visent à prendre en considération des escomptes qui découlent de l'application de la CCC. Combinés, ils auraient pour effet de réduire le taux d'environ 32 pour cent.

[83] Ces deux ajustements sont inutiles ou hors de propos. Premièrement, M. Stohn a admis que tous les enregistrements sonores ne sont pas assujettis à des CCC et qu'aucun renseignement disponible ne lui permettait d'estimer la proportion de ceux qui le sont. Deuxièmement, même si la preuve était contradictoire sous ce rapport, il semblerait que les répercussions de la CCC sur le marché des téléchargements permanents soient bien moindres que sur le marché des CD préenregistrés. Par exemple, aux États-Unis, où la CCC a pris naissance, les dispositions d'un contrat signé après le 22 juin 1995 censées permettre à une maison de disques d'obtenir des droits de reproduction mécanique à un taux réduit pour la distribution d'un enregistrement sonore numérique sont dans les faits inopérantes.¹⁰ Troisièmement, la CCC est conçue d'abord et avant tout pour le monde matériel : il est difficile d'associer des « biens gratuits », tels qu'on en parle dans les CCC, à iTunes. Enfin et surtout, si les CCC existent, c'est que les maisons de disques les ont inventées et qu'elles les demandent. Elles sont donc le plus en mesure de fournir une preuve forte et convaincante quant à la pertinence et au rôle de telles dispositions dans le monde numérique. Elles ne l'ont pas fait. En l'absence d'une telle preuve, la voie de la prudence consiste simplement à ne pas les prendre en considération.

[84] Les opposantes estiment qu'on devrait prévoir un escompte dans le présent tarif, qui vise la reproduction d'œuvres musicales, afin de refléter la valeur du droit de communiquer ces œuvres. Cette prétention repose sur deux hypothèses erronées. La première, c'est que la présente décision établira le prix pour tous les

is that the price should be the same whether one or two rights are required to deliver a product. The Board has rejected that argument more than once.¹² In addition, the proxy that we have adopted is the one proposed by the Objectors. It involves only the reproduction right.

[85] For its part, CSI proposed two adjustments.

[86] The first would account for the fact that members of ADISQ currently pay SODRAC mechanical royalties of 8.9¢. Messrs. Audley and Hyatt proposed an adjustment based on the assumption that the SODRAC-ADISQ agreement applies to 15 per cent of the Canadian market. The Objectors argue this number is too high; in their opinion, SODRAC's overall share of the Canadian market is 15 per cent and ADISQ accounts for only one third of SODRAC's business, or 5 per cent of the total market. The rest would be governed by SODRAC's agreement with CRIA, which uses the 7.7¢ rate. In our opinion, CSI could have provided information allowing us to determine precisely the importance of the SODRAC-ADISQ agreement in the Canadian market; it did not do so. We find the figures advanced by the Objectors inherently more credible, given what the Board has learned over the years of the Canadian market for prerecorded CDs. In any event, even if we accepted CSI's submissions, it would only have a marginal impact on the result. The correction to account for the SODRAC-ADISQ agreement yields an adjusted rate of 7.8¢.

[87] The second proposed adjustment would take into account that online services expressly grant consumers the right to make several copies of a download onto any number of devices or media. Some of these copies may be private copies; others are not and therefore, require the

droits, ce qui n'est simplement pas le cas.¹¹ La seconde, c'est que le prix devrait être le même, qu'il faille un ou deux droits pour distribuer un produit. La Commission a rejeté cet argument plus d'une fois.¹² Le prix de référence que nous avons adopté est, en outre, celui proposé par les opposantes. Il n'englobe que le droit de reproduction.

[85] CSI a, pour sa part, proposé deux ajustements.

[86] Le premier tiendrait compte du fait que les membres de l'ADISQ paient actuellement à la SODRAC des droits mécaniques de 8,9 ¢. MM. Audley et Hyatt ont proposé un ajustement fondé sur l'hypothèse selon laquelle l'entente entre la SODRAC et l'ADISQ s'applique à 15 pour cent du marché canadien. Les opposantes soutiennent que ce pourcentage est trop élevé; la SODRAC détient globalement, à leur avis, 15 pour cent du marché canadien et l'ADISQ ne représente que le tiers des affaires de la SODRAC, ou 5 pour cent du marché total. Le reste serait régi par l'entente conclue avec la CRIA, qui utilise le taux de 7,7 ¢. À notre avis, CSI aurait pu fournir de l'information permettant de déterminer précisément l'importance de l'entente entre la SODRAC et l'ADISQ sur le marché canadien; elle ne l'a pas fait. Nous considérons les chiffres présentés par les opposantes comme étant plus crédibles, compte tenu de ce que la Commission a appris au fil des ans du marché canadien des CD préenregistrés. De toute façon, même si nous acceptons les arguments de CSI, cela n'aurait que des répercussions minimales sur le résultat. La correction permettant de tenir compte de l'entente entre la SODRAC et l'ADISQ donne un taux ajusté de 7,8 ¢.

[87] Le second ajustement proposé tiendrait compte du fait que les services en ligne accordent expressément aux consommateurs le droit de faire plusieurs copies d'un téléchargement sur un éventail d'appareils ou de supports. Certaines de ces copies peuvent être des copies privées;

rightsholder's permission. At first glance, one would expect that consumers get added value from being able to make more than one copy, even when that option is not being exercised.¹³ It could also be argued that being able to authorize their subscribers to make more than one copy gives online services a competitive advantage over retailers of prerecorded CDs. If so, the MLA rate should be adjusted to take into account the value of these additional rights. There is evidence to the effect that the right to make extra copies is worth something in at least the wireless services market, where consumers pay less when music is downloaded only onto a PC than when it is downloaded onto both a cell phone and a PC.

[88] That being said, this is not the occasion to determine whether, or by how much, the price should be increased on this account. First, there is not enough evidence of what the right to make extra copies might be worth. Second, there may be factors that tend to considerably reduce this added value. For example, the fact that prerecorded and downloaded tracks sell at approximately the same price may indicate that the right to make additional copies is actually being given away to clinch the sale; nothing else seems important. Existing agreements between record labels and online services tend to show that labels have come to this conclusion. Third, expressing the rate as a percentage of the retail price will allow the market to implicitly attribute the value these additional rights may have, as is the case with wireless downloads.

[89] However, we reject the argument of the Objectors that it is unnecessary to account for these extra copies. To say that the MLA already takes into account that consumers are able in

d'autres ne le sont pas. Il faut donc la permission du titulaire de droits pour les faire. Au premier coup d'œil, on s'attendrait à ce que les consommateurs tirent une valeur ajoutée de la possibilité pour eux de faire plus d'une copie, même lorsqu'ils n'exercent pas cette option.¹³ On pourrait aussi soutenir qu'en pouvant autoriser leurs abonnés à faire plus d'une copie, les services en ligne détiennent un avantage concurrentiel par rapport aux détaillants de CD préenregistrés. Si c'est le cas, il faudrait ajuster le taux de la MLA pour tenir compte de la valeur de ces droits additionnels. La preuve démontre que le droit de faire des copies additionnelles a une certaine valeur, du moins sur le marché des services sans fil, où le consommateur paie moins lorsqu'il télécharge de la musique uniquement sur un ordinateur personnel que lorsqu'il la télécharge aussi sur son téléphone cellulaire.

[88] Cela dit, ce n'est pas le moment de déterminer si le prix devrait être majoré pour cette raison, et de combien, le cas échéant. Tout d'abord, il n'y a pas suffisamment de données concluantes permettant de déterminer ce que le droit de faire des copies additionnelles pourrait valoir. Deuxièmement, il peut exister des facteurs qui contribueraient à réduire considérablement cette valeur ajoutée. Le fait, par exemple, que les pistes préenregistrées et téléchargées se vendent environ au même prix pourrait signifier que dans les faits, on donne gratuitement le droit de faire des copies additionnelles pour conclure la vente; rien d'autre ne paraît avoir d'importance. Les ententes actuelles entre les services en ligne et les maisons de disques ont tendance à montrer que ces dernières en sont venues à cette conclusion. Troisièmement, exprimer le taux sous forme de pourcentage du prix de détail permettra au marché d'attribuer implicitement la valeur que peuvent avoir ces droits additionnels, comme dans le cas des téléchargements sans fil.

[89] Nous rejetons cependant l'argument des opposantes selon lequel il n'est pas nécessaire de tenir compte de la possibilité de faire des copies additionnelles. Dire que la MLA tient déjà

practice to make an unlimited number of copies is to argue that the MLA factors in a largely illegal activity. In addition, to argue that the private copying regime already takes care of these copies is to look at the issue from the wrong end of the telescope. CSI's suggestion that section 80 of the *Act* applies only to copies that have not otherwise been authorized is incorrect. A private copy is a private copy, whether or not it was authorized. However, some of the copies online services authorize clearly are not private copies. More importantly, the private copying regime exists to compensate the effects of a market failure, without being contingent on the extent of that failure. Confronted with this conundrum, and with a view to reinforcing the nexus that must exist between the regime and its stated objectives in order for the regime to remain constitutionally valid, the Board decided early on that it would discount authorized private copies from the calculation of the levy and leave it to the market to set the price for such copies.

3. The Average Retail Price of a Downloaded Track; the Resulting Rate

[90] The numerator that we will use to set the rate for permanent downloads, as indicated in paragraph 86, is 7.8¢. In order to derive a percentage rate, we now need to determine the average retail price of a downloaded track.

[91] The predominant retail price for single track permanent downloads appears to be 99¢. iTunes sells virtually all of its single tracks for that price. Some competitors sell tracks for more and sometimes offer promotions for less. Even in the unlikely scenario that 10 per cent of tracks were sold at \$1.19, the average price of a track would increase by only 2¢. We find that 99¢ is a reliable estimate of the average price of a single-track permanent download in Canada.

compte de la capacité pratique des consommateurs de faire un nombre illimité de copies, c'est affirmer que cette entente prend en compte une activité en grande partie illégale. En outre, avancer que le régime de copie privée voit déjà à ces copies, c'est envisager la question par le mauvais bout de la lunette. CSI fait erreur lorsqu'elle suggère que l'article 80 de la *Loi* ne s'applique qu'aux copies qu'on n'a pas par ailleurs autorisées. Une copie privée, autorisée ou non, est une copie privée. Cela dit, certaines des copies que les services en ligne autorisent de faire sont manifestement autre chose que des copies privées. Plus important encore, le régime de copie privée a été créé pour contrebalancer les effets d'un échec de marché, sans le subordonner à l'ampleur de l'échec. Confrontée à ce problème épineux et désireuse de renforcer le lien qui doit exister entre le régime et ses objectifs déclarés pour que ce régime demeure constitutionnellement valide, la Commission a décidé très tôt qu'elle soustrairait les copies privées autorisées lors du calcul des redevances et laisserait le marché déterminer le prix de ces copies.

3. Prix de détail moyen d'une piste téléchargée et taux applicable

[90] Le numérateur que nous utiliserons pour établir le taux applicable aux téléchargements permanents, tel qu'il est indiqué au paragraphe 86, est 7,8 ¢. Nous devons maintenant déterminer le prix de détail moyen d'une piste téléchargée afin de calculer un pourcentage.

