IN THE COPYRIGHT TRIBUNAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCRT 1

CT 1 of 2019

In the matter of an Application under Section 163(2) of the Copyright Act (Cap. 63)

Between

SINGNET PTE LTD

...Applicant

And

COMPOSERS AND AUTHORS SOCIETY OF SINGAPORE LTD

...Respondent

GROUNDS OF DECISION

Contents

SingNet Pte Ltd

v

Composers and Authors Society of Singapore Ltd

CT 1 of 2019

Before Mr Edwin San, Deputy President, Mrs Lee Ai Ming and Mr Low Chai Chong, Members

28 December 2021

Introduction

1. This is an application brought under section 163(2) of the Copyright Act (Cap. 63, 2006 Rev Ed) ("**the Act**"). The Applicant is SingNet Pte Ltd ("**SingNet**"), which is a subsidiary of Singapore Telecommunications Limited ("**SingTel**"). SingNet operates as an Internet service provider and offers Internet access solutions for both consumer users and commercial users. SingNet also provides the SingTel TV pay television service, which was formerly known as "MioTV".

2. The Respondent, the Composers and Authors Society of Singapore Ltd ("**COMPASS**"), is a collective management organisation ("**CMO**") in Singapore that deals specifically with music copyright, and usage of musical works and musical associated literary works. It administers public performance, broadcast, diffusion and reproduction rights in such works on behalf of its members and affiliated societies.

3. SingNet and COMPASS are in dispute over the reasonableness of the charges sought to be imposed by COMPASS for a licence in respect of the right to communicate copyright musical works (the "**Licence**

Scheme"). The licence rate in question is 1.5% of Net Television Revenue, which is defined as "all the subscription fees received by SingNet from its subscribers of the pay television services and advertising income received by SingNet from its pay television services (less the set-top box rental, technical access fees and actual advertising agency fees, provided that the aforesaid deduction for the actual advertising agency fees does not exceed 15% of the advertising income referenced to above)" (the "**Licence Rate**").

4. SingNet took the position that the Licence Rate is unreasonable and arbitrary, and filed an application to the Copyright Tribunal under section 163(2) of the Act (the "**Application**"). After considering all the evidence and submissions from the parties, we dismiss the Application with costs and set out the grounds of our decision below.

Background and Procedural History

5. SingNet and COMPASS have been in negotiations relating to the Licence Scheme since 2010. The parties eventually entered into a letter agreement dated 17 December 2014 for SingNet's payment of the sum of SGD1,070,000 in licence fees to COMPASS for the period from 1 July 2007 to 31 March 2013. SingNet effected payment of the sum to COMPASS on 7 January 2015.

6. However, the parties were then unable to reach an agreement for the period from 1 April 2013 onwards. From August 2016 to January 2019, the parties resumed negotiations for the licence fees for the period from 1 April 2013 onwards, but were still unable to reach an agreement. On 31 January 2019, SingNet made the Application under section 163(2) of the Act, leading to the present proceedings.

7. Separately, on 11 March 2019, COMPASS commenced Suit No 261 of 2019 against SingNet for acts of copyright infringement allegedly committed since on or about 1 April 2013 in respect of various musical works belonging to the owners represented by COMPASS. On 9 July 2019, the High Court ordered a stay of the suit pending the determination of the present proceedings before this Tribunal.

8. In the course of proceedings before this Tribunal, COMPASS applied under section 169(1) of the Act, requesting this Tribunal to refer the following question of law (the "**Question**") to the High Court (the "**Reference**"):

> Whether the Copyright Tribunal under section 163(2), read with section 163(6)(b), of the Copyright Act (Cap. 63) ("the Act"), has the power to grant a retrospective order, specifically, an order that applies for the period 1 April 2013, up until the date of the order of the Copyright Tribunal in CT 1/2019 in the application made pursuant to section 163(2) of the Act, by the Applicant SingNet Pte Ltd, on 31 January 2019.

9. We allowed the Reference.[1] Subsequently, in *Composers and Authors Society of Singapore Ltd v SingNet Pte Ltd* [2021] 3 SLR 1117, the High Court answered the Question in the negative, and held that the Copyright Tribunal has no jurisdiction under section 163(2) read with 163(6)(b) of the Act to grant a retrospective order. In other words, any order so granted by the Copyright Tribunal takes effect only from the date of the order.

The Legislative Framework

10. The Copyright Tribunals in Singapore are tribunals of specialised jurisdiction established in 1987 by statute under Part VII of the Act. It

[1] See *SingNet Pte Ltd v Composers and Authors Society of Singapore Ltd* [2020] SGCRT 1.

functions as a quasi-judicial forum for copyright owners and users to resolve disputes over copyright licensing issues without recourse to formal court proceedings.

11. One of the functions of the Copyright Tribunal is to serve as a check against CMOs imposing unreasonable licence fees or terms. This is because CMOs are generally in a dominant or even monopolistic position vis-à-vis licensees (see Tay Eu-Yen, *Collective Management of Musical Copyright in a Self-Regulated Regime* (2020) 32 SAcLJ 1064). In moving the Copyright (Amendment) Bill 2009 to expand the jurisdiction of the Copyright Tribunal, the then Senior Minister of State for Law, Associate Professor Ho Peng Kee, explained that:

> …licensors such as collecting societies and commercial agencies are capable of amassing a wide repertoire of copyright works. As such, they are able to adopt a relatively strong bargaining position vis-à-vis licensees or businesses that make use of the copyright works under their purview. In this way, the Copyright Tribunal can act as a check against licensors imposing unreasonable licensing fees and terms.

12. In *Tiananmen KTV & Lounge Pte Ltd and Others v Innoform Entertainment Pte Ltd* [2011] SGCRT 1 ("***Tiananmen KTV***"), the Tribunal held:

> 3 The Copyright Tribunal in Singapore is a creature of statute, established under the Copyright Act (Cap 63) ('the Act') in part to **exercise a measure of control over the activities of organisations, commonly referred to as collecting societies**, which administer the exercise of specific rights restricted by the copyright in particular types of work (as defined in s 7 of the Act) or subject-matter other than works (see Part IV of the Act which deals with copyright in

‘subject-matter other than works’) collectively on behalf of various owners of the copyright in these works or subject-matter other than works. **Such regulatory control is necessary in the public interest to curb any abuse by the collecting societies or collective licensing bodies, which are often in a monopolistic position as a result of their right to license the use of virtually all the works and subject-matter other than works needed in a particular sector (eg popular music in the entertainment world)…**

(**emphasis added in bold**)

13. To this end, the legislative framework under Part VII of the Act provides an avenue for a user of copyright work to seek redress from the Copyright Tribunal against a CMO imposing unreasonable licence fees or terms. In particular, section 163(2) of the Act provides that:

> (2) A person who claims, in a case to which a licence scheme applies, that he requires a licence but that the grant of a licence in accordance with the scheme would, in that case, be subject to the payment of charges, or to conditions, that are not reasonable in the circumstances of the case, may apply to a Tribunal under this section.

14. Section 163(6)(b) of the Act further provides that:

> (6) Where an application is made to a Tribunal under subsection (1), (2), (3) or (4), the Tribunal shall give to the applicant, to the licensor concerned and to every other party (if any) to the application an opportunity of presenting their cases and, if the Tribunal is satisfied that the claim of the applicant is well-founded, the Tribunal shall make an order specifying, in respect of the matters specified in the order —

> (b) in the case of an application under subsection (2) or (3) — the charges, if any, and the conditions, that the Tribunal considers reasonable in the circumstances in relation to the applicant;

15. The legal principles applicable to section 163(2) and section 163(6) of the Act, including that concerning the burden of proof, were examined and clarified in *Tiananmen KTV*:

> 26 Applying the above principles, on whom does the legal burden of proof lie in this case? **It is clear to us that it was for the Applicants to discharge their legal burden on a balance of probabilities (which is the standard of proof in civil cases) to prove that the Respondent's charges and conditions were not reasonable.** The evidential burden would be initially on the Applicants to establish this on a balance of probabilities. If it achieved this, the burden would shift to the Respondent to try at least to equalise the probabilities…
>
> 27 **Section 163(6) clearly provides that the Tribunal must be satisfied that the Applicant's claim is well-founded before it interferes with the terms of the licence in question**. To put it in another way, the Applicants must satisfy the legal burden of proving that their claim that the charges and conditions were not reasonable was well-founded; the legal burden lay not on the Respondent to show that the charges and conditions of the licence were reasonable. This was also the position of the Tribunal in *Singapore Broadcasting Corporation (SBC) v The Performing Right Society Ltd (Composers and Authors Society of Singapore Ltd, Third Party)* [1991] SGCRT 1:
>
>> SBC accepts that under section 163(2)(b), it has the burden of proof in establishing that the PRS licence

> scheme is unreasonable in its application to SBC. **The Tribunal must be satisfied that the case of the applicant (SBC) is well founded before it can exercise its powers under section 163(6). If the Tribunal is so satisfied, then it is obliged to make an order specifying the charges**, if any, and the conditions, that are considered reasonable in the circumstances in relation to the applicant.

(**emphasis in original omitted, emphasis added in bold**)

16. We agree with the above cited paragraphs from *Tiananmen KTV* and adopt the same for these proceedings. Accordingly, SingNet, as the applicant in these proceedings, must satisfy the legal burden of proving that its claim is well-founded. That is, SingNet must prove on a balance of probabilities that the Licence Rate is not reasonable in the circumstances of the case. If SingNet is able to do so, then this Tribunal is obliged to make an order under section 163(6)(b) of the Act. If SingNet is unable to do so, the Application must fail.

The Application under s 163(2) of the Act and SingNet's case

17. SingNet's Application is set out in paragraph 1 of Form 13 :

(a) "the charges as demanded by [COMPASS] for the licence in respect of the right of communication of copyright musical works are unreasonable and arbitrary;

(b) "the charges demanded should be derived only from and in relation to content of the [SingNet]'s Singtel TV Pay TV service ("Service") which utilises works for which a licence is required from [COMPASS] ("Relevant Content")";

(c) "the Copyright Tribunal fix a reasonable sum (including a reasonable tariff rate) for the charges that may be demanded by [COMPASS] in relation to [SingNet] for the Relevant Content of the Service"; and

(d) "the licence issued shall entitle [SingNet] to use any and all copyright works administered by [COMPASS] for the Relevant Content"

18. Paragraph 5 of Form 13 then sets out the grounds of the Application as follows:

(i) "The licence demanded is based on [SingNet's] Net Television Revenue. However, this is unreasonable because a large proportion of this revenue is derived from content that does not utilise copyright works administered by COMPASS."

(ii) "COMPASS has failed and/or refused to explain how the Licence Fee is determined both in terms of principle and quantum."

(iii) "COMPASS has changed the tariff rates and the base sum from which the tariff rate is applied to more than once. In particular, COMPASS had consistently demanded that the tariff rate be applied to gross revenue until January 2019, when this was revised to Net Television Revenue. The tariff rate was initially represented to 2.5% of gross revenue from 2019 onwards, and a discounted rate of 1.5% for the period of 1 April 2013 to 31 March 2017, and 1.8% from 1 April 2017 to 31 March 2018. Subsequently, this was changed to 2.5% of gross revenue from 2019 onwards, and a discounted rate of 1.5% for the period of 1 April 2013 to 31 December 2018."