[91] Le prix de détail prédominant pour le téléchargement permanent d'une piste individuelle semble être de 99 ¢. iTunes vend pratiquement toutes ses pistes individuelles à ce prix. Certains concurrents vendent des pistes plus cher et offrent parfois des promotions à prix réduit. Même dans le scénario improbable où l'on aurait vendu 10 pour cent des pistes à 1,19 \$, le prix moyen d'une piste n'augmenterait que de 2 ¢. Nous concluons que 99 ¢ est une estimation fiable du prix moyen au Canada d'un téléchargement permanent d'une piste.

[92] In the physical world, a reproduction triggers the same amount of remuneration whether it is sold as a single or as part of an album. On the other hand, the average price of a track is not the same when it is sold as part of an album. This price must be factored into our calculations. iTunes sells most of its albums for \$9.99.¹⁴ According to Mr. Cue, the average number of tracks on an album downloaded from iTunes is 13.¹⁵ The average price per track on an album is then 77¢. According to numbers on sales of permanent downloads provided by CSI,¹⁶ 55 per cent of all tracks sold as permanent downloads are singles, and 45 per cent are part of an album. Using these weighted figures yields an average price per track sold as a permanent download, either as a single or included on an album, of 89¢, resulting in a rate of 8.8 per cent [7.8¢ ÷ 89¢].

[92] Dans le monde matériel, une reproduction enclenche le versement d'un même montant, qu'elle soit vendue à la pièce ou fasse partie d'un album. Par contre, le prix moyen d'une piste individuelle n'est pas le même lorsqu'elle est vendue en tant que partie d'un album. Nous devons prendre en compte ce prix dans nos calculs. iTunes vend la plupart de ses albums 9,99 \$.¹⁴ D'après M. Cue, un album téléchargé à partir d'iTunes renferme en moyenne 13 pistes.¹⁵ Le prix moyen par piste sur un album est donc 77 ¢. Selon les chiffres sur les ventes de téléchargements permanents fournis par CSI,¹⁶ 55 pour cent de toutes les pistes vendues sous forme de téléchargements permanents sont individuelles et 45 pour cent font partie d'un album. Ces chiffres pondérés donnent un prix moyen de 89 ¢ par piste vendue sous forme de téléchargement permanent, qu'il s'agisse d'une piste individuelle ou faisant partie d'un album, ce qui se traduit par un taux de 8,8 pour cent [7,8 ¢ ÷ 89 ¢].

[93] Subject to an adjustment discussed later, we certify that rate. We want the tariff to generate the same amount of royalties as if online music services paid 7.8¢ per track. The following Table 1 shows that, if the relative share of album and single-track sales remains relatively stable, that result will be achieved.

[93] Nous homologuons ce taux sous réserve d'un ajustement dont nous traiterons plus loin. Nous voulons que le tarif produise le même montant de redevances que si les services de musique en ligne payaient 7,8 ¢ la piste. Le Tableau 1 qui suit montre qu'on atteindra ce résultat si la part relative des ventes d'albums et de pistes individuelles reste relativement stable.

TABLE 1
ROYALTY FLOW AT 8.8 PER CENT OF RETAIL

	Units	Price per unit	Total number of tracks	Sales	Royalties at 8.8% of retail price	Effective penny rate
Singles	7,258,100	99¢	7,258,100	\$7,185,519	\$632,326	8.7¢
Albums	464,600	\$9.99	6,039,800	\$4,641,354	\$408,439	6.8¢
Total			13,297,900	\$11,826,873	\$1,040,765	7.8¢

Based on Exhibit CSI-27.A, Table 1, page 3. The number of units of singles and albums are for year-to-date sales for July 23, 2006. A similar result was achieved using data recently released by Nielsen SoundScan Canada on downloads of tracks and albums in 2005 and 2006.

TABLEAU 1
FLUX DE REDEVANCES À 8,8 POUR CENT DU PRIX DE DÉTAIL

	Unités	Prix unitaire	Nombre total de pistes	Ventes	Redevances à 8,8 % du prix de détail	Taux effectif en cents
Pistes individuelles	7 258 100	99 ¢	7 258 100	7 185 519 \$	632 326 \$	8,7 ¢
Albums	464 600	9,99 \$	6 039 800	4 641 354 \$	408 439 \$	6,8 ¢
Total			13 297 900	11 826 873 \$	1 040 765 \$	7,8 ¢

Basé sur la pièce CSI-27.A, Tableau 1, page 3. Le nombre d'unités de pistes individuelles et d'albums correspond aux ventes depuis le début de l'année 2006 jusqu'au 23 juillet 2006. Des résultats semblables ont été obtenus en utilisant les données publiées récemment par *Nielsen SoundScan Canada* portant sur les téléchargements de pistes et d'albums en 2005 et 2006.

4. Setting a Minimum Price

[94] Both sides agree that the tariff should set a minimum fee that is two-thirds of the royalties generated by the full rate at the average price of a track when sold as a single. We agree. The minimum fee per track for permanent download is set at 5.9¢.

[95] The Objectors argue that the application of a per-track minimum fee to albums would hurt emerging artists whose albums they say tend to be priced lower than \$9.99, and would result in an unintended and unfair increase in the rate. With the increasing number of tracks on an album, the sum of the individual minimum fees would eventually surpass the amount that the application of the full rate to the price of the album would generate. To prevent this from happening, the Objectors proposed either that there be no minimum fee on albums or to replicate the approach followed in the United Kingdom, where minimum fees decrease as the number of tracks in a bundle increases. CSI argues on the other hand that if there is no minimum fee, bundles with a very large number of tracks could be sold at a price that would

4. Établissement d'un minimum

[94] Tous conviennent que le tarif devrait prévoir un prix minimum correspondant aux deux tiers des redevances que rapporte le plein taux au prix moyen d'une piste simple. Nous sommes d'accord. Le prix minimum par piste pour un téléchargement permanent est fixé à 5,9 ¢.

[95] Les opposantes soutiennent que l'imposition d'une redevance minimale par piste aux albums nuirait aux artistes de la relève, dont les prix des albums ont tendance, selon eux, à être établis à moins de 9,99 \$, et entraînerait une augmentation non délibérée et injuste du taux. Avec le nombre croissant de pistes sur un album, la somme des minimums dépasserait finalement le montant que rapporterait l'application du plein taux au prix de l'album. Pour éviter que cela ne se produise, les opposantes ont proposé qu'il n'y ait aucune redevance minimale sur les albums ou que soit adoptée la méthode qu'on suit au Royaume-Uni, où le minimum diminue à mesure que le nombre de pistes dans un ensemble (« *bundle* ») augmente. CSI affirme par contre que, s'il n'y a aucune redevance minimale, des ensembles renfermant un très grand nombre de pistes

result in an inappropriately low payment of royalties.

[96] The evidence the Objectors offered in this respect is rather thin. In fact, there is no evidence on which we could find that emerging artists' albums are being sold for less. Also, as we already noted, there is evidence that the average number of tracks on a downloaded album is 13, not 15.

[97] We are willing however to set minimum fees that will allow online services to test new business models in this emerging market while ensuring fair compensation for rights owners. Applying the single track minimum fee to a bundle priced at \$9.99 would result in royalties that are higher than the rate we set if the bundle contains more than 15 tracks. In our opinion, as for single tracks, the minimum fee for albums should be set at two-thirds of the royalties generated when the rate is applied to the average price of an album containing an average number of tracks. Consequently, we set the minimum fee for bundles at 4.5¢ per track [$9.99 \times 8.8\% \div 13 \times 0.67$]. In this way, the payment of the minimum fee will be triggered only when a bundle selling at \$9.99 contains 20 tracks or more. The Board will no doubt expect to be provided information about the impact of this measure in future proceedings dealing with this tariff.

C. The Rate for Limited Downloads and On-Demand Streaming

1. Limited Downloads

[98] We adopt the position agreed upon by the parties, to the effect that the rate for limited downloads should be two-thirds of the rate for

pourraient être vendus à un prix qui entraînerait le versement d'un montant de redevances trop peu élevé.

[96] La preuve que les opposantes ont présentée à ce sujet est plutôt mince. En fait, il n'y a aucune preuve permettant de conclure que les albums des artistes de la relève se vendent actuellement meilleur marché. Également, comme nous l'avons déjà noté, la preuve démontre qu'il y a sur un album téléchargé en moyenne 13 pistes, et non pas 15.

[97] Nous sommes prêts cependant à fixer des redevances minimales qui permettront aux services en ligne de mettre à l'essai de nouveaux modèles d'entreprise sur ce marché naissant, tout en assurant une rémunération juste pour les titulaires des droits. L'application de la redevance minimale par piste à un ensemble dont le prix est établi à 9,99 \$ entraînerait des redevances qui seraient plus élevées que le taux que nous fixons si l'ensemble renferme plus de 15 pistes. Comme pour les pistes individuelles, on devrait, à notre avis, fixer la redevance minimale pour les ensembles aux deux tiers des redevances que rapporte l'application du taux au prix moyen d'un album renfermant un nombre moyen de pistes. Nous fixons, par conséquent, la redevance minimale par piste d'un ensemble à 4,5 ¢ [$9,99 \times 8,8\% \div 13 \times 0,67$]. De cette façon, il n'y aura enclenchement du versement du minimum que lorsqu'un ensemble vendu à 9,99 \$ renferme 20 pistes ou plus. La Commission s'attendra sûrement à ce qu'on lui fournisse de l'information sur les répercussions de cette mesure à l'occasion des prochaines audiences portant sur le présent tarif.

C. Taux pour les téléchargements limités et les transmissions sur demande

1. Téléchargements limités

[98] Nous adoptons la position dont les parties ont convenu selon laquelle le taux pour les téléchargements limités devrait correspondre aux

permanent downloads. We certify a rate of 5.9 per cent. We remain concerned with the possibility that this approach may lead to some level of double discounting. The lower price charged for limited downloads already reflects a lower value, compared with permanent downloads. A lower royalty rate, intended to reflect a lower value for the right, might be an additional reduction to account for the same lower value.

[99] CSI's original proposal provided only one minimum fee for limited downloads. CSI now asks that different minimum fees apply according to whether or not a subscriber is authorized to copy the file onto a portable device. The Objectors first debated whether setting separate rates for portable limited downloads would go beyond the gazetted proposal. CSI's original proposal treated portable limited downloads as permanent downloads; moving them with limited downloads will result in lower rates. CSI's new proposal also has the merit of rationally accounting for the emergence of a business model that could not have been anticipated at the time of filing the tariff.

[100] CSI proposes that the ratio between the minimum fee payable when a subscriber can and cannot copy a file to a portable device be the same as for the amounts paid to record labels under the same circumstances. The Objectors would prefer that the ratio used be the one that exists between the average price paid for non-portable and portable limited downloads subscriptions. We agree with the Objectors' methodology, if only because it is more consistent with the approach we have used in setting the rate for permanent downloads. However, we would use the average between what Napster and MusicNet charge for such

deux tiers du taux pour les téléchargements permanents. Nous homologuons un taux de 5,9 pour cent. Nous craignons la possibilité que cette approche n'entraîne, dans une certaine mesure, un double escompte. Le prix moins élevé facturé pour les téléchargements limités reflète déjà une valeur inférieure par rapport aux téléchargements permanents. Un taux de redevance moins élevé, destiné à refléter une valeur inférieure pour le droit, pourrait constituer une réduction additionnelle qui tient compte de la même valeur inférieure.