(iv) "By reason of the matters stated in (i) to (iii) above, the charges as demanded by the licensor are unreasonable and arbitrary."

19. SingNet then elaborated and expanded upon its grounds of the Application in its Statement of Case and in evidence adduced during the hearing before

this Tribunal; in particular in the extensive Affidavit of Evidence-in-Chief ("**AEIC**") of its expert witness, Ms Pauline Booth.

20. We are cognisant of the fact that COMPASS contended that SingNet has departed from its "pleaded case" as set out in Form 13 and its Statement of Case.

21. In relation to ground (i), SingNet initially stated in its Statement of Case that it is unreasonable for the licence fee to be based on SingNet's Net Television Revenue because "a large proportion of this revenue is derived from sports content that does not utilise copyright works administered by the Respondent" and thus "Revenue that is derived from sports content on [SingNet's pay television services] should not form part of the base sum to which the tariff rate is applied."[2] In other words, SingNet's position appeared to be that revenue that is derived from sports content should be excluded from the royalty base to be assessed for the Licence Scheme.

22. However, SingNet subsequently acknowledged that sports content does feature music, even though it may to be a lesser extent compared to other types of content.[3] During the hearing, SingNet's witnesses also appeared to give differing account of SingNet's case. Mr Adam Zecha, who was the only representative of SingNet at the hearing, gave evidence that he would not only exclude sports content from the calculation of revenue for the licence fee, but also news and documentaries.[4] Mr Anurag Dahiya, SingNet's other factual witness, gave evidence that revenue from sports content should be excluded from the calculation for the licence fee or included at a lower rate.[5]

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[2] Applicant's Statement of Case at [12]
[3] Applicant's Closing Submissions at [21(d)]
[4] Transcript of hearing on 14 April 2021 at page 61 lines 15 – 17
[5] Transcript of hearing on 16 April 2021 at page 120 lines 14 – 19

23. Furthermore, at the respective time when Form 13 and the Statement of Case was filed, SingNet did not put forward an alternative charge for the Licence Scheme. This came later in Ms Pauline Booth's AEIC in which she proposed that a reasonable charge is 0.45% of SingNet's Net Television Revenue. Notably, the royalty base, and by extension, the proposed licence fee as proposed by Ms Booth did include the revenue that is derived from sports content. At the hearing on 15 April 2021, SingNet's counsel confirmed that SingNet is not seeking an order that revenue from sports content be excluded from the royalty base to be assessed for the Licence Scheme; instead, SingNet would abide by the findings of Ms Booth in her report.[6] COMPASS also took issue that much of Ms Booth's expert report was based on matters which have not been pleaded by SingNet.[7]

24. In relation to ground (ii), SingNet stated in its pleadings that COMPASS had refused or failed to explain how their licence charges are justified in principle and quantum. However, this ground appears to have been overtaken by events as in the course of the hearing before this Tribunal, COMPASS's witnesses gave evidence on the methodology concerning how the License Rate was derived. SingNet then took that position that this methodology was flawed.

25. At this juncture, it will be useful to pause and reiterate that the function of the Copyright Tribunal is to provide a quasi-judicial forum for parties to resolve disputes without recourse to formal court proceedings. Section 173 of the Act provides that:

> In proceedings before a Tribunal —
>
> (a) the procedure of the Tribunal shall, subject to this Act and the regulations, be within the discretion of the Tribunal;

[6] Transcript of hearing on 15 April 2021, at page 175 lines 15 –21 and page 177 lines 22 – 23

[7] Respondent's Closing Submissions at [58]

> (b) the Tribunal shall not be bound by the Evidence Act (Cap. 97); and
>
> (c) the proceedings shall be conducted with as little formality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit.

26. Viewed in its proper context, it becomes apparent that rules governing pleadings do not apply strictly to these proceedings as they otherwise might in ordinary civil proceedings. Rather, what is required, on a plain reading of section 163(6) and section 173 of the Act, is for the Copyright Tribunal to give the parties before it an opportunity to present their respective cases in order for the Tribunal to be able to have a proper consideration of the matters at hand. In this connection, section 173 of the Act confers on the Copyright Tribunal wide discretion in terms of procedure.

27. Accordingly, notwithstanding that there may have been some divergence between what was stated in SingNet's Form 13/Statement of Claim and its position at the hearing, we are minded to consider all the evidence and arguments put forth by SingNet as part of our assessment of whether SingNet's case is well-founded. In doing so, we are also unable to discern any tangible prejudice to COMPASS, considering the manner in which COMPASS had run its case and the evidence it had led before this Tribunal.

28. After reviewing SingNet's arguments in its totality, it is clear to this Tribunal that the key tenets of SingNet's case are as follows:

(a) First, the Licence Rate demanded by COMPASS purportedly applicable to pay television service providers in Singapore is based on a flawed methodology.

(b) Second, the circumstances in relation to SingNet are different from those in relation to StarHub, its closest competitor in the pay television service provider business. In particular, sports content is an important differentiator for SingNet. Unlike StarHub, a large proportion of SingNet's pay television revenue is attributable to sports content that uses less music. Thus, it is unreasonable to apply the same Licence Rate to SingNet.

(c) Third, COMPASS' consistent shifts in the licence rate and royalty base during negotiations demonstrate the arbitrariness and capriciousness in COMPASS' approach to the fixing of the Licence Fee for SingNet.

(d) A reasonable charge in the circumstances is 0.45% of SingNet's Net Television Revenue.

29. In support of its Application, SingNet adduced evidence from two factual witnesses and one expert witness:

(a) Mr Adam Zecha, who holds the role of Head, Content and Advertising Sales (Home, Consumer Singapore) since joining SingTel in March 2020;

(b) Mr Anurag Dahiya, who held that same position in SingTel from April 2015 to March 2020; and

(c) Ms Pauline Booth, SingNet's expert witness, who is a managing director in the Disputes & Investigations practice of Duff & Phelps Ltd.

30. COMPASS adduced evidence from three factual witnesses and one expert witness:

(a) Dr Edmund Lam, Chief Executive Officer and Director of COMPASS;

(b) Mr Raymond Tan, Senior Manager (Finance & IT) of COMPASS;

(c) Mr Melvin Tan, Senior Manager (Licensing) of COMPASS; and

(d) Mr Philip Williams, COMPASS' expert witness, who is a consultant with Frontier Economics Pty Ltd.

31. Upon the application of and with the consent of parties, this Tribunal gave leave for Mr Anurag, Ms Booth and Mr Williams to give evidence by way of Zoom in view of the Covid-19 situation.

Issues before this Tribunal

32. The two main issues before this Tribunal are:

(a) whether the Licence Rate is reasonable or not in the circumstances of the case; and

(b) if this Tribunal finds the License rate not to be reasonable, then what are the charges that this Tribunal considers reasonable in the circumstances in relation to SingNet, as provided under section 163(6)(b) of the Act.

The test of reasonableness

33. The concept of "reasonableness" takes centre stage in an application such as the present one. As a preliminary point, we note that there is no presumption of reasonableness in favour of the referred licence scheme. In *Tiananmen KTV*, the Tribunal held that:

> 29 **The Respondent put forth a related argument and submitted that there was a presumption of reasonableness since the licence was in force. With respect, this contention was without any legal basis.** Legal or evidential presumptions (eg the statutory presumptions under the Misuse of Drugs Act (Cap 185), a presumption of a resulting trust where a person makes a gratuitous transfer of property to another person's name) did not arise in this case. Such was also the position of the Tribunal in *Sunvic Production Pte Ltd v Composers and Authors Society of Singapore Ltd (COMPASS)* [1993] SGCRT 1 at paragraph 9.1 in relation to an application under s 161(1):

> The choice is between varying or confirming the scheme. In so deciding, the criterion to be applied is one of reasonableness. **We are of the view that in the case of a reference under s 161 there is no presumption in favour of either. The matter is within the discretion of the Tribunal.**

(**emphasis in original in underline, emphasis added in bold**)

34. The meaning of "reasonableness" in the context of the Act has also been examined in earlier decisions. In *Singapore Broadcasting Corporation (SBC) v The Performing Right Society Ltd (Composers and Authors Society of Singapore Ltd, Third Party)* [1991] SGCRT 1 ("***SBC***"), the Tribunal established the following principles:

> … **It is the view of this Tribunal that "reasonable" in the context of section 163(2) bears the broader meaning of "fair".** In this sense, it is similar to the task of evaluating "equitable remuneration" under other licensing sections of the Copyright Act < see for example section 158(3)(a) > . **This Tribunal also accepts that "reasonableness" must be assessed in the particular circumstances of the position of the parties in Singapore. This Tribunal accepts that it is not bound by any decision on royalty rates from other jurisdictions. These decisions may however be of some help for comparative purposes, although the Tribunal is reminded that the circumstances prevailing in other countries may not be the same as in Singapore.**
>
> PRS also take the point that the issue in the first place is whether SBC are able to show that the PRS licence scheme would subject SBC to charges or conditions which are not reasonable in the circumstances of the case. **Within the concept of reasonableness, different schemes can, of course, be accommodated. The issue is**

> **not, however, whether there are other schemes which are reasonable, but whether the PRS licence scheme is shown to be unreasonable in the circumstances.**
>
> In determining the law, SBC argued that commonsense and logic should be the guidelines to follow. **In the absence of binding precedents, commonsense is undoubtedly a good indicator of reasonableness.** This Tribunal also accepts as being compatible with the determination that "reasonable" bears the meaning of "fair"…
>
> … The reasonableness of the PRS licence scheme must be looked at in the particular circumstances of the case at hand. **This Tribunal accepts that reasonableness is not a concept whose parameters can be defined with mathematical precision. It is a matter which is to be looked at broadly and whose essence is fairness to the parties. Viewed in this manner many diverse factors will be relevant including flexibility and practicality.** It is possible that within this concept of reasonableness, a number of different types of schemes might be accommodated.
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> (at paragraph 10.2 and 13 of the judgment; **emphasis in original omitted, emphasis added in bold**)

35. These principles were later endorsed by the Tribunal in *Sunvic Production Pte Ltd v Composers and Authors Society of Singapore Ltd* [1993] SGCRT 1 ("***Sunvic***"):

> … We also adopt the definition of reasonableness accepted by the Copyright Tribunal in *SBC v PRS* [1991] FSR 573 at 593 to 594. In essence, "reasonable" means "fair" or "equitable". Reasonableness is not something which can be assessed on a purely mathematical basis. We also accept that within the context of "reasonableness" a

number of different schemes might be accommodated. A number of different royalty rates might also fall within the scope of what is reasonable. Reasonableness must be looked at in the context of local circumstances. Evidence as to terms and rates in other jurisdictions whilst useful for comparative purposes are not binding. Further, where the circumstances in those jurisdictions are different they may not even be useful as comparisons…

(at paragraph 9.1 of the judgment)

36. More recently, the Tribunal in *Tiananmen KTV* affirmed the same, and further set out the approaches that a tribunal may adopt in assessing the reasonableness. These include: the market rate, the notional bargaining rate; comparable bargains; and judicial estimation. We set out the relevant portions in full below:

> 36 Essentially, what is "reasonable" means what is fair and equitable having regard to the particular factual matrix at hand, and entails a value judgment which cannot be arrived at through the application of a rigid mathematical formula. Instead, what is reasonable is to be determined by looking at the circumstances of the position of the parties in Singapore. As for the position in other jurisdictions, such evidence may serve as a useful guide for the purposes of comparison, although they would need to be regarded with circumspection as the prevailing conditions in those jurisdictions may be very different from those in Singapore. In the absence of binding precedents, commonsense is a good indicator of reasonableness.
>
> 37 **In determining that which is "reasonable", what are some of the factors which are to be looked at?** To this, we turn to the practices of equivalent Tribunals in Australia and the UK for guidance. The Copyright Tribunal of Australia (it should be noted

that Singapore's Copyright Act is largely modeled on the Australian Copyright Act 1968 and not on its English equivalent) has, in the case of *Reference by Phonographic Performance Company of Australia Limited* [2007] ACopyT 1, laid down some of the factors to be considered when considering a reference brought to the Tribunal by the licensor under s 154(1) of the Australian Copyright Act 1968 (to consider, among other matters, the reasonableness of the licence fees imposed for the use of sound recordings in public) which proposes to bring a licence scheme into operation, and which both the Applicants and the Respondent cited and submitted can be adopted by this Tribunal:

> 11 **In determining whether a proposed scheme, and the licence fee payable under it, are reasonable, a number of approaches might be adopted. The approaches include the following, which may overlap to a certain extent:**
>
> **- Market rate: the rate actually being charged for the same licence in the same market in similar circumstances.**
>
> **- Notional bargain rate: the rate on which the Tribunal considers the parties would agree in a hypothetical negotiation, between a willing but not anxious licensor and a willing but not anxious licensee.**
>
> **- Comparable bargains: bargains not in the same market but sufficiently similar to such a notional bargain as to provide guidance to the Tribunal.**
>
> > **- Judicial estimation: the rate determined by the Tribunal after taking into account a range of matters such as:**

- previous agreements or negotiations between the parties;

- comparison with other jurisdictions;

- comparison with rates set by other licensors, capacity to pay, value of the copyright material, the general public interest and the interests of consumers; and

- administrative costs of a licensing body (see *Audio Visual Copyright Society Ltd v Foxtel Management Pty Ltd* (No. 4) 68 IPR 367 at [131] and [142].

12 The Society contends, in essence, that there is no market rate or comparable bargain available in the present case. The Tribunal's approach, therefore, must be a combination of notional bargain rate and judicial estimation. It may be that the latter includes the former.

38 The factors set out by the Tribunal in the above case were endorsed in the Australian case of *Reference by Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968* [2010] ACopyT 1.

A survey of the practice of the Performing Right Tribunal (the predecessor to the Copyright Tribunal prior to 1988) and the Copyright Tribunal in the UK suggests a similar approach. The learned authors of The Modern Law of Copyright and Designs (3rd Edition, Butterworths, 2000) have usefully summarised the approach of the two Tribunals in assessing the proper tariff over the years:

26.17 Most references made to the Performing Right Tribunal and the Copyright Tribunal in relation to licensing schemes have related to the royalties or tariff to be paid by the licensees within the scheme. In assessing the proper tariff the Tribunal has adopted the principle that the proper rate – in most circumstances – is that which would be negotiated between a willing licensor and a willing licensee. Relevant considerations include the value of the copyright music to the music user's business and the need of the collecting societies to exploit their repertoire. In arriving at a rate the Performing Right Tribunal usually started from an existing tariff to see whether it represented a proper assessment of the market value at the time it was negotiated and, if so, whether there had been a material change in the circumstances since that date and the date of the reference. …

…

The Tribunal … turned to a consideration of possible comparables, such as existing royalty rates paid by other types of users or of rates paid in other countries by users for similar rights. This was the approach adopted by the Copyright Tribunal in *British Airways plc v Performing Right Society Ltd* which concerned the tariff set by the PRS for the use of music on aircraft. The Tribunal considered UK comparables form other businesses, in particular cinemas, as well as comparables for airlines registered in other countries.

26.18 The PRS on a number of occasions has suggested a tariff calculated as a percentage of the actual takings of the copyright user as it considers that this is the only true way of reflecting the actual use being made of its repertoire. The disclosure of such figures was, not unnaturally, resisted by the copyright users and in such cases the Tribunal initially imposed a tariff calculated in accordance with a formula, specially devised to meet the case, which yielded approximately the same amount in revenue as that based on actual takings. Individual licensees under the scheme were also given the option, after notification to the PRS, of applying a percentage based upon their actual takings if this yielded a lower figure than the formula. The Tribunal stated that the licensee was in a sense to be regarded as paying a premium for the privilege of withholding his trading figures. In a more recent case, however, the Tribunal regarded the fear of inadvertent disclosure of training figures by the PRS as having proved unfounded and fixed the tariff as a percentage of actual receipts. <u>It is clear that revenue can only be used as a basis for calculation of a tariff where there is an adequate nexus between the use of music and revenues earned.</u>

(emphasis added)

39 **This Tribunal, like both the parties before us, came to the view that the formulation of the guiding principles and factors in the case of *Reference by Phonographic Performance Company of Australia Limited* [2007] ACopyT 1 were appropriate to the case at hand and in line with the practice of our Copyright Tribunal, as well as the comparable Tribunal in the UK.** In assessing the reasonableness of the charges and mode of payment in the matter before us, reference was made to these factors.

(**emphasis in original in underline, emphasis added in bold**)

37. To summarise, in determining whether a licence rate is reasonable under section 163(2) of the Act, the following key principles apply:

(a) There is no presumption of reasonableness in favour of the referred licence scheme.

(b) What is “reasonable” means what is fair and equitable, having regard to the particular circumstances of the position of the parties in Singapore. This entails a value judgement which cannot be decided on a purely mathematical basis. Commonsense and logic should be guidelines to follow.

(c) The Tribunal is not bound by any decision on royalty rates from other jurisdiction. While such decisions may be helpful for comparative purposes, they must be viewed with circumspection as the prevailing circumstances in those jurisdictions may differ to those in Singapore.

(d) A number of different licence rates may fall within the scope of what is reasonable. However, the issue is not whether there are other rates which are (more) reasonable, but whether the licence rate in question is reasonable or not in the circumstances.

(e) There are different approaches the Tribunal may adopt in assessing the reasonableness of a licence rate, including the market rate approach, the notional bargain rate approach, comparable bargains approach, and the judicial estimation approach. These approaches may overlap to a certain extent.

38. In our present case, there is no dispute between the parties on the applicable law on the test of reasonableness under section 163(2) of the Act. Where this consensus ends, however, is on the question of which approach this Tribunal should adopt to assess the reasonableness of the Licence Rate in the present case. COMPASS submitted that this Tribunal should adopt the market rate approach while SingNet advocated for the judicial estimation approach. In our view, and for the reasons elaborated below, the appropriate approach to be adopted in the present case is the judicial estimation approach.

39. In considering which of the four approaches to adopt in the present case, we find the practices of the Copyright Tribunal in Australia to be useful and instructive. The Copyright Tribunal of Australia has, in the case of *Phonographic Performance Company of Australia Limited under s 154(1) of the Copyright Act 1968* (Cth) [2016] ACopyT 3, helpfully set out a fourfold framework, which we respectfully adopt, in applying the appropriate approach to assess reasonableness:

> 36 The approach of the Tribunal to the assessment of equitable remuneration in cases such as the present is fourfold. First, if a market price is available then that price will be imposed. Secondly, if no direct market price is available, then an attempt will be made to determine what bargain the parties might have reached in a hypothetical negotiation (on a willing but not over anxious basis). Thirdly, if this is not possible then the Tribunal will examine comparable transactions to see whether they can throw any light on price. Finally, if that cannot be done, the Tribunal will engage in a process of judicial estimation which will involve a synthesis of the relevant facts and circumstances into a rate which the Tribunal regards as reasonable or equitable in the circumstances: see as to these four matters, *Reference by Phonographic Performance Company of Australia Limited under s 154(1) of the Copyright Act 1968* (2007) 73 IPR 162.

40. Accordingly, in our present inquiry, we consider sequentially the appropriateness of the market rate approach, the notional bargain rate approach, and the comparable bargain approach, before finally landing on the judicial estimation approach as the appropriate approach for the present case.

Market rate approach

41. The market rate approach is typically the first port of call in the assessment of reasonableness of a licence rate. The Tribunal in *Tiananmen KTV* (at [38]) cited with approval the following extract from The Modern Law of Copyright and Designs (3rd Edition, Butterworths, 2000):

> 26.17 …In arriving at a rate the Performing Right Tribunal usually started from an existing tariff to see whether it represented a proper assessment of the market value at the time it was negotiated and, if so, whether there had been a material change in the circumstances since that date and the date of the reference.

42. The first question is thus whether there is a market rate in the present case. On this, COMPASS argued that the "market rate", as defined in *Tiananmen KTV* (at [37], citing with approval *Reference by Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968* (Cth) [2007] ACopyT 1 at [11]), is the "rate actually being charged for the same licence in the same market in similar circumstances". COMPASS' Dr Lam gave evidence that StarHub paid the Licence Rate of 1.5% of Net Television Revenue from 2012 to 2019,[8] and COMPASS adduced evidence of the licence agreement with StarHub for the three-year period from 1 January 2017 to 31 December 2019. As StarHub is the only other pay television service provider in Singapore, COMPASS submitted that the Licence Rate, being the rate actually being paid by SingNet's closest (and only) competitor, is therefore the market rate for pay television service providers in Singapore.

[8] Transcript of hearing on 16 April 2021 at page 149 lines 4 – 23

43. COMPASS then concluded that it is reasonable for SingNet to pay the same market rate.[9] In support of this, COMPASS relied on Mr Williams' explanation by way of market equilibrium in his expert report:

> In my opinion, it is an equilibrium for any particular copyright licensee to be paying the same licence rate as the licensees who are producing close substitute services. If close competitors pay licence fees at different rates, society is not at an equilibrium. An important role to be played by social institutions such as copyright tribunals is to provide co-ordination around a single equilibrium.[10]

44. When questioned on whether the Licence Rate was reasonable *in itself*, Mr Williams took the view that the key and *only* consideration is to look at the licence rate being paid by other competitors in the pay television industry:

> Q: That's from paragraph 13. **In other words, for this tribunal to decide what is a reasonable licence fee for COMPASS to charge SingNet, a pay TV service provider, the key consideration is to look at what other pay TV services providers are paying for this licence; correct?**
>
> A: **Yes.**[11]
>
> Q: Because if I was to study your report, Mr Williams, taking a (inaudible), it really doesn't matter what the numerical rate is. **The rate is reasonable as long as SingNet and StarHub are paying the same rate. That seems to be what I sense from reading your report. Do you agree or disagree?**

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[9] Respondent's Closing Submission at [172]

[10] Supplementary Affidavit of Evidence in Chief of Philip Laurence Williams at Exhibit "PW-2" at [39]

[11] Transcript for 16 April 2021 at page 15 lines 18 – 23

A: **Yes, I do. I think it's very important that individual licensees should pay the same rate as that paid by their closest competitors.**[12]

Q: You also did not consider any analysis on whether there's a justification for 1.5 per cent of net TV revenue to be levied as the licence fee, correct?