[99] Au départ, CSI ne prévoyait qu'une seule redevance minimale pour les téléchargements limités. Elle demande maintenant de moduler la redevance minimale suivant qu'un abonné est ou non autorisé à copier le fichier sur un appareil portatif. Les opposantes ont d'abord discuté de la question à savoir si le fait de fixer des taux séparés pour les téléchargements limités portables irait plus loin que la proposition publiée dans la *Gazette du Canada*. Dans sa proposition originale, CSI traitait les téléchargements limités portables comme des téléchargements permanents; les englober avec les téléchargements limités entraîne des taux moins élevés. La nouvelle proposition de CSI a également le mérite de tenir compte logiquement de la création d'un modèle d'entreprise qui n'aurait pas pu être prévu au moment du dépôt du tarif.

[100] CSI propose que le rapport entre la redevance minimale exigible selon qu'un abonné peut ou non copier un fichier sur un appareil portatif soit le même que pour les montants versés aux maisons de disques dans ces cas. Les opposantes préféreraient que le rapport utilisé soit celui qui existe entre le prix moyen payé pour l'abonnement qui permet de copier un fichier sur un appareil portatif et celui qui ne le permet pas. Nous sommes d'accord avec la méthodologie des opposantes, ne serait-ce que parce qu'elle est plus conforme à l'approche que nous avons adoptée en fixant le taux pour les téléchargements permanents. Nous utiliserons

subscription as the average monthly subscription fees. These numbers are \$9.50 when further reproduction on a portable device is not allowed, and \$14.50 when it is. The resulting minimum fees that we certify are 37.4¢ and 57.0¢ per month respectively.

2. On-Demand Streaming

[101] CSI requested a tariff for services that only offer on-demand streaming, even though no such service currently exists. The Objectors suggest that we should not certify a tariff for non-existent services. This suggestion misses one important point. Tariffs are in essence prospective and can well target uses of which little is known. CSI has asked for a tariff that ostensibly targets a possible, protected use of its repertoire, and should be allowed to have a tariff certified for that use.

[102] CSI asked that the rate for on-demand streaming be set somewhere between the rate set for limited downloads and the rate pay audio services (Galaxie and Max Trax) have agreed to pay to CSI. Its assumption is that on-demand streams are worth less than limited downloads but more than pay audio, since on-demand streaming allows customers to select the tracks they listen to while pay audio services are non-interactive streaming. For their part, the Objectors proposed that the royalties be based on what commercial radio stations pay for the right to use CSI's repertoire, and proposed a rate of 0.5 per cent.

[103] We reject the Objectors' proposal for two reasons. First, music is worth more to on-demand streaming than to commercial radio, if only because listeners choose commercial radio for a variety of reasons, one of which is music, while

toutefois comme moyenne des frais d'abonnements mensuels la moyenne entre ce que facturent *Napster* et *MusicNet* pour un tel abonnement. Ces montants sont de 9,50 \$ lorsque la reproduction sur un appareil portatif n'est pas permise et de 14,50 \$ quand elle l'est. Les redevances minimales en découlant et que nous homologuons sont respectivement de 37,4 ¢ et de 57,0 ¢ par mois.

2. Transmissions sur demande

[101] CSI a demandé un tarif pour les services qui n'offrent que des transmissions sur demande, même s'il n'en existe actuellement aucun. Les opposantes prétendent que nous ne devrions pas homologuer un tarif pour des services qui n'existent pas. Cette prétention ne tient pas compte d'un point important. Les tarifs sont essentiellement prospectifs et peuvent viser des utilisations dont on sait peu de choses. CSI a demandé un tarif qui vise une possible utilisation protégée de son répertoire, et devrait pouvoir faire homologuer un tarif à cette fin.

[102] CSI veut que le taux pour les transmissions sur demande se situe entre le taux établi pour les téléchargements limités et ce que les services sonores payants (Galaxie et Max Trax) ont accepté de lui verser. Cela suppose que les transmissions sur demande valent moins que les téléchargements limités, mais davantage que les services sonores payants; les transmissions sur demande permettent aux consommateurs de choisir les pistes qu'ils écoutent, tandis que les services sonores payants sont des transmissions non interactives. Pour leur part, les opposantes ont proposé que les redevances reflètent ce que paient les stations de radio commerciales pour leur utilisation du répertoire de CSI, et ont proposé un taux de 0,5 pour cent.

[103] Nous rejetons la proposition des opposantes pour deux motifs. Premièrement, la musique a plus de valeur pour les transmissions sur demande que pour la radio commerciale, ne serait-ce que parce que les auditeurs choisissent

those who listen to on-demand streams do so exclusively for the music. Second, a radio station has the option of operating without making reproductions of musical works; a streaming service does not have that option. That makes the right to reproduce more valuable in a stream than over the radio.¹⁷

[104] Once again, we are concerned with the possibility that CSI's approach may lead to some level of double discounting, if the retail price of a service offering only on-demand streams is lower than for one that also offers limited downloads. Notwithstanding this, we adopt CSI's methodology. This results in a rate of 4.6 per cent.

[105] CSI requested that the minimum fee for on-demand streaming be set as a function of the ratio between the percentage rate for on-demand streaming and limited downloads. The Objectors did not propose a minimum rate for this category. Applying CSI's methodology to the rates yields a minimum fee of 29.2¢ [$4.6 \div 5.9 \times 37.4$].

3. Adjusting the Rates to Account for the Use of Music not in CSI's Repertoire

[106] CSI initially proposed that the rates for limited downloads and on-demand streams be adjusted to reflect the fact that not all works an online service uses are in CSI's repertoire. During the hearings, it became clear that there was no need to do so. The Services know of every instance in which a track is downloaded or streamed; indeed, the DRMs they use with limited downloads report the number of times a download was played when the consumer's device "reports" to the service. CSI is therefore able to segregate tracks that use its repertoire from those that do not and to calculate royalties accordingly.

la radio pour diverses raisons, dont la musique, tandis que ceux qui écoutent une transmission sur demande le font exclusivement pour la musique. Deuxièmement, une station de radio peut fonctionner sans faire de reproduction d'œuvres musicales; un service de transmissions n'a pas cette possibilité, ce qui rend le droit de reproduire plus précieux pour le second que pour la première.¹⁷

[104] Encore une fois, nous craignons que l'approche de CSI puisse entraîner, dans une certaine mesure, un double escompte, si le prix de détail d'un service n'offrant que des transmissions sur demande est inférieur à celui d'un service qui offre également des téléchargements limités. Nous adoptons néanmoins la méthodologie de CSI, ce qui donne un taux de 4,6 pour cent.

[105] CSI a demandé que la redevance minimale pour les transmissions sur demande soit fixée en fonction du rapport entre le taux pour ces transmissions et le taux pour les téléchargements limités. Les opposantes n'ont pas proposé de taux minimum pour cette catégorie. L'application de la méthodologie de CSI aux taux donne une redevance minimale de 29,2 ¢ [$4,6 \div 5,9 \times 37,4$].

3. Ajustement des taux pour tenir compte de l'utilisation de musique non incluse dans le répertoire de CSI

[106] CSI proposait au départ un ajustement des taux pour les téléchargements limités et les transmissions sur demande afin de rendre compte du fait que son répertoire n'inclut pas toutes les œuvres qu'utilise un service en ligne. Durant les audiences, il est devenu évident qu'un tel ajustement n'était pas nécessaire. Les services sont au courant de chaque téléchargement et de chaque transmission; les GDM dont ils se servent signalent même le nombre de fois qu'un téléchargement a été joué lorsque l'appareil du consommateur « communique » avec le service. CSI peut donc distinguer les pistes faisant appel à son répertoire de celles qui ne le font pas et calculer en conséquence les redevances.

[107] Both sides agree that royalties for services that offer only on-demand streams be calculated according to the number of individual streams. As for services that offer both on-demand streams and limited downloads, CSI asked that the royalties be calculated according to the number of plays, while the Objectors asked that they be calculated according to the number of downloads. The Objectors' main argument in this regard is that since this is a reproduction tariff, reproductions, not plays, should be used whenever possible to calculate the royalties. We disagree. When practical, reproduction royalties (and their distribution) should be a function of consumption. Recorded music is consumed by listening to it. The *CMRRA/SODRAC Inc. Commercial Radio Tariff, 2007* reflects this: a low-use station pays less than other stations not because it makes fewer copies, but because it airs the repertoire less. In this instance, however, we agree with Rogers that using plays to calculate royalties for limited downloads would create significant practical problems. Moreover, at least for the time being, there is little to gain in accuracy by using both plays and downloads to calculate royalties for services that offer both on-demand streams and limited downloads. Consequently, royalties for these services will be calculated using only downloads.

D. The Rate Base

[108] CSI requested that royalties be calculated using all revenues received in connection with the products and services that are subject to the licence covered by the tariff, including advertising revenues. The Objectors, on the other hand, argue that royalties should be based on what consumers pay to use the online service. They purport that CSI's proposed approach is

[107] Tous s'entendent pour dire que les redevances pour les services n'offrant que des transmissions sur demande soient fonction du nombre de transmissions. Pour les services offrant des transmissions sur demande et des téléchargements limités, CSI demande que les redevances soient fonction du nombre d'écoutes; selon les opposantes, c'est le nombre de téléchargements qui, lorsque c'est possible, devrait servir à ce calcul, au motif principal que les copies, non les écoutes, devraient servir à calculer les redevances dans un tarif portant sur la reproduction. Nous ne sommes pas d'accord. Lorsque cela est pratique, les redevances pour la reproduction devraient être établies (et réparties) en fonction de la consommation. La musique enregistrée se consomme en l'écoutant. Le *Tarif CMRRA/SODRAC inc. pour la radio commerciale, 2007* reflète ce principe : une station à faible utilisation paie moins qu'une autre station non pas parce qu'elle fait moins de copies, mais parce qu'elle diffuse moins le répertoire. Dans la présente affaire, toutefois, nous sommes d'accord avec Rogers. Le fait de calculer les redevances pour les téléchargements limités en fonction de l'écoute entraînerait des problèmes pratiques importants. Qui plus est, du moins pour l'instant, le résultat obtenu en utilisant tant l'écoute que le téléchargement pour établir les redevances des services qui offrent à la fois des transmissions sur demande et des téléchargements limités ne serait pas vraiment plus précis. Par conséquent, les redevances de ces services seront fonction uniquement du nombre de téléchargements.

D. Base tarifaire

[108] CSI a demandé qu'on calcule les redevances en fonction de tous les revenus découlant des produits et services assujettis à la licence visée par le tarif, y compris les revenus de publicité. Les opposantes, pour leur part, soutiennent que les redevances devraient reposer sur ce que paient les consommateurs pour utiliser le service en ligne. Selon elles, l'approche

contrary to what it has agreed to with services on the one hand, and with record labels on the other.

[109] We agree with the Objectors' proposed approach, but for different reasons. First, online music services do not earn much more than what consumers pay. Second, we need to know whether, and to what extent, these other revenue streams are attributable to the use of CSI's repertoire. There was some evidence that advertising-based services may start offering music for free on the Internet. We think that these new services will remain relatively marginal, at least for the life of the current tariff. In the meantime, the minimum fees that we have set should generate sufficient royalties from those services. For these reasons, the tariff will use what consumers pay to the services as the rate base.

E. The Role of Record Labels

[110] CRIA's Class A members were allowed to object to the proposed tariff because they operate or intend to operate their own online services. Their interest goes beyond this, however. They wish to be able to act as intermediaries between CSI and the online services, presumably only with respect to the musical works that are embedded onto sound recordings that each of them owns. In order to achieve this, they ask that the tariff not specify who can apply for a licence.