A: Yes, as I said before, I think the **reasonableness of a fee can <u>only</u> be assessed by looking at the fees paid by the closest competitors**.[13]

Q: I suggest to you, Mr Williams, that in preparing this report, you have made the greatest assumption of all: that 1.5 per cent of net television revenue that StarHub has paid in the past up to 31 December 2019 is reasonable. Do you agree or disagree?

A: As I've said a couple of times now, **I don't think that one can assess the reasonableness of a fee in isolation of the fees paid by close competitors.**[14]

(**emphasis added in bold**)

45. In other words, in Mr Williams' application of the market rate approach, reasonableness is assessed solely by reference to the rate paid by close competitors. This is so even if there is only one competitor.[15] The implication of this in the present case is that it must be reasonable for SingNet to pay the Licence Rate because StarHub has also been paying the same.

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[12] Transcript for 16 April 2021 at page 23 lines 3 – 11
[13] Transcript for 16 April 2021 at page 25 lines 3 – 8
[14] Transcript for 16 April 2021 at page 26 lines 3 – 10
[15] Transcript for 16 April 2021 at page 18 lines 18 – 22

46. On the other hand, SingNet contended that there is no market rate for pay television service providers in Singapore. In rejecting the market rate approach, SingNet put forward three main arguments :

(a) First, there is no justification for treating the Licence Rate as the market rate where it is a rate agreed to by a seller that is a monopoly and a buyer that is part of a duopoly. The best that can be said is that there was *a* rate of 1.5% of Net Television Revenue being paid by *one* user.

(b) Second, there does not appear to be evidence of an established market rate. This is evident from COMPASS' changing proposals to SingNet throughout negotiations, and the fact that both StarHub and SingNet paid various different rates in the past.

(c) Third, even if the Licence Rate can be treated as a going rate or market rate, it no longer exists as StarHub has ceased to pay the Licence Rate after 31 December 2019.

47. We agree with SingNet's first argument that the Licence Rate does not constitute the market rate. We are unable to accept that the rate paid by *one* competitor is *ipso facto* the market rate. This Tribunal raised this concern during the hearing:

> Ms Lee: **So I'm saying that the situation you have here is one party has agreed to pay the one rate, the other party hasn't quite agreed to pay, and in fact is not happy at all with this existing rate. So in a situation like that, can you say that there is a market rate?**
>
> Mr Williams: SingNet's willingness to pay is very, very high, when I define "willingness to pay" in the way of an economist; that is, what would be the increase in their profit as a result of having a licence compared with not having a licence. If they don't have a

licence, basically, they can't have a pay TV service. So it's a very, very big number, their willingness to pay. And if you look at the numbers, the revenue that SingNet generates from its pay TV service is roughly the same. It goes up and down, but from year to year, it's pretty similar to that of StarHub. There are differences, of course, but the differences are not overly material. So my guess is the willingness to pay for both are very, very high, because without a licence, they can't have a pay TV service. Each of them generates roughly the same sort of revenue. I don't know about profitability, but roughly the same sort of revenue. **So my guess is it would be both economically efficient and also fair for them to pay the same rate. Now, it's true -- I accept your implicit proposition that there's nothing magic about the 1.5**, but that somebody wants to just pay less is just normal. I mean, it's just normal business conduct. So there's nothing -- I'm not condemning SingNet in any way. They're just saying, "No, we'd rather pay less". Well, I would rather pay less for the pair of shoes that I bought last week; of course you would. **But I think there is a lot to be said for a tribunal of this kind, if there is a going rate, to stick to it. That's really all I'm saying. I'm not saying that there's any magic about the 1.5. All I'm just saying is if that's the going rate, it's best to demand that close competitors pay it.**

Mr Low: Taking the example of shoes, in this case, we only have two shoe sellers in the market, right? It's a duopoly. How does that affect in any way your analysis, when there is a duopoly, right? Because in a duopoly, the actions of one can affect the other, so we don't know why one of these two duopoly -- one would pay and the other one would not. How would that affect your assessment?

Mr Williams: It may be that, although I didn't do this in my reports, **perhaps a better approach might have been to look not just at the rate paid by StarHub, but the rates paid by the more distant competitors as well.** In my first report, I talk about who these more

> distant competitors are, and it might have been perhaps a more nuanced look to look at not just the rates paid by StarHub, but the rates paid by the other people who I mentioned as less close competitors as well. Now, if their rates are much lower than the rate paid by StarHub, well, then, perhaps that might be a consideration to take into account when saying, no, the market seems to be lower than 1.5. If those rates are higher, it might be a ground for saying, well, perhaps 1.5 is a bit low, perhaps it should be a little bit higher.
>
> **In my report, all I did was to look at one rate, and perhaps -- I think, perhaps as a result of Dr Lai's questions, it might have been perhaps better to have looked at -- asked for a whole lot of rates rather than just one rate. It would still be my opinion that the closest rate and perhaps the rate that should be given the highest weight should be the StarHub rate.**[16]
>
> (**emphasis added in bold**)

48. As evident from the exchange above, this Tribunal finds it difficult to accept that the Licence Rate as the market rate based on a single reference point. In our view, the Licence Rate of 1.5% of Net Television is merely *one* rate that was paid by StarHub to COMPASS from 2012 to 2019. It cannot then be said, on this basis alone, that the Licence Rate constitutes *the* market rate in the pay television industry. We hesitate, based on economics or common sense, to simply accept the Licence Rate as the market rate where it is a rate agreed between a licensor that is a monopoly (COMPASS) and a licensee that is part of a duopoly (StarHub).

49. Indeed, in *Sunvic*, the Tribunal was cautious of according too much weight to the market rate where there is a lack of competition in the market:

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[16] Transcript for 16 April 2021 at page 62 line 22 – page 65 line 13

> 11.14 …**We also note that in some respects the market for performing rights licences in Singapore is an artificial one. The public performance rights in the majority of music and songs in Singapore vests in COMPASS. In this sense they occupy a dominant position in the market place as there is no alternative source of public performance licences in Singapore. COMPASS may therefore be able to establish a new rate fairly quickly. This rate once established can become a benchmark for an award of damages. We are of the view that whilst evidence as to acceptability of the market rate is very important, the Tribunal should be careful in looking at the evidence as the market conditions are somewhat artificial.** We also note that *in SBC v PRS* 21 [1991] FSR 573 the Tribunal accepted at p.632 that where there has been a history of negotiations and agreements, these can be useful indicators of reasonableness. This we also accept. However, the evidence in the present case does not establish that the 3% tariff rate introduced in Singapore in 1988 was a product of negotiations with interested users in Singapore. It was unilaterally introduced by COMPASS. It is with this in mind that we approach the evidence of market acceptability of the new rate.
>
> (**emphasis added in bold**)

50. In *Phonographic Performance Company of Australia Limited under s 154(1) of the Copyright Act 1968* (Cth) [2016] ACopyT 3, the Copyright Tribunal of Australia held that, in principle, there is no market where the licensor is a monopolist:

> 37 In the Tribunal's opinion, there is no mechanism by which the market value of the rights that PPCA proposes to licence may be ascertained. **This is principally because there is no market.** In relation to sound recordings, PPCA's licensors include the three major record labels, Universal, Warner and Sony, so that it is not

practically possible to use a sound recording belonging to them without PPCA's agreement. **The Tribunal accepts that PPCA occupies the position of a monopolist in the market for the provisions of such sound recordings. If it were not for the role of the Tribunal, PPCA would be able to raise its prices without suffering any adverse competitive consequences.**

38 In the market for the acquisition of rights to use sound recordings, Foxtel is most likely not a monopolist. There are other industry participants who also seek to use sound recordings, for example, the broadcasters of free to air television and other subscription television providers. In practical terms, however, PPCA has no choice but to deal with Foxtel. The only practical way that PPCA can recover value for the use of its repertoire by Foxtel is by dealing with it.

39 Regardless of whether the situation in which Foxtel and PPCA find themselves is truly to be described as a bilateral monopoly or not, it is quite clear that the concept of a market price involving a willing but not over-anxious vendor and purchaser makes no sense. These parties are bound by circumstance to deal with each other.

40 **The Tribunal is satisfied that there is no market price which it could determine.** It is also satisfied that there is no way that it could determine how these two parties might deal with each other on a hypothetical basis.

(**emphasis added in bold**)

51. Likewise, in *Phonographic Performance Company of Australia Limited under s 154(1) of the Copyright Act 1968 (ACN 000680 704) under section 154(1) of the Copyright Act 1968* [2010] ACopyT 1, the Tribunal rejected

the argument that the rate derived from two existing schemes should be accepted as the "going rate":

> 290 The Tribunal also rejects the scheme proposed by Fitness Australia. That scheme is based upon the existing APRA and PPCA schemes. The rate derived from those schemes is said by Fitness Australia to be the "going rate". **However, in the Tribunal's view, the rate in the existing Tariff V and in the APRA scheme is not reflective of a going rate.** It was an amount agreed at a particular time by the parties following negotiation. It was not based on any economic analysis of the industry nor any examination of the users' WTP. It was simply a figure arrived at as a commercial compromise by the parties. It should not determine the basis of payment for all time. **The scheme proposed by Fitness Australia is essentially to maintain the status quo, with very minor variations. The Tribunal does not accept that there is a "going rate" for copyright licence fees in fitness classes. Neither does the Tribunal accept that there should be no material departure from the status quo.**
>
> (**emphasis added in bold**)

52. In a similar vein, we are unable to accept the proposition that the rate paid by only one other user (i.e. StarHub in this present case) constitutes the market rate and is therefore reasonable and binding on all subsequent users or licensees. This proposition, while seemingly attractive in its simplicity, does not stand up to a closer scrutiny. To take Mr Williams' approach to its logical conclusion, it does not matter what the actual numerical rate is. During questioning, Mr Williams went as far as to concede that if StarHub agreed to pay 20%, that would also be a reasonable rate for SingNet to pay.[17] On this basis, it would appear that an otherwise unreasonable rate

[17] Transcript for 16 April 2021 at page 23 line 15 – page 24 line 11

shall be deemed reasonable solely because it had earlier been accepted by the only other competitor. This, in our view, is an unacceptable result.

53. In our view, at best, it can only be said that the Licence Rate of 1.5% is a rate paid by SingNet's closest competitor. The fact that StarHub paid the Licence Rate of 1.5% from 2012 to 2019 does not, in and by itself, mean that it is the market rate and is therefore reasonable. This Tribunal therefore does not find the application of the market rate approach helpful in the present case.

Notional bargain rate approach

54. The notional bargain rate approach requires the Tribunal to determine the rate on which the parties would agree in a hypothetical negotiation, between a willing but not anxious licensor and a willing but not anxious licensee (*Tiananmen KTV* at [37], citing with approval *Reference by Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968 (Cth)* [2007] ACopyT 1 at [11]).