[111] CRIA's members argue that the systems currently in place to clear rights for prerecorded CDs can easily be put to use in the online market, allowing them to provide fully cleared products here as in the physical world. They point to certain difficulties which online services have encountered in obtaining licences from CSI, all of which they argue can be overcome if record

proposée par CSI est contraire à ce dont cette dernière a convenu avec les services d'une part, et avec les maisons de disques d'autre part.

[109] Nous sommes d'accord avec l'approche proposée par les opposantes, mais pour des raisons différentes. Premièrement, les services de musique en ligne ne touchent pas beaucoup plus que ce que les consommateurs paient. Deuxièmement, nous devons savoir si, et dans quelle mesure, ces autres sources de revenus découlent de l'utilisation du répertoire de CSI. Certains éléments de preuve montrent que les services fondés sur la publicité pourraient commencer à offrir gratuitement de la musique sur Internet. Nous pensons que ces nouveaux services demeureront relativement marginaux, du moins pendant la durée de validité du présent tarif. Entre-temps, les redevances minimales que nous avons fixées devraient rapporter suffisamment de redevances de ces services. Pour ces raisons, le tarif aura comme base tarifaire ce que les consommateurs versent aux services.

E. Le rôle des maisons de disques.

[110] Les membres de la classe A de la CRIA ont pu s'opposer au tarif proposé parce qu'ils exploitent ou ont l'intention d'exploiter leurs propres services en ligne. Leur intérêt ne s'arrête cependant pas là. Ils désirent pouvoir jouer le rôle d'intermédiaires entre CSI et les services en ligne, probablement uniquement pour les œuvres musicales incorporées à des enregistrements sonores que possède chacun d'eux. Ils demandent, pour y arriver, que le tarif ne précise pas qui peut demander une licence.

[111] Les membres de la CRIA soutiennent qu'on peut facilement avoir recours, sur le marché en ligne, aux systèmes actuellement établis pour affranchir les droits relatifs aux CD préenregistrés, ce qui leur permettrait d'y offrir des produits entièrement affranchis, comme dans un environnement matériel. Ils font mention de certaines difficultés que les services en ligne ont

labels are allowed to sub-licence CSI's repertoire to the services.

[112] CSI opposes this request. It notes that the request does not come from the online music services themselves, who all have agreements with CSI. It submits that there are no valid legal or practical reasons to allow the record labels to step into the shoes of the actual users of the repertoire and that there is no precedent for such action. CSI acknowledges that there have been difficulties in processing the applications of online services. It points out that given the sheer numbers involved, it was to be expected that setting up the required systems would take some time. CSI has hired additional staff to address the problem. It mentions the labels' allegedly less than stellar record of compliance with the MLA as an indication that they should not be allowed to interpose themselves in the relationship between user and collective. Finally, CSI insists that it must be able to maintain a direct relationship with the users in order to properly monitor the actual use of its repertoire.

[113] We are convinced that the tariff should not allow the record labels to interpose themselves between CSI and the online music service, for the following reasons.

[114] First, allowing the record labels to licence the use of CSI's repertoire pursuant to this tariff would add an unnecessary layer of communication between the collective and the actual user of its repertoire. As Mrs. Fortier explained, this has not been common practice in the past; it should not become common practice in this case.¹⁸

[115] Second, to allow the record labels to interpose themselves would overly complicate the

éprouvées pour obtenir des licences de CSI, difficultés qui, selon eux, peuvent toutes être surmontées si les maisons de disques sont autorisées à octroyer des sous-licences aux services pour le répertoire de CSI.

[112] CSI s'oppose à cette demande. Elle souligne que la demande ne provient pas des services, qui ont tous des ententes avec CSI. Elle fait valoir qu'il n'existe aucune raison valable, sur le plan juridique ou pratique, de permettre aux maisons de disques de se substituer aux utilisateurs réels du répertoire et qu'il n'existe aucun précédent pour une telle mesure. CSI reconnaît que le traitement des demandes des services en ligne a soulevé des difficultés. Elle fait remarquer qu'étant donné l'énormité du nombre de demandes, il fallait s'attendre à ce que la mise en place des systèmes nécessaires prenne un certain temps. On a commencé à embaucher du personnel additionnel pour s'attaquer au problème. CSI signale qu'en raison des antécédents de conformité à la MLA des maisons de disques, qui n'auraient rien d'admirable, celles-ci ne devraient pas être autorisées à s'interposer dans la relation entre l'utilisateur et la société de gestion. Enfin, CSI soutient qu'elle doit pouvoir maintenir un rapport direct avec les utilisateurs afin de surveiller adéquatement l'usage réel de son répertoire.

[113] Nous sommes convaincus que le tarif ne devrait pas permettre aux maisons de disques de s'interposer entre CSI et le service de musique en ligne, pour les motifs suivants.

[114] Premièrement, permettre aux maisons de disques d'octroyer une licence d'utilisation du répertoire de CSI en vertu du présent tarif ajouterait inutilement un niveau de communication entre la société de gestion et l'utilisateur réel de son répertoire. Comme M^{me} Fortier l'a expliqué, ce n'était pas la pratique courante dans le passé; il ne faudrait pas que cela le devienne dans ce cas.¹⁸

[115] Deuxièmement, permettre aux maisons de disques de s'interposer compliquerait trop la

way in which CSI would obtain the information to which it is entitled. If all four major labels were to avail themselves of the tariff, CSI would receive, in each reporting period, at least five reports with respect to each service: one from the service and one from each label. Allowing independent labels to enter the fray would further complicate these relationships.

[116] Third, CSI has already established direct relationships with all the services that operate in Canada. There seems to be no need to disrupt those relationships.

[117] Fourth, the person who is ultimately liable for the royalties pursuant to the tariff remains the actual user of the repertoire. Providing unreliable information can result in increased liability. Thus, it is probable that the person who bears the ultimate burden for an error is least likely to commit that error.

[118] Fifth, the efficiencies that the record labels contend can be achieved by dealing through them are far from certain. No one knows whether it would be more efficient for labels to report on part of the sales of several online services or for each service to report on its total sales from a number of overlapping catalogues of sound recordings. Nothing prevents the labels from convincing CSI and the services that they can help to make reporting under the tariff more efficient. Nothing prevents CSI from rearranging its reporting channels; we will not force it to do so.

[119] In the past, the Board has stated that generally speaking, a tariff should target uses, not users.¹⁹ The *Act*, not the Board, determines who is liable to pay for a protected use. A tariff can neither impose liability where the *Act* does not nor remove liability where it exists.

façon dont CSI obtiendrait l'information à laquelle elle a droit. Si les quatre grandes maisons se prévalaient du tarif, CSI recevrait, pour chaque période de déclaration, au moins cinq rapports pour chaque service : un du service et un de chaque maison. Permettre à des maisons indépendantes d'entrer en lice compliquerait ces relations encore davantage.

[116] Troisièmement, CSI a déjà établi des relations directes avec tous les services faisant affaire au Canada. Il n'y a aucune raison de perturber ces relations.

[117] Quatrièmement, la personne devant payer, en fin de compte, les redevances prévues au tarif demeure l'utilisateur réel du répertoire. Fournir des renseignements peu fiables risque d'entraîner une responsabilité accrue. Il est donc probable que la personne qui supporte en dernière analyse le fardeau d'une erreur est la moins susceptible de commettre cette erreur.

[118] Cinquièmement, les gains d'efficacité que les maisons de disques prétendent qu'il est possible de réaliser en traitant par leur entremise sont loin d'être certains. Nul ne sait s'il serait plus efficace pour les maisons de faire rapport d'une partie des ventes de plusieurs services en ligne ou pour chaque service de faire rapport de son chiffre d'affaires global à partir d'un certain nombre de catalogues d'enregistrements sonores qui se recoupent. Rien n'empêche les maisons de persuader CSI et les services qu'elles peuvent contribuer à faire rapport plus efficacement aux termes du tarif. Rien n'empêche non plus CSI de remanier sa filière de communication de rapports; nous ne l'obligerons pas à le faire.

[119] La Commission a déclaré dans le passé qu'en règle générale, un tarif devrait viser les utilisations, non pas les utilisateurs.¹⁹ C'est la *Loi*, non pas la Commission, qui détermine qui est tenu de payer pour une utilisation protégée. Un tarif ne peut ni imposer une responsabilité lorsque la *Loi* ne le fait pas, ni dégager une responsabilité lorsque celle-ci existe.

[120] The Board has also stated that generally speaking, a tariff should target both the right to do and the right to authorize. When administered collectively, the right to authorize an act is subject to the same regime as the act itself. Furthermore, the authorization right, though separate, co-exists with the right to do.²⁰

[121] We agree with both propositions. We do not consider that proscribing record labels from availing themselves of this tariff contradicts either proposition.

[122] Thus, many of the tariffs that do not mention whom it can be collected from involve persons who are jointly liable for a single act. This is the case, for example, of the non-broadcast television service and the cable operator for the single communication that occurs when a program is transmitted from the service, to the operator and then on to the operator's subscriber. Simply put, it is not possible to split a single act. Here, as we pointed out, the record labels cannot claim to be the actual users, though they may carry some liability for that use if they purport to authorize it. It is possible to segregate what the labels do from what the online music services do. The Board has already underlined that it is legally possible to assign the right to do to a collective and the right to authorize to another.²¹

[123] Also, almost all tariffs that deal with both the right to act and the right to authorize are SOCAN tariffs. If SOCAN did not file tariffs for both acts, subsection 67.1(4) of the Act would prevent it from seeking payment from those who authorize. Here, this is not the case; record labels will not be able to avail themselves of the tariff, but CSI will retain the option to license them if it wishes, and to sue them if they purport to authorize the unlicensed use of its repertoire.

[120] La Commission a aussi déclaré qu'en règle générale, un tarif devrait viser aussi bien le droit d'accomplir que le droit d'autoriser. Lorsqu'il est administré collectivement, le droit d'autoriser un acte est assujéti au même régime que l'acte lui-même. En outre, le droit d'autorisation, bien que distinct, existe de pair avec le droit d'accomplir.²⁰

[121] Nous sommes d'accord avec les deux propositions. À notre avis, prescrire que les maisons de disques ne peuvent se prévaloir du présent tarif ne contredit pas l'une ou l'autre proposition.

[122] Ainsi, nombre de tarifs qui ne mentionnent pas de qui les redevances peuvent être perçues visent des personnes solidairement responsables d'un même acte. C'est le cas, par exemple, du service de télévision spécialisée et payante et du câblodistributeur, pour la communication unique qui se produit lorsqu'une émission est transmise à partir du service au câblodistributeur, puis de là à l'abonné de ce dernier. Il est tout simplement impossible de scinder un acte unique. Dans le cas présent, comme nous l'avons fait remarquer, les maisons de disques ne peuvent pas prétendre être les utilisateurs réels, même si elles peuvent assumer une certaine responsabilité pour cette utilisation si elles prétendent l'autoriser. Il est possible de séparer ce que font les maisons de ce que font les services de musique en ligne. La Commission a déjà souligné qu'il est légalement possible d'accorder le droit d'accomplir à une société de gestion et le droit d'autoriser à une autre.²¹

[123] Également, presque tous les tarifs qui portent sur le droit d'accomplir et le droit d'autoriser sont des tarifs de la SOCAN. Si la SOCAN n'a pas déposé de tarif pour les deux actes, le paragraphe 67.1(4) de la Loi l'empêche de demander un paiement à ceux qui autorisent. Ici, ce n'est pas le cas. Les maisons de disques ne pourront se prévaloir du tarif, mais CSI pourra toujours leur octroyer une licence si elle le désire ou les poursuivre en justice si elles prétendent autoriser l'utilisation sans licence de son répertoire.

[124] Other tariffs specifically provide that they do not apply to certain types of use. This is what we propose to do. The relevant provision prevents the record labels from interposing themselves only to the extent that a CSI licence is required. Labels will remain free to licence the use of musical works where they are already authorized to do so.

[125] Had we not been convinced that we are able to expressly prevent record labels to avail themselves of the tariff, we would have designed the administrative provisions so as to ensure that CSI would not be obliged to deal with multiple reporting channels. For example, we would have provided that unless CSI consented, one, and only one, report per service could be filed in a reporting period.

F. Ability to Pay

[126] The online music industry is in its infancy. It is small by any standard, with relatively low profit margins and long payouts. Still, we believe that online services can absorb the royalties we set without raising prices while at the same time remaining able to meet their mid- and long-term business objectives.

[127] We think that it is appropriate to phase in this new tariff by applying a discount of 10 per cent to the rates we would set otherwise. This discount is the same that the Board granted when it first certified the Pay Audio Services Tariff. This discount is intended to apply only for the life of this tariff.

G. Validation Measures

[128] There is evidence before us which permits us to compare the rates we certify with those in three major foreign markets.

[124] D'autres tarifs prévoient expressément qu'ils ne s'appliquent pas à certains types d'utilisation. C'est ce que nous proposons de faire. La disposition pertinente empêche les maisons de disques de s'interposer uniquement dans la mesure où une licence de CSI est nécessaire. Les maisons de disques seront toujours en mesure de permettre l'utilisation d'une œuvre musicale lorsqu'elles sont déjà autorisées à le faire.

[125] Si nous n'avions pas été persuadés que nous pouvons expressément empêcher les maisons de disques de se prévaloir du tarif, nous aurions conçu des dispositions administratives qui auraient fait en sorte que CSI ne soit pas obligée de traiter avec plusieurs filières de communication de rapports. Par exemple, nous aurions prévu qu'à moins que CSI n'y consente, il y aurait dépôt d'un seul et unique rapport par service durant une période de déclaration.

F. Capacité de payer

[126] L'industrie de la musique en ligne en est encore à ses débuts. Selon tous les critères, elle est petite, sa marge bénéficiaire est relativement peu élevée et ses dépenses sont importantes. Nous croyons quand même que les services en ligne peuvent absorber les redevances que nous fixons sans avoir à hausser leurs prix, tout en conservant la capacité de respecter à moyen et à long terme leurs objectifs commerciaux.

[127] Nous pensons qu'il y a lieu de faire entrer progressivement en vigueur le nouveau tarif en appliquant un escompte de 10 pour cent aux taux que nous fixerions autrement. Cet escompte est le même que celui que la Commission a accordé lorsqu'elle a pour la première fois homologué le tarif pour les services sonores payants. Il n'est destiné à s'appliquer que durant la durée de validité du présent tarif.

G. Mesures de validation

[128] Le preuve au dossier nous permet de comparer les taux que nous homologuons à ceux qui sont établis sur trois grands marchés étrangers.

[129] In the United States, for the reproduction of the musical work, permanent downloads currently are subject to the compulsory licence rate of 9.1¢ per track, which corresponds to 9.1 per cent of the retail price of a download from the *iTunes Music Store*.²² That rate will be subject to review by the Copyright Royalty Board for the period starting January 1, 2008.

[130] In Germany, the *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (GEMA) intends to collect an effective rate of 12 per cent of gross revenues for the right to communicate and reproduce the musical work (not the sound recording) with respect to permanent and limited downloads. The German association representing producers of musical recordings has proposed a royalty of 6 per cent generally and 4.8 per cent for the downloading of music onto cell phones.

[131] In the United Kingdom, the Mechanical Copyright Protection Society, the Performing Rights Society and the British Phonographic Industry settled on a rate of 8 per cent for the reproduction and communication of musical works in all downloads and on-demand streams. The rate base, however, continues to be the object of a dispute which will be settled by the Copyright Tribunal.

[132] The rates we are certifying would be 8.8, 5.9 and 4.6 per cent before discount. After discount, they are 7.9, 5.3 and 4.1 per cent. The simple average of these rates are 6.4 and 5.8 per cent. The weighted average rates, reflecting the relative importance of each type of download, would be much closer to the higher, permanent download rate.

[133] The Board has often stated that caution must be exercised when comparing the rates it

[129] Aux États-Unis, pour la reproduction des œuvres musicales, les téléchargements permanents sont actuellement assujettis au taux de la licence obligatoire de 9,1 ¢ la piste, ce qui correspond à 9,1 pour cent du prix de détail d'un téléchargement à partir du *iTunes Music Store*.²² Ce taux sera soumis à un examen du *Copyright Royalty Board* pour la période débutant le 1^{er} janvier 2008.

[130] En Allemagne, la *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (GEMA) veut percevoir un taux effectif de 12 pour cent des revenus bruts pour le droit de communiquer et de reproduire les œuvres musicales (non pas les enregistrements sonores) dans le cas des téléchargements permanents et limités. L'association allemande représentant les producteurs d'enregistrements musicaux a proposé une redevance de 6 pour cent en général et de 4,8 pour cent pour le téléchargement de musique sur un téléphone cellulaire.

[131] Au Royaume-Uni, la *Mechanical Copyright Protection Society*, la *Performing Rights Society* et la *British Phonographic Industry* ont convenu d'un taux de 8 pour cent pour la reproduction et la communication d'œuvres musicales dans tous les téléchargements et toutes les transmissions sur demande. La base tarifaire continue cependant de faire l'objet d'un différend qui sera réglé par le *Copyright Tribunal*.

[132] Les taux que nous homologuons seraient de 8,8, de 5,9 et de 4,6 pour cent avant escompte. Ils sont, après escompte, de 7,9, de 5,3 et de 4,1 pour cent. Les moyennes simples de ces taux sont 6,4 et 5,8 pour cent. Les taux moyens pondérés, qui reflètent l'importance relative de chaque type de téléchargement, se rapprocheraient beaucoup plus du taux plus élevé s'appliquant aux téléchargements permanents.

[133] La Commission a souvent déclaré qu'il faut faire preuve de prudence lorsqu'il y a

certifies to those that apply in other jurisdictions. We nevertheless find that looking at the U.S., U.K. and German situations brings us some measure of comfort that the rates we set in this decision are fair to both copyright owners and copyright users.

VI. TARIFF WORDING

[134] Arriving at the wording of the tariff we certify proved to be a complicated task. Consultations started almost as soon as the hearings ended, when we addressed a series of questions on the structure of the tariff and what it ought to address. Over more than four months, parties, helped by Board counsel, exchanged several sets of correspondence. They met with our counsel for one full-day meeting. They received two drafts, the second being significantly different than the first. Consultations ended barely two weeks ago.

[135] The wording of the tariff we certify is very different from what was published in the *Canada Gazette* or what CSI proposed in the end. This explains why this section of our reasons is somewhat longer than usual.

Definitions

[136] We removed a number of unnecessary definitions. Of those that remain or were removed, some deserve comment.

[137] Section 3 lists what an online music service "and its authorized distributors" are allowed to do pursuant to the tariff. The parties proposed a definition of authorized distributor which we did not include in the tariff. The notion simply does not need to be defined.

comparaison des taux qu'elle homologue et de ceux qui s'appliquent dans d'autres ressorts. Nous concluons néanmoins que l'examen de ce qui se pratique aux États-Unis, au Royaume-Uni et en Allemagne confirme, dans une certaine mesure, que les taux que nous homologuons dans la présente décision sont justes à la fois pour les titulaires de droits et pour les utilisateurs de ces droits.

VI. LIBELLÉ DU TARIF

[134] Il a été difficile de finaliser le libellé du tarif que nous homologuons. Les consultations ont débuté très peu de temps après la fin des audiences, par une série de questions que nous avons adressées concernant la structure du tarif et ce dont il devrait traiter. Pendant plus de quatre mois, les parties, avec l'aide de notre conseiller juridique, ont procédé à plusieurs échanges. Elles se sont rencontrées avec notre conseiller pour une journée entière. Elles ont reçu deux projets, dont le deuxième différait substantiellement du premier. Les consultations se sont terminées il y a deux semaines à peine.

[135] Le libellé du tarif que nous homologuons est fort différent du projet publié dans la *Gazette du Canada* ou de ce que CSI proposait en bout de piste. Voilà pourquoi la présente section de nos motifs est passablement plus longue qu'à l'habitude.

Définitions

[136] Nous avons omis plusieurs définitions inutiles. Parmi celles qui restent ou que nous avons enlevées, certaines méritent qu'on les commente.

[137] L'article 3 décrit ce qu'un service de musique en ligne « et ses distributeurs autorisés » peuvent faire en vertu du tarif. Les parties ont proposé une définition de distributeur autorisé que nous n'avons pas retenue. Le concept peut fort bien se passer de définition.

[138] CSI asked that the tariff apply to on-demand streams and limited downloads only when they are offered for a fee. CSI and the Objectors agreed that to achieve this, a definition of subscriber was required. We believe that simply using the term without defining it is sufficient. The notion of subscription implies that a payment is made for what is the object of the subscription. Furthermore, in the longer term, we believe that it would probably be appropriate to include such services in the tariff even when they are financed through other means, such as advertising.

[139] The definition of portable limited download was the subject of lengthy discussions. We agree with Rogers that portable limited downloads should be defined as copies that are made by the subscriber. When a service allows the file to be delivered by it to more than one device, as we described in paragraph 87, this should not be considered a portable download.

Application

[140] The tariff allows an online music service and its authorized distributors to make all reproductions required in connection with the operation of a service. It also allows the service to provide 30-second promotional and other previews without incurring any liability or reporting obligations.

[141] The tariff does not apply to medleys. In the physical market, these uses apparently are not licensed through the MLA; they are the subject of separate deals. It is no imposition on those who negotiate those deals to require them to also address uses in the online market.

Reporting Requirements

[142] The information that an online music service is required to provide CSI is considerably less than what CSI was asking for. The following

[138] CSI demandait que le tarif vise les transmissions sur demande et les téléchargements limités uniquement lorsqu'il faut payer pour les obtenir. CSI et les opposantes s'entendaient pour dire que pour y arriver, il fallait définir ce qu'est un abonné. Nous croyons qu'il suffit d'utiliser le terme sans le définir. La notion d'abonnement implique d'effectuer un paiement pour ce à quoi on s'abonne. Qui plus est, à plus long terme, nous croyons qu'il conviendrait sans doute que le tarif vise de tels services et ce, même s'ils sont financés autrement, au moyen de la publicité, par exemple.

[139] La définition de téléchargement limité portable a fait l'objet de longs échanges. Nous sommes d'accord avec Rogers que le téléchargement limité portable devrait être une copie que fait l'abonné. Le service permettant à un fichier d'être livré à plus d'un appareil, comme celui que nous décrivons au paragraphe 87, ne devrait pas être considéré comme un téléchargement portable.

Application

[140] Le tarif permet au service de musique en ligne et à ses distributeurs autorisés de faire toutes les reproductions nécessaires à l'exploitation du service. Il permet aussi au service de fournir des fichiers promotionnels et d'écoute préalable de 30 secondes sans que cela n'entraîne de paiement ou d'obligations de rapport.

[141] Le tarif ne vise pas les pots-pourris. Dans le marché physique, on n'utilise pas la MLA pour autoriser ces utilisations; elles font l'objet de licences distinctes. Ce n'est pas trop exiger de ceux qui négocient ces licences de tenir compte des utilisations dans le marché en ligne.