55. The Tribunal in *Phonographic Performance Company of Australia Ltd under s 154 of the Copyright Act 1968* (Cth) [2015] ACopyT 3 helpfully clarified the concept of a notional bargain:

> 24 The concept of a notional bargain was considered by the Full Tribunal in *WEA Records Pty Ltd v Stereo FM Pty Ltd* (1983) 1 IPR 6 (the *2MMM* case) in which the issue was the amount that should be payable by a broadcaster (in that case, the FM commercial radio broadcaster, 2MMM) for the broadcast of sound recordings. The Full Tribunal focused on the value to 2MMM of the rights to be licensed, albeit recognising that those rights were confined to what is known as protected sound recordings only. The notional bargain approach, as the Full Tribunal decided, was to be applied to:

> a collective bargain by the broadcaster on the one hand and all identifiable copyright owners on the other, each exercising their actual bargaining power. **The only assumption which is made is that they are each willing to negotiate and conclude an agreement.**
>
> 25 In other words, insofar as possible, **the notional bargain must reflect the actual position of the parties, not (as in a compulsory acquisition case) the position that would be reached between a hypothetical licensor and a hypothetical licensee with notionally equal bargaining power.**
>
> (**emphasis added in bold**)

56. Essentially, the notional bargain rate should represent the rate that the parties would have reasonably agreed on in the *actual* prevailing circumstances. In constructing a notional bargain to derive this rate, the *only* assumption made is that the parties were willing to negotiate and conclude a bargain.

57. The limitations of the notional bargain rate approach have been addressed in several Australian cases. In *Audio-Visual Copyright Society Ltd v New South Wales Department of School Education* (1997) 37 IPR 495 ("***Schools case***"), the Tribunal rejected using the notional bargain rate approach to assess equitable remuneration for copyright materials used by the schools under a *compulsory* licence provided by the Audio-Visual Copyright Society Ltd. In particular, the Tribunal observed (at 511) that the respective positions of the parties were so far apart that they would not have come to an agreement under any circumstances:

> I think it likely that, if rates such as were agreed to be paid by the universities had been suggested to the schools, there would not have

> been any agreement because the schools would have said that they were beyond their means. **They would have claimed an inability to meet them and either brought the matter to the tribunal at a much earlier stage or given up copying broadcasts of programs which they would otherwise have used for their pupils.**
>
> (**emphasis added in bold**)

58. The Tribunal added (at 515–518) that:

> It is, however, fair to say that both Ms Bridge and Mr Collis-George tended to distinguish in their own minds between what in absolute terms equitable remuneration should desirably be and what in realistic and practical terms was achievable. The distinction can be perceived but **in the hard world of negotiating where parties discuss whether one will buy and another will sell what has to be taken into account is the willingness of the buyer and the ability of the buyer to pay a certain price. If the buyer is not willing or is not able, business cannot be done.** I could fix a figure that I thought was fair and reasonable but which would bring the whole of this arrangement to an end. Frankly, that is what, in my opinion, the effect of the AVCS claim will be if it is met in full. Nobody would pay it and the whole scheme will collapse. That is the last thing that anybody wants.
>
> In any event my task is to assess equitable remuneration for copyright materials used by the schools under a **compulsory** licence. **There is in fact no question of unwillingness to deal. The parties must deal.** However difficult the task, I must fix equitable remuneration. And I must fix it, so it seems to me, not in a vacuum but in the setting and context of all the surrounding circumstances. **In my opinion, it is relevant and appropriate for the tribunal to take into account realities such as the capacity and willingness of the schools to pay.** Parties who were willing but not anxious to

> deal would clearly do so. The tribunal should not be in any different position.
>
> (**emphasis added in bold**)

59. In other words, the issue in the *Schools case* was not that the parties were unwilling to deal with each other. In fact, the parties were not only willing but were required to conclude an agreement on the compulsory licence. The issue was that the schools did not have the ability to pay. Under such circumstances, the Tribunal held (at 520) that it would be artificial to determine a notional bargain rate:

> Is it then an appropriate case in which I should endeavour to construct a notional bargain between the parties? I do not think that course is appropriate here because I am not confident enough to construct the sort of hypothetical bargain that would need to be constructed if that course were followed. The exercise would have an undesirable artificiality about it which would make it not useful.

60. An important proposition to be drawn here is that the notional bargain rate approach may be too artificial to provide real assistance in cases where the parties were already willing to negotiate, but the actual circumstances are such that they would still not have been able to reach an agreement on the rate. In *Phonographic Performance Company of Australia Limited under s 154(1) of the Copyright Act 1968* (Cth) [2016] ACopyT 3, the Tribunal similarly held that the concept of a notional bargain may not be meaningful as the parties were bound by circumstances to deal with each other:

> 37 … In relation to sound recordings, PPCA's licensors include the three major record labels, Universal, Warner and Sony, so that it is not practically possible to use a sound recording belonging to them without PPCA's agreement…

> 38 … In practical terms, however, PPCA has no choice but to deal with Foxtel. The only practical way that PPCA can recover value for the use of its repertoire by Foxtel is by dealing with it.
>
> 39 Regardless of whether the situation in which Foxtel and PPCA find themselves is truly to be described as a bilateral monopoly or not, it is quite clear that **the concept of a market price involving a willing but not over-anxious vendor and purchaser makes no sense. These parties are bound by circumstance to deal with each other.**
>
> 40 The Tribunal is satisfied that there is no market price which it could determine. It is also satisfied that **there is no way that it could determine how these two parties might deal with each other on a hypothetical basis.**
>
> (**emphasis added in bold**)

61. In the present case, there is arguably no question of unwillingness to conclude an agreement, given that both parties had been negotiating for approximately nine years. SingNet has no choice but to deal with COMPASS; it cannot legally operate its pay television services without a licence from COMPASS. Conversely, COMPASS is compelled to deal with SingNet to recover the value for use of its repertoire by SingNet. The parties are therefore bound by circumstance to deal with each other. Despite this, the evidence before us shows that both parties had not been able to come to a common ground after lengthy negotiations that spanned across nine years. Under these circumstances, we are of the view that the exercise of constructing a notional bargain between COMPASS as a willing but not anxious licensor and SingNet as a willing but not anxious licensee would be too artificial to provide real assistance in this present case.

62. We also note that our view is supported by Mr Williams' economic analysis of the theory of bargaining. In his expert report, Mr Williams similarly concluded that the concept of hypothetical negotiation would not be helpful in the present case.[18] From an economic standpoint, he explained that the theory of bargaining suggests that the hypothetical negotiation would be over the decision of the value (surplus) created by COMPASS's granting a licence to SingNet. This value is the difference between the SingNet's willingness to pay (WTP) and the COMPASS's willingness to sell (WTS). The licence fee will then show how the value is to be divided between COMPASS and SingNet.

63. Mr Williams went on to explain that the WTS of the seller is the minimum price the seller would need in order to recover its costs, and the WTP of the buyer is the maximum price the buyer would be prepared to pay rather than not have a licence. In this context, SingNet's WTP might be thought of as the difference between the profits SingNet would earn if it had a licence and the profit SingNet would generate if it had to manage without a licence. This is difficult to ascertain and may well be very high. As we observed above, SingNet would not be able to operate its pay television services without acquiring a licence from COMPASS. Even if one could produce an estimate of SingNet's WTP, there is likely to be a large range between the WTS of COMPASS and the WTP of SingNet. This range is the value produced by the granting of the licence. In Mr Williams' view, which we agree with, bargaining models are unlikely to give any particular insight as to how this value should be divided between COMPASS and SingNet.

64. Thus, whether from a legal or economic standpoint, we do not think that the notional bargain rate would be helpful in the present case to assess the reasonableness of the Licence Rate. For completeness, we note that neither

[18] Supplementary Affidavit of Evidence-in-Chief of Philip Laurence Williams at [17] – [23]

COMPASS nor SingNet advocated the adoption of the notional bargain rate approach as the approach to assess reasonableness in the present case.

Comparable bargain approach

65. The comparable bargain approach takes into account comparable transactions that are not in the same market but are sufficiently similar to the transaction in question (*Tiananmen KTV* at [37], citing in *Reference by Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968 (Cth)* [2007] ACopyT 1 at [11]). In applying this approach, the Tribunal may turn to possible comparables such as existing licence rates paid by other types of users or rates paid in other countries by users for similar rights (*Tiananmen KTV* at [38], citing The Modern Law of Copyright and Designs (3rd Edition, Butterworths, 2000) at [26.17]).

66. Neither party in the present proceedings indicated that the comparable bargain approach is appropriate in the present case. We note that SingNet's Mr Zecha gave evidence relating to licensing flat fee arrangements for PCCW Media and True Vision in Hong Kong and Thailand respectively, but SingNet ultimately did not make submissions on these points. Instead, SingNet submitted that this Tribunal should adopt the judicial estimation approach by applying the methodology proposed by Ms Booth, which we examine in detail below at paragraphs 138 to 175. In any event, there is insufficient evidence on any comparable transaction before this Tribunal to effectively apply the comparable bargain approach.

Judicial estimation approach

67. Given that there is no market rate, no meaningful way to construct a notional bargain and no suitable comparable in the present case, we therefore proceed with the process of judicial estimation. As noted in the Australian *Schools case*, the judicial estimation approach is a fallback

option that requires the Tribunal to estimate a reasonable licence rate in light of the available evidence:

> …if the notional bargain approach were not available or thought to be fallible in the circumstances of a given case, **the task became one of judicial estimation, the court or tribunal doing its best in the circumstances upon the basis of the evidence which there was**. I remarked that this was always a difficult task but by no means an uncommon one. It follows that there are three stages. If there is a going rate, it will normally be applied or at least treated as providing strong guidance as to the outcome. If there is not a going rate, it may be possible to approach the matter upon the basis of a hypothetical bargain. But care has to be taken that this does not lead to an artificial result. If that approach is not thought to be helpful, **one must fall back on judicial estimation and do the best one can**.
>
> …
>
> …Difficult and uncertain though that is, it is I think the only choice that I have. I must do my best, **taking into account the whole of the evidence and the whole of the circumstances of the case**, to reach a conclusion on what I consider to be equitable remuneration in all the circumstances. The exercise is a difficult one. **It involves a large degree of uncertainty and it also involves the tribunal selecting a figure not only with which not everyone would agree but which may be only one of several figures which could reasonably be arrived at in the circumstances.**
>
> (at 507 and 520; **emphasis added in bold**)

68. The subjectivity of this exercise was highlighted in *Phonographic Performance Company of Australia Limited under s 154(1) of the Copyright Act 1968* (Cth) [2016] ACopyT 3:

> 92 There being no market value and no way of determining the outcome of a hypothetical bargaining process, and with none of the comparable transactions relied upon by the parties proving suitable, it is necessary for the Tribunal to engage in the process of judicial estimation. **This involves an assessment of the pertinent circumstances, many of which will conflict in the directions towards which they tend. It also involves questions of degree and judgment; it is not a calculus and no answer is right, although some will be more right than others.**
>
> (**emphasis added in bold**)

69. To some extent, the judicial estimation approach may overlap with the other three approaches and take into account a range of matters such as: previous agreements or negotiations between the parties, comparisons with other jurisdictions, comparisons with rates set by other licensors, capacity to pay, value of the copyright material, the general public interest and the interests of consumers; and the administrative costs of a licensing body (*Tiananmen KTV* at [37], citing with approval *Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968 (Cth)* [2007] ACopyT 1 at [11]).

70. In essence, in applying the judicial estimation approach, the Tribunal must use its best endeavour to take into account all relevant evidence and circumstances of the case in assessing a reasonable licence rate. This is not a matter of science or mathematics, but an exercise that will inevitably involve questions of degree and judgment.