Exigences de rapport

[142] L'information qu'un service de musique en ligne doit fournir à CSI est moindre, et de loin, que ce que CSI demandait. Les principes suivants

principles guided us in deciding what should and should not be provided.

[143] First, CSI should get enough information to allow it to identify which files use its repertoire and which do not. For this reason, services must report descriptive information concerning files for which, according to the service, no licence is required.

[144] Some objectors fear that CSI may seek to use the information it gets on works that are not in its repertoire to recruit new members. We do not think it necessary to account for this possibility for two reasons. First, the reporting timelines are simply too tight for CSI to be able to gain any significant advantage in this respect. Second, there is no reason to believe that CSI has done this in the past or may be thinking of doing it in the future. Needless to say, any indication to the contrary would result in the Board changing the reporting requirements and imposing restrictions on what CSI may use the information for.

[145] Second, given the way in which business has been conducted to date in related markets, CSI should obtain a certain amount of information that is otherwise redundant. CSI has convinced us that there is enough uncertainty in the information it gets pursuant to the MLA, for example, to justify providing a certain amount of alternative, additional information. That being said, redundancy should be limited to what is clearly informative and helpful. Asking for more information than necessary penalizes those who provide CSI with all the information it needs in the first place. Generally speaking, the best way to get correct information is to ask for it and to sanction those who do not comply.

[146] Third, CSI should get not only the information it requires to calculate and distribute

nous ont guidés pour décider ce qui devrait ou non être fourni.

[143] Premièrement, CSI devrait obtenir suffisamment de renseignements pour lui permettre de distinguer les fichiers qui utilisent son répertoire de ceux qui ne le font pas. Pour ce motif, les services doivent fournir des renseignements descriptifs sur les fichiers pour lesquels le service soutient qu'une licence n'est pas nécessaire.

[144] Certaines opposantes craignent que CSI utilise les renseignements concernant les œuvres ne faisant pas partie de son répertoire pour recruter de nouveaux membres. Il ne nous semble pas nécessaire de tenir compte de ce scénario pour deux motifs. D'abord, les échéances de rapport sont bien trop courtes pour permettre à CSI d'obtenir un avantage important sous cet aspect. Ensuite, rien ne permet de croire que CSI a agi ainsi par le passé ou pourrait songer à agir ainsi à l'avenir. Rien ne sert d'ajouter qu'une indication à l'effet contraire entraînerait un resserrement considérable de l'information que CSI obtient en vertu du tarif et de l'usage qu'elle peut en faire.

[145] Deuxièmement, compte tenu de la façon dont les choses se passent dans des marchés connexes, CSI devrait obtenir certains renseignements qui sont par ailleurs redondants. CSI nous a convaincus, par exemple, que l'information qu'elle obtient en vertu de la MLA est suffisamment aléatoire pour justifier qu'on lui fournisse certains renseignements alternatifs, additionnels. Cela dit, la redondance devrait se limiter à ce qui est nettement instructif et utile. Demander plus d'information que nécessaire pénalise ceux qui fournissent déjà à CSI les renseignements dont elle a besoin. Règle générale, la meilleure façon d'obtenir la bonne information est de la demander puis de pénaliser ceux qui ne le font pas.

[146] Troisièmement, CSI devrait obtenir non seulement l'information qu'il lui faut pour

royalties, but also other information that will allow it to develop a sense of overall compliance without having to resort to systematic audits. This is why we would have required services to provide information about their overall sales, had CSI not agreed in the end to abandon this request. On the other hand, financial information concerning files for which no licence is required ought to be kept to a minimum.

[147] Financial information concerning files using works whose status is uncertain is another matter. Thus, when CSI realized that we would probably not require services to provide it with detailed sales reports for all files, it asked to be provided with at least a list of all files that had been streamed or downloaded in a month. We would not have done so for files for which no licence is required. We thought of requiring some sales information regarding files using works whose status is uncertain but did not do so in the end. For this tariff, at least, it seems to us that CSI will be sufficiently busy dealing with files it knows to be in its repertoire. Moreover, some services already provide complete sales data to CSI simply because it is more convenient to do so. The matter should be reexamined when the time comes to certify the next tariff.

[148] Fourth, if information is essential, a service ought to provide it even if this means getting it from someone else. Music labels do not always provide online music services the name of the author of a musical work, the International Standard Recording Code assigned to a sound recording or a variety of information about the album on which a sound recording may have been released in physical format. This is not reason enough to relieve the service from providing the information. Services require a licence. They need CSI's help to determine what is in its repertoire and what is not. Basic

calculer et répartir les redevances, mais aussi celle lui permettant de se faire une idée du niveau de conformité sans devoir recourir à des vérifications systématiques. Nous aurions donc exigé des services qu'ils fassent part de leurs ventes totales si CSI n'avait pas en bout de piste abandonné sa demande à cet effet. Par contre, la fourniture de données financières portant sur les fichiers ne nécessitant pas de licence doit être ramenée au strict nécessaire.

[147] Il faut aborder autrement les données financières portant sur les fichiers utilisant des œuvres dont le statut est incertain. Ainsi, après avoir constaté que nous n'exigerions sans doute pas que les services lui fournissent des rapports de vente détaillés pour tous les fichiers, CSI a demandé de recevoir au moins la liste de tous ceux qui sont transmis ou téléchargés durant le mois. Nous ne l'aurions pas fait pour les fichiers ne nécessitant pas de licence. Nous avons songé à exiger la fourniture de certaines données concernant les fichiers utilisant des œuvres dont le statut est incertain, mais nous ne l'avons finalement pas fait. Aux fins du présent tarif à tout le moins, il nous semble que CSI en aura bien assez de traiter des fichiers qu'elle sait faire partie de son repertoire. Qui plus est, certains services fournissent déjà à CSI des rapports de vente complets tout simplement parce que cela leur simplifie la tâche. Il faudra réexaminer la question avant d'homologuer le prochain tarif.

[148] Quatrièmement, si un renseignement est essentiel, le service devrait le fournir même s'il doit se le procurer ailleurs. Les maisons de disque ne fournissent pas toujours aux services de musique en ligne le nom de l'auteur de l'œuvre musicale, le code international normalisé des enregistrements attribué à l'enregistrement sonore ou d'autres renseignements concernant l'album sur lequel un enregistrement a pu être publié sur support physique. Cela ne suffit pas à exempter le service de fournir ces renseignements. Les services ont besoin d'une licence. Ils ont besoin de l'aide de CSI pour

copyright information should therefore be provided. In other cases, where the information is helpful but not essential, the information ought to be provided only if available.

[149] In this tariff, however, we are willing to make an exception. This is a first tariff with significant retroactive effects. CSI's licences with the services do not oblige them to provide the information. Requiring the labels and the services to adjust their systems rapidly could prove unnecessarily costly. However, it appears that the worldwide reporting format currently being discussed contemplates including most if not all of that information. In any event, the services should expect to be required to supply this information in all cases in the near future.

Information Flow

[150] Upon starting operations, a service will report and update monthly basic information about itself and the files it posts on its server. CSI will then tell the service which files use CSI's repertoire. We are conscious that in so doing, we are certifying a tariff that entrenches the systematic violation of the rights of those whom CSI does not represent. For practical reasons, it would be difficult to act otherwise, at least for the time being. This may be due in large part to what could be seen as a variety of applications of the so-called long tail effect to this market. First, the market was originally structured around the compulsory licence that existed in Canada until 1989 and that still exists in the United States. Second, this market requires players to rapidly digitize and offer back catalogues whose owners may not always be easy to identify. Third, the quest to offer everything that is available means that a lot of what is offered may be consumed little, if at all; understandably, no one wishes to expend resources to determine who owns the rights in something that generates no royalties. This is a

établir ce qui est ou non dans son répertoire. Ils devraient donc fournir des renseignements de base concernant le droit d'auteur. Autrement, lorsque l'information recherchée est utile sans être essentielle, elle ne devrait être fournie que si elle est disponible.

[149] Dans le présent tarif, toutefois, nous sommes prêts à faire une exception. Il s'agit d'un premier tarif dont l'effet rétroactif est important. Les licences de CSI n'obligent pas les services à fournir ces renseignements. Exiger des maisons de disques et des services qu'ils ajustent leurs systèmes à courte échéance pourrait coûter fort cher inutilement. Cela dit, il semble que le format mondial de rapport dont on discute en ce moment pourrait inclure la plupart, sinon la totalité, des renseignements pertinents. À tout événement, les services devraient s'attendre à devoir bientôt fournir cette information dans tous les cas.

Flux d'information

[150] Dès que son exploitation débute, un service fournira et mettra à jour mensuellement des données de base sur le service et sur les fichiers qu'il offre sur son serveur. CSI indiquera ensuite au service les fichiers qui utilisent son répertoire. Nous sommes conscients qu'en agissant ainsi, nous homologuons un tarif qui enchâsse la violation systématique des droits de ceux que CSI ne représente pas. Pour des raisons pratiques, il serait difficile d'agir autrement, du moins pour l'instant. Cet état de fait pourrait être en grande partie imputable à ce qui pourrait être perçu comme diverses applications à ce marché du soi-disant effet de longue traîne. Premièrement, le marché a d'abord été structuré en fonction de la licence obligatoire qui existait au Canada jusqu'en 1989 et qui existe encore aux États-Unis. Deuxièmement, ce marché exige que les participants numérisent et offrent rapidement des catalogues existants dont les propriétaires pourraient ne pas toujours être faciles à identifier. Troisièmement, la tentative d'offrir tout ce qui est disponible signifie qu'on peut consommer peu, ou pas du tout, une large part de

matter that will have to be re-examined in subsequent proceedings.

[151] Each month, a service will report to CSI the information required to calculate the royalties owing and CSI will do so, based on the reports each service files, and then invoice the service. The Objectors' request to have the option of calculating royalties themselves or asking CSI to do so would create unnecessary uncertainty and delays.

[152] Reporting and payment dates have been set to allow CMRRA to continue to distribute royalties within 75 days of each quarter. This can be made easier by spreading the reporting burden over time. For this reason, information is to be exchanged every month even though payments are made only once per quarter.

[153] Involving CSI in the information chain has certain consequences. Since the system is not fully self-reporting, for example, it is possible that a service may pay an incorrect amount of royalties through no fault of its own. A service should not then be held liable for the consequences of CSI's errors. We have reworded the usual provisions dealing with payment adjustments, liability for audit costs and interests accordingly. We did not grant CSI's request that liability be shifted only where incorrect payments are the result "solely" of an error or omission on the part of CSI. We do not wish to put all the burden of a joint error on only one party.

[154] On the other hand, we have not allowed the Objectors to audit CSI's books. CSI will provide

ce qui est offert; personne ne désire, naturellement, consacrer des ressources pour déterminer qui possède les droits sur une piste qui ne rapporte aucune redevance. C'est là une question qu'il faudra réexaminer dans le cadre d'affaires subséquentes.

[151] Chaque mois, le service fournira à CSI les renseignements requis pour calculer les redevances payables, CSI effectuera ce calcul en utilisant ces renseignements puis fera parvenir un état de compte au service. La demande des opposantes d'avoir l'option de calculer les redevances elles-mêmes ou de demander à CSI de le faire engendrerait de l'incertitude et des délais inutiles.