71. Here, our task at hand is to take into account all relevant matters to determine whether the Licence Rate of 1.5% of Net Television Revenue is reasonable, and if not, estimate what a reasonable rate would be. It is

necessary, therefore, to examine in detail the relevant evidence led by both parties. In the present case, this Tribunal has been provided with substantial evidence, including evidence on the following key factors: (a) COMPASS' methodology behind the Licence Scheme, (b) the extensive negotiation history between both parties and (c) the degree of music use in SingNet's sports content. All of these factors are germane to the assessment of whether the License Rate is reasonable. Having duly considered the parties' arguments and all the evidence before us, we come to the decision that the Licence Rate is reasonable in the circumstances in relation to SingNet; it therefore follows that SingNet's case is not well-founded. We detail our reasons in the following sections below.

COMPASS' methodology behind the Licence Rate

72. In these proceedings, COMPASS provided an explanation of the history and methodology behind the Licence Rate. The relevant evidence in this regard is the respective AEIC of Dr Lam and Mr Raymond Tan as well as their respective oral testimonies before this Tribunal. In summary, COMPASS' evidence of how the Licence Rate came to be 1.5% of Net Television Revenue is as follows:[19]

(a) First, in the early years of pay television, COMPASS and StarHub had agreed on the "percentage of revenue" rate model. The parties initially explored applying different rates to different types of programmes, but eventually agreed that a single average rate should apply to StarHub's entire pay television programming with the rate reflecting the average music usage across the programmes. The reason was that both parties recognised the difficulty of allocating advertising and subscription revenues to each type of programming separately for computation.

[19] Affidavit of Evidence-in-Chief of Lam Kin Hong Edmund filed on 19 April 2021 at [14] – [17] and [29(a)]; and Affidavit of Evidence-in-Chief of Tan Hock Leong Raymond at [5] – [10]

(b) It is also Dr Lam's evidence that, in negotiating the licence rate then, both COMPASS and StarHub considered but decided against using the *SBC* rates. This was because StarHub's channel offerings and, by extension, music use were much higher than that of SBC which had only 3 television channels. Additionally, the repertoire of PRS at the time was smaller compared to the repertoire of COMPASS then.

(c) In deriving the Licence Rate, the starting point was the reference rate of <u>6.5%</u> that COMPASS applied to online music streaming services which have audio-visual content and were assumed to have 100% music content. Such online music streaming services include websites for gaming, dance tutorial and karaoke purposes. The intention was to start with a "music intensive" rate for audio-visual content as a reference point, and adjust it downwards according to the music usage in StarHub's pay television programming.

(d) COMPASS then conducted a music usage survey in 2004/5 on StarHub's pay television channels (the "**StarHub Survey**"). Both parties had wanted the survey results to help determine the reasonable rate to be charged for StarHub's pay television services then. The survey shows that on average between 38% and 46% of the total broadcast hours comprised music.

(e) Next, COMPASS took the lower range of 38% from the StarHub Survey, multiply it with the reference licence rate of 6.5% to derive the initial rate of 2.5% after rounding off. This 2.5% represented COMPASS' target licence rate.

(f) The Licence Rate of 1.5% is a discounted rate of COMPASS' target licence rate of 2.5%. During negotiations, COMPASS would reiterate the licence rate of 2.5% while StarHub would negotiate for a lower rate due to various reasons such as stiffer competition. In particular, in the early years, StarHub expended substantial investment laying the cable network for broadband and cable television for Singapore.[20] In view of these circumstances, COMPASS licenced StarHub with a rate which progressively increased from 1.2% in 2010, to 1.35% in 2011, and then settled at 1.5% from 2012 onwards.

73. In short, the rate of 2.5% was adjusted from the reference rate of 6.5% based on the music usage result from the StarHub Survey. The parties then further negotiated and agreed on a discounted rate of 1.5%. This was how the Licence Rate of 1.5% was arrived at.

74. In its submissions, SingNet raised a number of criticisms towards COMPASS' methodology behind the Licence Rate, which are summarised as follows:

(a) First, not all the channels offered by StarHub were surveyed. For example, even though ESPN Sports was apparently carried on StarHub TV then, it was not one of the channels surveyed under the Sports category. Notably, at that time, ESPN Sports had broadcast rights for the English Premier League prior to SingNet's entry to the pay television market.

(b) Another criticism is that the StarHub Survey was a purely mechanical and mathematical exercise, designed to produce only a rough estimate of the duration of music content played as a percentage of the total duration of the programming on a selection of StarHub TV channels. In particular, the percentage of music content identified was calculated only by reference to broad ranges based on multiples of five.

[20] Transcript for 16 April 2021 at page 138 line 21 – page 139 line 22

(c) Further, COMPASS made no attempts to assess the percentage of that content which consisted of music within COMPASS' repertoire. Thus, the survey only reflects usage of music in general and not specifically the usage of music within COMPASS' repertoire.

(d) Moreover, the StarHub Survey did not take into account that there are a different number of channels in each programming category. COMPASS calculated the overall average music usage rate by taking a simple average (as opposed to a weighted average) of all the rates applicable to each programming category. Hence, the derived value is unlikely to be an accurate one.

(e) As each programming category generates different amount of revenue, COMPASS' use of the overall revenue as the royalty base failed to take into account the relative portions of revenue generated by each programming category. Instead, the rate of each programming category should be applied to the revenue generated from that programming category.

(f) There is no reasoned basis for how the reference rate of 6.5% was initially derived. In any case, there is also no rational basis to use the 6.5% rate applicable to internet websites for gaming, dance tutorial and karaoke purposes as the starting reference rate. The economic value of music to such music intensive websites is very different from the economic value of music to the services provided by a pay television provider. COMPASS' methodology of pro-rating the music usage assumes an equivalence in value of music to two different types of users with very different business models.

(g) Even after going through the exercise of conducting the StarHub Survey to derive the initial rate of 2.5%, COMPASS and StarHub agreed that applicable rate for the most immediate period of time in

2005 was 0.5% of net revenue, which was a mere 20% of the derived licence rate. The rate increased to only 1.2% in 2010, 1.35% in 2011 and 1.5% thereafter. To date, no user has paid the 2.5% rate.

75. In response, COMPASS submitted that SingNet had failed to put its case to the relevant witnesses during the hearing and, pursuant to the rule in *Browne v Dunn* (1893) 6 R 67, HL, urged this Tribunal to disregard SingNet's submissions concerning the said methodology. In support of this, COMPASS cited the following extract in *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 ("***Hong Leong***") (at [42]):

> …The effect of that rule is that where a submission is going to be made about a witness or the evidence given by the witness which is of such a nature and of such importance that it ought fairly to have been put to the witness to give him the opportunity to meet that submission, to counter it or to explain himself, then if it has not been so put, the party concerned will not be allowed to make that submission. …

76. However, we note that the court in *Hong Leong* also made the following qualification in the same paragraph:

> …It is not a rigid, technical rule. Nor is it necessarily satisfied by a formulaic recitation of a party's case to a witness, with an invitation merely to agree or disagree. In *Chan Emily v Kang Hock Chai Joachim* [2005] 2 SLR(R) 236 at [15], Choo Han Teck J noted that the rule which is derived from a case more than a century old must be applied with due regard to the realities of modern litigation and in evaluating any given objection, consideration should be given to the totality of the evidence in the case. I think that is correct. In *Lo Sook Ling Adela v Au Mei Yin Christina* [2002] 1 SLR(R) 326 the Court of Appeal noted (at [40]) that the rule is not rigid and does not

> require every point to be put to the witness but this would generally be required where the submission was "at the very heart of the matter". This was approved by the Court of Appeal in *Ong Jane Rebecca v Lim Lie Hoa* [2005] SGCA 4 at [49]–[50]. I approached the evidence and the submissions in this case in that light.

77. Accordingly, we do not think that a rigid application of the rule in *Browne v Dunn* is appropriate in these proceedings and we are prepared to accord flexibility to both parties to put forth all relevant arguments for consideration. In any case, we observe that SingNet's counsel did in fact put most, if not all, of these points to Dr Lam and Mr Raymond Tan during the hearing, and we do not think that there were any omissions that had caused substantial unfairness or prejudice to COMPASS. We thus allow SingNet's submissions with respect to their criticisms of COMPASS' methodology and set out our assessment of COMPASS's methodology below.

(i) The reference rate of 6.5%

78. We first address an apparent discrepancy observed between Dr Lam's evidence and Mr Raymond Tan's evidence with respect to the percentage value of the starting reference rate applicable to online audio-visual content with 100% music usage. In Dr Lam's AEIC, the reference rate was stated as 6.5% whereas in Mr Raymond Tan's evidence, the reference rate was stated as 6.25%. In the licence agreements produced by COMPASS, the actual rate charged for the online music streaming service providers was 6.25%.[21] When questioned during the hearing, Dr Lam explained that the initial rate of 6.5% was initially fixed by COMPASS, and later adjusted to 6.25% after the Asia-Pacific Committee Meeting in order to maintain a commensurate rate with the CMOs in other countries.[22]

[21] Respondent's 3rd SLOD Tab 1 – 4
[22] Transcript of hearing on 16 April 2021 at page 142 line 21 – page 147 line 5

79. On this, SingNet contended that COMPASS has not provided a reasoned basis for how the initial rate of 6.5% was derived in the first place. Also, the adjustment to 6.25% to be commensurate with other Asian-Pacific jurisdictions demonstrates COMPASS' inconsistency in setting licence rates. Specifically, SingNet submitted that COMPASS had not explained why there is no similar need to be commensurate with other jurisdictions for pay television services, although they appear to want to remain competitive in respect of the rates for online streaming services.

80. In our view, COMPASS did provide valid reasons. We note that a key feature of online music streaming services is that the online audio-visual content is accessible to consumers in various jurisdictions over the Internet. As a CMO with reciprocal agreements with affiliated societies in other countries, there was therefore a need for COMPASS to ensure that its rate for the same online music streaming services would be commensurate with the rate in other jurisdictions. In contrast, the pay television industry in each jurisdiction may be very different, and it may not be suitable to follow the rate applied in another country as a benchmark. We therefore find it sensible and acceptable for COMPASS to follow the established 6.25% rate for online music streaming services as a starting reference rate, and then make its own adjustments to this starting reference rate to derive a suitable rate for pay television service providers in Singapore.

81. SingNet also objected to the selection of this rate applicable to online music streaming services as the reference rate. In particular, SingNet argued that COMPASS failed to recognise that the economic value of music to the online music streaming services is different from the economic value of music to the services provided by pay television service providers. For example, the reference rate was applied to internet audio-visual content where the use of music is integral, such as gaming, dance tutorial and

karaoke websites. In comparison, the importance and value of music in SingNet's pay television services is much lower. In support of this assertion, SingNet relied on a survey of its pay television subscribers conducted by Ms Booth to examine the relative importance of music to SingNet pay television subscribers (the "**SingNet Subscriber Survey**"). The survey results show that the "music" attribute ranked the lowest in various programming categories and hence suggested that the value of music to SingNet's pay television services is marginal. In light of this disparity in the value of music to both types of services, SingNet argued that it would therefore not be appropriate to derive a licence rate for pay television services from the reference rate applicable to online music streaming services.