[152] Nous avons établi les échéances de rapport et de paiement de façon à permettre à la CMRRA de continuer à répartir les redevances au plus tard 75 jours après la fin du trimestre. Il sera plus facile d'y arriver en étalant les obligations de rapport. Pour ce motif, l'échange de renseignements se fait à chaque mois même si les paiements sont effectués seulement une fois par trimestre.

[153] Certaines conséquences découlent du fait d'impliquer CSI dans l'échange de renseignements. Ainsi, comme le fardeau de rapport n'incombe pas uniquement à l'utilisateur, il est possible qu'un service verse un montant de redevances incorrect sans avoir lui-même commis d'erreur. Un service ne devrait pas faire les frais des erreurs que CSI commet. Nous avons réécrit en conséquence les dispositions usuelles traitant des ajustements de paiement, de la responsabilité pour les frais de vérification et des intérêts. Nous n'avons pas fait droit à la demande de CSI voulant que la responsabilité pour un paiement erroné ne lui incombe que s'il découle « uniquement » d'une erreur ou d'une omission de sa part. Nous ne souhaitons pas imposer le fardeau d'une erreur conjointe à une seule personne.

[154] Par contre, nous n'avons pas permis aux opposantes de vérifier les livres de CSI. Cette

detailed royalty calculations; these should be sufficient for a service to verify if the amount being asked of it is correct.

Termination of the Licence

[155] CSI asks that the tariff provide for the termination of the licence if a service does not pay royalties, does not comply with the tariff or becomes bankrupt or insolvent. The only other tariffs to do so are the Canadian Broadcasters Rights Agency (CBRA) Media Monitoring Tariffs. The Objectors disagree. They point out, among other things, that certain provisions of the *Bankruptcy and Insolvency Act (BIA)* and of the *Companies' Creditors Arrangements Act* prevent the termination of agreements.

[156] Our understanding is that the *BIA* addresses copyright issues differently. It seems to us that if, as section 83 of the *BIA* provides, an assignment of copyright is terminated by operation of the law (that is, without the scenario having been provided for in the assignment contract), then *a fortiori*, a licence can provide that a bankrupt licensee shall not be entitled to avail itself of the licence. We see no reason why copyright owners should subsidize an insolvent operation. Furthermore, we would rather let the ordinary courts of law determine whether or not a provision such as section 13 of the tariff is or not effective.

[157] Subsections 65.1(1) and (2) of the *BIA* may prevent CSI from ending the licence for the sole reason that royalties are owing "in respect of" a period before the filing of a notice of intention or proposal. Apparently, this allows a trustee to use the licence as long as it is complied with from the date of the notice of intention or proposal. Subsection 65.1(4) also provides that a person is entitled to require immediate payment for the use of "licensed property" after the filing

dernière fournira un calcul détaillé des redevances, ce qui devrait suffire au service pour vérifier si le montant qu'on lui demande est le bon.

Résiliation de la licence

[155] CSI demande que le tarif prévoie la résiliation de la licence si un service ne verse pas ses redevances, ne se conforme pas au tarif, fait faillite ou devient insolvable. Les seuls autres tarifs dans lesquels on retrouve une telle disposition sont les tarifs de l'Agence des droits des radiodiffuseurs canadiens (CBRA) pour la veille médiatique. Les opposantes sont en désaccord. Elles soulignent, entre autres, que certaines dispositions de la *Loi sur la faillite et l'insolvabilité (LFI)* et de la *Loi sur les arrangements avec les créanciers des compagnies* empêchent qu'on mette fin à des ententes.

[156] Selon nous, la *LFI* traite différemment les questions de droit d'auteur. Il nous semble que si son article 83 permet de mettre fin à une cession de droit d'auteur par opération de la loi (et donc, sans que le contrat de cession permette la résiliation), il faut, *a fortiori*, qu'une licence puisse stipuler que le licencié en faillite ne peut plus s'en prévaloir. Nous ne voyons pas pourquoi les titulaires de droits d'auteur devraient subventionner une exploitation insolvable. Qui plus est, nous préférons laisser aux tribunaux de droit commun le soin de décider si une disposition telle l'article 13 du tarif est efficace ou non.

[157] Les paragraphes 65.1(1) et (2) de la *LFI* pourraient empêcher CSI de mettre fin à la licence au seul motif que des redevances sont impayées « à l'égard » d'une période antérieure au dépôt de l'avis d'intention ou de la proposition. Cela semble permettre au syndic de se prévaloir de la licence pour autant qu'il s'y conforme à partir de la date de l'avis ou de la proposition. Le paragraphe 65.1(4) prévoit par ailleurs qu'une personne peut exiger d'être payée

of the notice or proposal, or to require the further advance of money or credit. In the longer term, a solution may be to provide that an insolvent service must pay royalties in advance. Again, analyzing this matter is better left to another time.

Security, TPMs and Other Requirements

[158] The tariff does not deal with minimum security requirements, the use of technological protection measures (TPMs), the nature and extent of the information regarding copyright that a service should provide to its customers or customer content usage rules. From the outset, it was agreed that at most, the tariff would require that the service comply with the same rules as those agreed upon with the music labels. As time went on, it became clear that such a provision would be redundant at best. Then recently, PureTracks announced that it had started offering some files without any attached DRM software. It is better to address this matter later, to the extent it is relevant.

Transitional Provisions

[159] We have allowed for extended delays to file reports that relate to periods before the tariff was certified. The agreements between CSI and the online services require the services to make interim payments until the Board certified the tariff. The discrepancies between these payments and what the final tariff sets, though not insignificant, are relatively modest. Furthermore, CSI has not yet provided many of the reports it must supply in order for the services to know what they ought to pay. Under the circumstances, we see no need to provide for the payment of interests on the difference.

sur-le-champ pour l'utilisation de « biens ... faisant l'objet d'une licence » après le dépôt de l'avis ou de la proposition ou encore, d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits. À plus long terme, il conviendrait peut-être de prévoir qu'un service insolvable doit verser des avances sur ses redevances. Encore une fois, il est préférable de remettre cette analyse à plus tard.

Sécurité, MPT et autres exigences

[158] Le tarif ne traite pas de normes minimales de sécurité, de l'utilisation de mesures de protection technologiques (MPT), de la nature ou du contenu des renseignements concernant le droit d'auteur que le service devrait fournir à ses clients ou de normes d'utilisation du contenu par ces derniers. Dès le départ, on s'entendait pour dire que le tarif, tout au plus, prévoirait que le service se conforme aux règles convenues avec les maisons de disques. Avec le temps, il est devenu évident qu'une telle disposition serait au mieux redondante. Puis récemment, PureTracks a annoncé qu'elle offrait désormais certains fichiers libres de tout logiciel de GDN. Il vaut mieux remettre cette question à plus tard, si tant est qu'elle soit même pertinente.

Dispositions transitoires

[159] Nous avons allongé les délais d'échange des rapports visant des périodes écoulées avant que le tarif soit homologué. En vertu des ententes entre CSI et les services en ligne, ces derniers effectuent des versements provisoires jusqu'à ce que la Commission homologue un tarif. La différence entre ces paiements et ce que le tarif final établi, sans être insignifiante, est relativement modeste. Qui plus est, CSI n'a pas encore fourni plusieurs des rapports qui doivent être remis aux services pour leur permettre de savoir combien ils doivent payer. Dans les circonstances, nous ne croyons pas qu'il soit nécessaire de prévoir le versement d'intérêts sur la différence.

VII. FINAL RATES

[160] The following Table 2 shows the rates we obtain before the application of the 10 per cent discount, and the ones we certify, after its application.

VII. TAUX DÉFINITIFS

[160] Le Tableau 2 qui suit montre les taux que nous obtenons avant l'application de l'escompte de 10 pour cent, et ceux que nous homologuons, après son application.

TABLE 2

Category	Rates before discount	Rates certified, after discount
Permanent Download	8.8% of the amount paid by a consumer <u>Minimum fee:</u> 4.5¢ per file in a bundle; 5.9¢ per file in all other cases	7.9% of the amount paid by a consumer <u>Minimum fee:</u> 4.1¢ per file in a bundle; 5.3¢ per file in all other cases
Limited Download	5.9% of the amounts paid by subscribers <u>Minimum fee:</u> 57.0¢ per month, per subscriber if portable limited downloads are allowed; 37.4¢ if not	5.3% of the amounts paid by subscribers <u>Minimum fee:</u> 51.3¢ per month, per subscriber if portable limited downloads are allowed; 33.7¢ if not
On-demand Stream	4.6% of the amounts paid by subscribers <u>Minimum fee:</u> 29.2¢ per month, per subscriber	4.1% of the amounts paid by subscribers <u>Minimum fee:</u> 26.3¢ per month, per subscriber

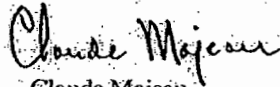
TABLEAU 2

Catégorie	Taux avant escompte	Taux homologués, après escompte
Téléchargement permanent	8,8 % du montant payé par le consommateur <u>Redevance minimale :</u> 4,5 ¢ par fichier faisant partie d'un ensemble; 5,9 ¢ pour tout autre fichier	7,9 % du montant payé par le consommateur <u>Redevance minimale :</u> 4,1 ¢ par fichier faisant partie d'un ensemble; 5,3 ¢ pour tout autre fichier
Téléchargement limité	5,9 % des sommes payées par les abonnés <u>Redevance minimale :</u> 57,0 ¢ par mois, par abonné si les téléchargements limités portables sont permis; 37,4 ¢ si ce n'est pas le cas	5,3 % des sommes payées par les abonnés <u>Redevance minimale :</u> 51,3 ¢ par mois, par abonné si les téléchargements limités portables sont permis; 33,7 ¢ si ce n'est pas le cas
Transmission sur demande	4,6 % des sommes payées par les abonnés <u>Redevance minimale :</u> 29,2 ¢ par mois, par abonné	4,1 % des sommes payées par les abonnés <u>Redevance minimale :</u> 26,3 ¢ par mois, par abonné

[161] It is not possible to estimate with any reliability the total amount of royalties that this tariff will generate for CSI. However, based on numbers recently publicly released by Nielsen SoundScan Canada, it is possible to estimate that the tariff on permanent downloads would generate royalties close to \$2 million in 2006, and slightly under \$1 million in 2005.

[161] Il est impossible d'estimer avec quelque degré de fiabilité que ce soit le montant total des redevances que le présent tarif rapportera à CSI. D'après les chiffres récemment rendus publics par *Nielsen SoundScan Canada*, il est cependant possible d'évaluer que le tarif pour les téléchargements permanents rapporterait près de 2 millions de dollars de redevances en 2006 et un peu moins de 1 million de dollars en 2005.