82. In our assessment, the SingNet Subscriber Survey does not advance SingNet's case very far. Regardless of the value of music to SingNet's subscribers, it is the value of music with respect to the *user* of the copyright (i.e. SingNet) which is relevant in the case of licensing. In *Sunvic*, the Tribunal held that, in assessing a reasonable licence rate, consideration is not placed on the importance of music to the specific endeavour in question to be licensed (a live concert in this case):

> 11.8 …We accept that the music use is only one of several factors that attract customers to a popular concert. In some concerts where the artiste commands a strong stage presence or where there are dance routines built in, it may well be that that is the main reason as to why customers are prepared to pay for the show. **Be that as it may, the reality is that in most, if not all, popular concerts, the show cannot go on without the music. The music may not always be the dominant consideration in the minds of the audience; its importance, however, cannot be ignored.** In some cases, the music itself could well be one of the main attractions. **The view of the Tribunal is that in assessing what is a reasonable royalty, the**

matter should not be approached on the basis that music use is always the critical factor in attracting audiences. Its relative importance is a variable which will depend on all the circumstances of the case. In most cases, however, the bottom line will be that without the music there will be no show.

(**emphasis added in bold**)

83. In *Tiananmen KTV*, the Tribunal cited with approval the following extract from The Modern Law of Copyright and Designs (3rd Edition, Butterworths, 2000):

> 26.17 … In assessing the proper tariff the Tribunal has adopted the principle that the proper rate – in most circumstances – is that which would be negotiated between a willing licensor and a willing licensee. Relevant considerations include the **value of the copyright music to the music user's business and the need of the collecting societies to exploit their repertoire**…

(**emphasis added in bold**)

84. It is therefore evident that what matters in the context of licensing is the value of music to the licensee and not the end consumers. In this regard, the value of music to the online music streaming service providers and to pay television service providers are not substantially different—both type of licensees could not operate their business without a licence. Their willingness to pay would thus be very high. Viewed in this proper context, we thus do not find COMPASS' selection of rate applicable to online music streaming services as the starting reference rate to be out of kilter with the concepts of reasonableness and common sense. It would have been unacceptable if COMPASS had used the higher licence rate applicable for audio-only services (e.g. Spotify or Apple Music) as the starting reference rate for audio-visual content. This COMPASS did not do. Instead, COMPASS selected a starting reference rate applicable for audio-visual

content with a presumed 100% music usage. This, as we have earlier stated, is sensible and acceptable.

85. Furthermore, in our view, the subsequent steps taken by COMPASS of adjusting this starting reference rate in accordance with the actual music usage rate in StarHub's programming is obvious and commonsensical. Put simply, as a matter of principle, if a user provides an audio-visual content that has a music usage rate of 50%, it would be consistent and fair for that user to pay half of the starting reference rate. The merits of using the music usage rate as a multiplier is that the degree of music use is quantifiable and therefore objective. While it is recognised that there may always be other approaches that may arguably better take into account the qualitative value of music to the economic activity of different types of users, we are satisfied that COMPASS' methodology of deriving the Licence Rate from a higher starting reference rate of 6.5% is objective, sensible and acceptable and not lacking "a proper basis in common sense" as contended by SingNet.[23]

(ii) Limitations of the StarHub Survey

86. The next issue concerns the computation of the music usage rate in StarHub's programming. This was done through the StarHub Survey. As detailed in paragraphs 74(a) to (g) above, SingNet highlighted various limitations and shortcomings of the methodology of the StarHub Survey. Specifically, it was undisputed by COMPASS that not all of StarHub's channels were surveyed. The survey only measured the usage of music in general, and was not focused on only musical works that were within COMPASS' repertoire. The relative broadcast duration of the StarHub's channels within each programming category was also not accounted for in the final derived music usage rate.

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[23] Applicant's Closing Submissions at [29]

87. While these may be said to be valid criticisms of the methodology of the StarHub Survey, we note that the purpose of this StarHub Survey was to assist COMPASS and StarHub in the negotiation of a mutually acceptable license rate as stated by Mr Raymond Tan in his AEIC[24] as well as testimony before this Tribunal.[25] According to Mr Raymond Tan, StarHub also conducted their own survey and did not object to the COMPASS' survey results as per the StarHub Survey. What is clear to us from Mr Raymond Tan's evidence that the aim of the StarHub Survey was to simply produce a ballpark estimate of music usage in StarHub's programming, which was then ultimately used as a multiplier of the starting reference rate. For this purpose, we do not see the need to specifically measure the usage of music that was in COMPASS' repertoire. Additionally, although it may have been be more accurate to use a weighted average methodology to take into account the relative broadcast duration of each programming category, the failure to do so does not, in our view, fatally render the results to be entirely inaccurate or unfit for said purpose.

88. As admitted by COMPASS, the StarHub Survey was never intended to be a wholly precise and exhaustive calculation of music use of across all StarHub's channels, or of content consisting of only COMPASS' repertoire, or indeed representative of the programming broadcast at any specific time. At this juncture, it merits recalling the following principles set out in *SBC* (at [13]):

> …This Tribunal accepts that reasonableness is not a concept whose parameters can be defined with mathematical precision. It is a matter which is to be looked at broadly and whose essence is fairness to the parties. Viewed in this manner many diverse factors will be relevant including flexibility and practicality. It is possible that within this

[24] Affidavit of Evidence-in-Chief of Tan Hock Leong Raymond at [6]
[25] Transcript for 14 April 2021 at page 185 lines 11 - 22

> concept of reasonableness, a number of different types of schemes might be accommodated.

89. We also bear in mind that the Tribunal in *Sunvic* held (at [14.1]) that a licence scheme "should be made as practical as possible, not just for ease of use, but also so as to avoid increasing the costs of collection". Indeed, the considerations of practicality and flexibility are particularly relevant here. SingNet's contentions with the methodology of the survey boil down to a question of degree of precision and granularity. However, it has to be noted that the StarHub survey itself has to be viewed as a means and not an end in itself. COMPASS has explained that the StarHub Survey was conducted to merely assist the parties in negotiations of a mutually acceptable licence rate. Specifically, the music usage rate derived from the StarHub Survey was used as a multiplier to adjust the starting reference rate in order to arrive at the initial licence rate of 2.5%. Viewed in this context, we find that it may not have been necessary, or even practical, for COMPASS, in discharging its role to set a reasonable licence rate, to commission a survey to the level of precision and granularity that SingNet demands, e.g. to specifically calculate the exact broadcast duration of each programming category or the percentage of music in COMPASS' repertoire that was used.

90. It is also noteworthy that the parties did not intend for the results of the StarHub Survey to be singularly determinative of the final licence rates to be charged. COMPASS exercised some flexibility and ultimately did not stick to the initial rate of 2.5% in the course of negotiations with StarHub and agreed on the discounted rate of 1.5%.

(iii) The discount from 2.5% to 1.5%

91. SingNet also submitted that the derived rate from COMPASS' methodology is not reflected in the rates actually paid by StarHub. For

clarity, we set out the rates that were paid by StarHub after conducting the StarHub Survey:

Period	**Rate charged to StarHub**[26]
FY2005 – FY2009	0.5% – 0.8%
FY2010	1.2%
FY2011	1.35%
FY2012 – FY2019	1.5%

92. SingNet's contention is that, after going through the exercise of conducting the StarHub Survey in 2004 / 2005, the applicable rate for the most immediate period was 0.5% of Net Television Revenue, which is only one-fifth of the derived rate of 2.5%. It also appears that the rate was maintained at 1.5% of Net Television Revenue for 7 years from 2012 to 2019. SingNet highlighted that StarHub has never paid the rate of 2.5% that was derived from COMPASS' methodology. SingNet submitted that this suggests that the 2.5% rate that was derived from COMPASS' methodology had no basis in reality. Furthermore, SingNet submitted that StarHub's decision to extend a discretionary discount of 1% demonstrates the arbitrary nature of COMPASS's approach of setting the Licence Rate.

93. We are not persuaded by the argument that the fact that StarHub was paying a discounted rate means that COMPASS had been arbitrary in setting the Licence Rate of 1.5%. It also does not mean that COMPASS' methodology was ultimately irrelevant in its determination of the Licence Rate. As we have examined above, for COMPASS, the initial rate of 2.5% that was derived from its methodology essentially served as a target rate during negotiations. As explained in Mr Melvin Tan's oral testimony, during negotiations, COMPASS would start with the position of 2.5% and

[26] Transcript for 16 April 2021 at page 148 lines 7 – 16

StarHub would push back for a lower rate.[27] These to-and-fro negotiations eventually resulted in an agreement that the rate shall start at 0.5% and be gradually increased to the discounted rate of 1.5%. COMPASS gave StarHub such leeway because of StarHub's earlier substantial investment in laying the cables network for broadband and cable television for Singapore, as well as the stiffer competition from SingNet. No matter the reason, there can be no argument that COMPASS is entitled to extend a discretionary discount to its licensees. What is important is that it must not do so in a capricious or arbitrary manner as to make the particular licence rate in question to be unreasonable. In this connection, after reviewing the relevant evidence, we find that COMPASS had been even-handed in applying the discounted rate of 1.5% to both StarHub and SingNet. As we discuss further below, both pay television service providers were afforded a similar runway where the payable licence rate gradually increased to 1.5% over a similar period of years.

94. Pertinently, we note that this Application does not concern the rate of 2.5%. The rate in question is 1.5% of Net Television Revenue. This is a rate that has in fact been paid by StarHub over the recent years from 2012 to 2019. Having examined the history and background behind the Licence Rate, we find that there is a principled and logical approach to COMPASS's methodology in deriving the final rate of 1.5%:

(a) First, COMPASS took a reference rate that was applicable to audio-visual content with 100% music usage;

(b) Second, COMPASS then measured the music usage of StarHub's pay television programming and adjusted the reference rate accordingly to derive 2.5%;

[27] Transcript for 15 April 2021 at page 19 lines 20 – 25

(c) Third, COMPASS and StarHub negotiated and agreed on lower rates which would eventually increase to the final discounted rate of 1.5%.

95. In summary, having considered the evidence and both parties' arguments on this point, we come to the view that COMPASS' methodology cannot be said to be unreasonable or arbitrary. While SingNet has identified certain shortcomings in COMPASS' methodology, none of these shortcomings are significant in our assessment, and we come to the conclusion that COMPASS's methodology, while imperfect, is one that withstands close scrutiny and emerges as principled, objective and logical.

Negotiation history

96. In the course of the hearing, the parties adduced voluminous evidence on the extensive negotiation history between SingNet and COMPASS. Under the judicial estimation approach, previous negotiations between parties are a relevant factor to be taken into consideration (*Tiananmen KTV* at [37], citing with approval *Reference by Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968 (Cth)* [2007] ACopyT 1 at [11]). According to SingNet's application in Form 13, one of the main grounds on which it claims the Licence Rate demanded by COMPASS is unreasonable and arbitrary is that COMPASS has, without explanation, changed the licence rates and the royalty base from which the licence rate is applied more than once during negotiations. SingNet submitted that this demonstrates the arbitrariness and capriciousness in COMPASS' approach to the fixing of the Licence Rate for SingNet.