Le secrétaire général,


Claude Majeau
Secretary General

ENDNOTES

1. Exhibit CSI-27.A, Tab C, *Mobile Music, Juniper Research*, at page 157.
2. When CMRRA is not a publisher's exclusive agent, it is possible to obtain a licence directly from the publisher.
3. At least to the extent that those are not private copies within the meaning of Part VIII of the *Act*.
4. Ringtones that use the original sound recording of a musical work. Throughout the hearings, parties referred to them as "ringtunes".
5. Though the parties to NDMA's are American, they do apply to Canadian transactions.
6. Professor Globerman defined the value of the marginal product as "the monetary value of the increased output associated with additional usage of the input holding usage of other inputs constant".
7. No one alluded to the fact that when the "decision" to charge the same price to reproduce a musical work on vinyl, cassette or CD was made, that price was regulated. It still is in the United States. This might have influenced the decision to continue charging a single price in Canada even after 1989, when free bargaining was allowed to occur. In our view, this is not sufficient to allow us to ignore the historical reality of the MLA, especially since the single price continued to prevail after deregulation, which occurred at a time when all three known prerecorded formats were still competing.
8. Making a prerecorded CD involves other copies that were not mentioned, including

NOTES

1. Pièce CSI-27.A, onglet C, *Mobile Music, Juniper Research*, à la page 157.
2. Lorsque la CMRRA n'est pas l'agent exclusif d'un éditeur, il est possible d'obtenir une licence directement de ce dernier.
3. Du moins dans la mesure où il ne s'agit pas de copies privées au sens de la Partie VIII de la *Loi*.
4. Les sonneries utilisant l'enregistrement sonore original d'une œuvre musicale. Pendant toute l'audience, les parties ont parlé de « *ringtunes* ».
5. Même si les parties aux NDMA sont américaines, les ententes s'appliquent à des opérations canadiennes.
6. Le professeur Globerman a défini la valeur du produit marginal comme étant [TRADUCTION] « la valeur monétaire de l'augmentation de l'extrant se rattachant à l'usage additionnel de l'intrant en maintenant l'utilisation des autres intrants constante ».
7. On a passé sous silence le fait que lorsque la « décision » de facturer le même prix pour reproduire une œuvre musicale sur un vinyle, une cassette ou un CD a été prise, ce prix était réglementé. Il l'est encore aux États-Unis. Cela a pu influencer la décision de continuer à facturer un seul prix au Canada même après 1989, moment où on a déréglementé le prix. Ce n'est pas suffisant, à notre avis, pour que nous ne tenions pas compte de la réalité historique de la MLA, étant donné surtout que le prix unique a continué à prévaloir après la déréglementation, qui est survenue à une époque où les trois formats préenregistrés connus se faisaient encore concurrence.
8. La fabrication d'un CD préenregistré nécessite des reproductions dont on n'a pas

- those that are used to embed the musical work onto the CD; the master recording itself is not used for that purpose.
9. The legal perspective is altogether different however, as we point out in paragraph 84 below.
10. See U.S. Copyright Act, 17 U.S.C. §115 (c) (3) (E) (ii) (II).
11. The tariff allowing an online music service to communicate a musical work will be set following hearings into SOCAN Tariff 22, which are due to start on April 17, 2007.
12. See, for example, decision of October 20, 2006 certifying the NRCC Background Music Tariff, 2003-2009, at paragraph 114.
13. Decision of December 12, 2003 certifying the Private Copying Tariff, 2003-2004, at page 27.
14. There are some sales at higher prices, but nothing indicates that they have a significant impact on the market.
15. We prefer this figure to the one of 15, used by Messrs. Audley and Hyatt, which is based on data provided by SoundScan, for two reasons. First, the average number of tracks is increased by the availability of prerecorded compilation albums which are not generally available online. Second, the evidence offered by Mr. Cue as to what occurs at iTunes, the dominant player in the market, is the best evidence available.
16. Exhibit CSI-27.A, at page 3, Table 1.
17. Decision of March 28, 2003 certifying the CMRRA/SODRAC Inc. Commercial Radio
- fait mention, y compris celles qui sont utilisées pour graver l'œuvre musicale sur le disque compact; on n'utilise pas la bande maîtresse à cette fin.
9. La perspective juridique est fort différente toutefois, comme nous le soulignons plus loin, au paragraphe 84.
10. Voir la loi américaine sur le droit d'auteur, 17 U.S.C. §115 (c) (3) (E) (ii) (II).
11. Le tarif permettant à un service de musique en ligne de communiquer une œuvre musicale sera fixé après les audiences relatives au tarif 22 de la SOCAN qui doivent débiter le 17 avril 2007.
12. Voir, entre autres, la décision du 20 octobre 2006 homologuant le Tarif SCGDV pour la musique de fond, 2003-2009, au paragraphe 114.
13. Décision du 12 décembre 2003 homologuant le Tarif pour la copie privée, 2003-2004, à la page 27.
14. On en vend certains à des prix plus élevés, mais rien n'indique que ces ventes ont des répercussions importantes sur le marché.
15. Nous préférons ce chiffre à 15, utilisé par MM. Audley et Hyatt, qui est fondé sur des données fournies par *SoundScan*, et ce, pour deux raisons. Premièrement, les albums de compilation préenregistrés, qui ne sont généralement pas offerts en ligne, accroissent le nombre moyen de pistes. Deuxièmement, la preuve présentée par M. Cue au sujet de ce qui se passe chez iTunes, l'acteur dominant sur le marché, est la meilleure preuve disponible.
16. Pièce CSI-27.A, à la page 3, Tableau 1.
17. Décision du 28 mars 2003 homologuant le Tarif de la CMRRA/SODRAC inc. pour la

Tariff, 2001-2004, at page 13; Decision of August 18, 2006 certifying SOCAN Tariff 24 (Ringtones), at paragraphs 93 to 99.

18. There are, of course, exceptions to this. Royalties for public performances in concert venues and reception rooms are mostly collected from the venues, not the performers. There are practical reasons for doing so, which are simply not present here, as we explain in the following paragraph.

19. Decision of March 15, 2002 certifying the SOCAN-NRCC Pay Audio Services Tariff, 1997-2002, at pages 27-28; Decision of March 19, 2004 certifying SOCAN Tariffs 2.A (Commercial Television) and 17 (Pay and Specialty Television), at pages 38-39.

20. See generally, decision of March 26, 2004 dealing with an issue of jurisdiction concerning SOCAN Tariff 4 (Concerts), at pages 8-9.

21. *Idem*, at page 11.

22. A "digital phonorecord delivery" does not trigger the equivalent of the Canadian communication right in the United States.

radio commerciale, 2001-2004, à la page 13; Décision du 18 août 2006 homologuant le Tarif 24 de la SOCAN (Sonneries), aux paragraphes 93 à 99.

18. Il existe évidemment des exceptions à ce principe. En règle générale, on perçoit les redevances pour l'exécution publique de musique dans les salles de concert ou de réceptions des exploitants de ces salles et non des interprètes. Il y a des motifs pratiques pour ce faire, motifs qui n'existent tout simplement pas en l'espèce, comme nous l'expliquons dans le paragraphe suivant.

19. Décision du 15 mars 2002 homologuant le Tarif SOCAN-SCGDV applicable aux services sonores payants, 1997-2002, aux pages 27-28; Décision du 19 mars 2004 homologuant les tarifs 2.A (Télévision commerciale) et 17 (Télévision payante et spécialisée) de la SOCAN, aux pages 38-39.

20. Voir de façon générale, la décision du 26 mars 2004 disposant d'une question de compétence portant sur le tarif 4 de la SOCAN (Concerts), aux pages 8-9.

21. *Idem*, à la page 11.

22. La distribution d'un enregistrement sonore numérique n'enclenche pas le versement de l'équivalent du droit canadien de communication aux États-Unis.

F

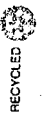


Exhibit F-1

Physical Rates

<u>Country</u>	<u>Mechanical Rate</u>	<u>Average PPD¹</u>	<u>Average # tracks</u>	<u>Effective royalty per track</u>	<u>Exchange Rate²</u>	<u>Royalty per track in U.S. \$</u>
U.S. ³	N/A	N/A	N/A	N/A	N/A	0.091
Canada	N/A	N/A	N/A	CAD 0.081	0.977	0.079
Austria	9.009%	€ 12.50	14	€ 0.080	1.559	0.125
Denmark	9.009%	DKK 98	12	DKK 0.736	0.209	0.154
Finland	9.009%	€ 12.50	12	€ 0.094	1.559	0.147
France	9.009%	€ 11.07	15	€ 0.066	1.559	0.103
Germany	9.009%	€ 12.00-13.00	12-15	€ 0.072-0.098	1.559	0.112-0.153
Ireland	8.500%	€ 11.4225	12	€ 0.081	1.559	0.126
Japan	6.000%	¥ 2500-3000 ⁴	10-12	¥ 12.5-18.0	0.010	0.125-0.180
Netherlands	9.009%	€ 12.00	12	€ 0.090	1.559	0.140
Norway	9.009%	NOK 110	12	NOK 0.826	0.1925	0.159
Spain	9.009%	€ 12.00-13.00	11-12	€ 0.090-0.106	1.559	0.140-0.165
Sweden	9.009%	SEK 110	12	SEK 0.826	0.1659	0.137
Switzerland	9.009%	CHF 18.85	12.5	CHF 0.136	0.9876	0.134
UK	8.500%	£ 7.79	12	£ 0.055	1.976	0.109

¹ "Published Price to Dealer" for a full-price CD, less VAT.

² Source: XE Currency Data Feed Source, as of April 1, 2008, www.xe.com.

³ Includes widespread use of controlled composition clauses.

⁴ Retail price.

Exhibit F-2

Digital Rates

Country	Typical Retail Price ¹	Royalty Rate ²	VAT Rate ³	VAT	Royalty	Mech.	Perf.	Mechanical Royalty	Exchange Rate ⁴	Royalty in U.S. \$	Mechanical Royalty in U.S. \$
U.S.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	0.091	N/A	0.091	0.091
Canada	CAD 0.99	8.800%			CAD 0.0871	N/A	N/A	CAD 0.0871	0.977	0.0851	0.0851
Austria	€ 0.99	8.000%	20.0%	€ 0.165	€ 0.066				1.559	0.103	
Belgium	€ 0.99	8.000%	21.0%	€ 0.1718	€ 0.0655				1.559	0.1021	
Denmark	DKK 7.14 ⁵	12.000% ⁶	25.0%		DKK 0.8568				0.2091	0.1792	
Finland	€ 0.88 ⁵	8.000%	22.0%		€ 0.0704				1.559	0.1098	
France	€ 0.99	8.000%	19.6%	€ 0.1622	€ 0.0662				1.559	0.1032	
Germany	€ 0.99	15.000% ⁶	19.0%	€ 0.1581	€ 0.1248				1.559	0.1946	
Ireland	€ 0.99	8.000%	21.00%	€ 0.1718	€ 0.0655				1.559	0.1021	
Japan	¥ 200	7.700% ⁷	5.00%	¥ 9.5238	¥ 14.6667				0.010	0.1467	
Netherlands	€ 0.99	10.000%	19.0%	€ 0.1581	€ 0.0832				1.559	0.1297	
Norway	NOK 8 ⁵	8.000%	25.0%		NOK 0.64				0.1925	0.1232	
Spain	€ 0.99	8.000%	16.0%	€ 0.1366	€ 0.0683				1.559	0.1065	
Sweden	SEK 8.04 ⁵	8.000%	25.0%		SEK 0.6432				0.1659	0.1067	
Switzerland	CHF 1.50	8.000%							0.9876	0.1185	
UK	£ 0.79	8.000%	17.5%	£ 0.1177	£ 0.0538	75%	25%	£ 0.04034	1.976	0.1063	0.0797

¹ Source: Responses to email inquiries or publicly available information from Apple concerning its iTunes retail prices.

² Sources: Responses to email inquiries, internal MCPS-PRS document, or RIAA Ex. D-101-DP.

³ Source: Value-Added Taxes (VAT), as of April 1, 2008, www.uscib.org/index.asp?documentID=1676 or responses to email inquiries.

⁴ Source: XE Currency Data Feed Source, as of April 1, 2008, www.xe.com.

⁵ Retail price excludes VAT.

⁶ Online rates are presently being contested.

⁷ Up to 15% reduction is possible.