(i) No change in royalty base

97. We first address the change in the royalty base. In its Statement of Case, SingNet stated that COMPASS "had consistently demanded in its letters up till 2017 that the royalty base to which tariff rate was to be applied was

"Gross Revenue", which [COMPASS] did not define" and only "subsequently revised its position in [its] lawyers' letter of 9 January 2019, where it demanded that the tariff rate was to be applied to the Applicant's Net Television Revenue." During the hearing, Dr Lam clarified that there was actually no shift in the royalty base. He explained that SingNet had misunderstood that "Net Television Revenue" is "Gross Revenue" less deductions of up to 15%, when both terms in fact include a deduction of 15%. In particular, he pointed to a draft agreement which Mr Melvin Tan sent to SingNet via email on 22 March 2012, where the definition of "Gross Revenue" is substantially the same as that of "Net Television Revenue" in COMPASS' lawyers' letter of 9 January 2019. Thus, in our assessment, there was actually no significant change to the royalty base employed by COMPASS during the course of the negotiations. It is perhaps unfortunate that the purported discrepancy appears to have arisen by the loose usage of the two terms, but nothing significant, in our view, turns on this point as we are unable to perceive any serious misapprehension by either party as to the basis of the other's position during the negotiations.

(ii) Changes in licence rate

98. As for COMPASS' changes to the licence rate percentage during negotiations, SingNet argued that COMPASS' position would often shift as proposals were exchanged back and forth, without COMPASS providing any explanation. Specifically, SingNet pointed to one occasion in October 2012 where COMPASS rejected SingNet's proposal and counter proposed an offer that was less favourable than COMPASS' previous offer to SingNet made 3 months ago in July 2012.[28]

99. We carefully reviewed in detail the negotiation correspondence (in the form of emails, letters and negotiation meeting minutes) exchanged between the parties from 2011 to 2019. Having examined the entire chain of

[28] Applicant's List of Documents at Tab 1, page 6 to 9

correspondence over the nine years, we are unable to conclude that COMPASS had acted capriciously during the arms-length negotiations with SingNet or had fixed the Licence Rate arbitrarily after making unjustified changes in its proposals regarding the applicable licence rate. It is common commercial practice during a negotiation for parties to review and revise their positions and change their offers in accordance to the progress and context of the negotiation. In the present case, we observe that *both* COMPASS and SingNet made changing proposals in the course of negotiations that dragged on for nine years. SingNet's Mr Dahiya, who was involved in negotiations with COMPASS from 2014 onwards, had this to say:

> So my sense from talking to the team was that essentially it had been a commercial negotiation, or **like any other commercial negotiation that we would carry out, and in any negotiation, you know, it's very common to have some anchor points between parties where you start working off them.** In content, it's not uncommon at all, because there's no real objective very often to measure exactly how much you should be paying for a piece of content, for instance, **so very often it's two parties working off each other's anchors, and so the numbers there were -- as I saw them were based on those anchor points**, whatever information we had in terms of what COMPASS had found acceptable in the past, et cetera, and numbers that had been discussed. So it was -- it was using those as kind of baselines and then working from there to have certain growth as the business grows, so in that sense, it's -- it's kind of -- it's a little bit of -- there's not that much of science there.[29]
>
> (**emphasis added in bold**)

100. What Mr Dahiya described above is the typical practice of negotiating parties responding to each other's positions on an arms-length basis and

[29] Transcript of hearing on 16 April 2021 at page 128 line 23 – page 129 line 16

attempting to find an acceptable middle ground that best serves their respective commercial interests. In this case, COMPASS' starting position, or "anchor point", was clear – the applicable licence rate of 2.5% for pay television service providers.[30] However, COMPASS's position was that it retained the discretion not to apply the 2.5% rate immediately, but rather slowly build up to it from a lower rate depending on negotiations. We pause to add that we are unable to discern any capriciousness in COMPASS taking such a position. SingNet would then, on multiple occasions, counter propose to pay on a lump sum basis for the first few years, and then on a percentage of revenue basis that would gradually increase to a rate that fell short of COMPASS' target rate of 2.5%. Through such back-and-forth exchanges, the parties negotiated extensively over several parameters, such as the quantum of SingNet's lump sum payments, the runway that SingNet would have before the transition to a percentage of revenue basis, the rate of increase of the percentage licence rate, and the eventual percentage the licence rate would settle at. In the entire course of such negotiations, we observe that COMPASS' proposals to SingNet were responsive to SingNet's counterproposals. The proposed graduated rates were built towards and largely anchored around the target rate of 2.5%, and subsequently around the discounted rate of 1.5% when SingNet claimed that it was unable to pay the higher rate.

101. For all of SingNet's quibbles about COMPASS changing its position during negotiations, we cannot help but observe that it was SingNet which did so in an arguably more significant and blatant manner. The parties came the closest to an agreement in December 2013. In an earlier email of 10 June 2013, SingNet asked COMPASS to consider lump sum payments for the licence fees for FY1314 and FY1415, with the percentage licence rate to only kick in from FY2016 onwards. On 9 December 2013, COMPASS'

[30] Affidavit of Evidence-in-Chief of Melvin Tan Choon Nghee at [41]

Mr Melvin Tan wrote in his email that COMPASS was prepared to accept the following lump sum payments proposed by SingNet:[31]

(i) $1,000,000 for 20 July 2007 to 31 March 2013

(ii) $1,250,000 for FY1314

(iii) $1,400,000 for FY1415

(iv) $1,500,000 for FY1516

However, Mr Melvin Tan emphasised in the email that COMPASS would only agree and accept these lump sum payments "strictly on the condition that the discounted rate of 1.5%... will apply from FY1617" and "[the] applicable rate of 2.5% will be reviewed progressively in advance to culminate in FY2021."

102. The parties then had an in-person meeting on 13 December 2013. In an email on the same day, SingNet's representative, Ms Karen Lee, confirmed the lump sum payments as stipulated above but stated that SingNet was only prepared to commit to an agreement up till FY1617, and would need "escalated approval" thereafter.[32] Specifically for FY1617, she stated that the fees will be "*FY1617(1st April 2016 to 31st March 2017) 1.5% discounted to 1.35% of revenue*". She further added "For years beyond FY1617, we will have to enter into renewal discussions".

103. However, three days later on 17 December 2013, Ms Lee sent another email informing COMPASS that SingNet "[had] to relook the terms of [their] agreement" after a meeting with SingNet's management. In Ms Lee's next email on 21 December 2013, SingNet proposed the following and thereby effectively resiled from its previous conveyed position:[33]

[31] Applicant's List of Documents at Tab 3, page 21 – 22
[32] Applicant's List of Documents at Tab 3, page 21
[33] Applicant's List of Documents at Tab 3, page 20 – 21

(i) $1,000,000 for 20 July 2007 to 31 March 2013

(ii) <u>$500,000</u> for FY1314

(iii) <u>$500,000</u> for FY1415

(iv) SingNet would not be able to commit to an agreement thereafter

(v) The agreement shall "include SingTel's IPTV, Internet and Mobile platforms."

104. Unsurprisingly, this change in position caused a breakdown in negotiations. Not only did SingNet reduce the agreed lump sum payments, it also resiled on its earlier conveyed position to agree on a percentage licence rate for FY1617, which was a condition for COMPASS' initial acceptance of the lump sum payments that was explicitly communicated to SingNet. It was not until 27 May 2014 that COMPASS responded to resume negotiations, and the parties' positions deviated even further apart thereafter.

105. What is clear from the aforesaid is that SingNet itself had changed its position significantly during the negotiations without explanation. When put in the unenviable position to provide an explanation during the hearing, Mr Dahiya accepted that parties may often go back and forth with proposals in negotiations, and that sometimes parties do change their position in negotiations.[34] We find this statement acceptable and it therefore follows that it cannot be fair for SingNet to allege that COMPASS had fixed the Licence Rate capriciously due to the fact that it had proposed different moving rates during negotiations, when SingNet itself had also done the same. Such variations in position are part and parcel of commercial negotiations, especially when the negotiations took place over nine years with changes in personnel. Based on our review of the context and nature of the negotiation history between the parties, the changes in COMPASS'

[34] Transcript of hearing on 16 April 2021 at page 89 line 12 – 16

proposed rates were nothing out of the ordinary and, without more, do not demonstrate that the Licence Rate was fixed arbitrarily or capriciously.

(iii) SingNet's initial acceptance of the rate of 1.35%

106. We now turn our focus to SingNet's initial acceptance in December 2013 of the rate of 1.35% during the course of negotiations. In our view, this is germane to the assessment of whether the Licence Rate of 1.5% is unreasonable.

107. The context of SingNet's acceptance of 1.35% in December 2013 is key. We have already discussed how SingNet initially accepted 1.35% for FY1617 and then later resiled on this position. To recap, we set out here the parties' negotiation history leading up to SingNet's acceptance of 1.35% in Dec 2013:

(a) The parties had a meeting on 28 May 2013. According to COMPASS' meeting minutes, the parties agreed on a lump sum fee of $1,000,000 for the period 20 July 2007 to 31 March 2013. However, there was no conclusion on the licence rate for the period thereafter.[35]

(b) In its email of 10 June 2013, SingNet asked that COMPASS consider lump sum payments for FY1314 and FY1415 as well, with the percentage licence rate to only kick in from FY2016 onwards.[36]

(c) In its reply on 29 August 2013, COMPASS proposed, on a without prejudice basis, the following:[37]

(i) $1,250,000 for FY1314

(ii) $1,500,000 for FY1415

[35] Respondent's List of Documents at Tab 10, page 39

[36] Applicant's List of Documents at Tab 3, page 27 – 28

[37] Applicant's List of Documents at Tab 3, page 27

(iii) 1.5% thereafter

At this stage, COMPASS was asking for the Licence Rate of 1.5% to apply moving forward from FY1516.

(d) The parties then exchanged several rounds of proposals.[38] In particular, in its email of 27 November 2013, COMPASS made the following revised proposal:[39]

(i) $1,000,000 for 20 July 2007 to 31 March 2013
(ii) $1,250,000 for FY1314
(iii) $1,400,000 for FY1415
(iv) $1,500,000 for FY1516
(v) 1.35% for FY1617
(vi) 1.45% for FY1718
(vii) 1.5% for FY1819

(e) Subsequently, the parties exchanged further proposals. In its email of 13 December 2013 from Ms Karen Lee, SingNet then revisited COMPASS' proposal of 27 November 2021 and accepted items (i) to (v). However, SingNet was unable to commit to an agreement for FY1718 onwards (i.e. items (vi) and (vii)), and parties would instead have to enter into renewal discussions.[40]

108. Based on the above, it is significant to note that, in December 2013, parties actually came to an agreement, including on the applicable licence rate for FY1617 at 1.35%. At that point, both parties were projecting forward and negotiating the applicable percentage licence rate that would apply when

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[38] Applicant's List of Documents at Tab 3, page 23 – 27
[39] Applicant's List of Documents at Tab 3, page 23
[40] Applicant's List of Documents at Tab 3, page 21

SingNet eventually switched from lump sum payments to a percentage licence rate. COMPASS was prepared to accept 1.35% for FY1617, and was proposing an increase to 1.45% and 1.5% for FY1718 and FY1819 respectively. SingNet accepted the rate of 1.35% for FY1617, but was unable to commit to a rate thereafter. While SingNet eventually resiled from this position without any clear explanation, the fact that SingNet was prepared to accept 1.35% for FY1617 suggests to us that the percentage rate of 1.5% proposed by COMPASS is not entirely unreasonable even from SingNet's own standpoint.

109. It is also pertinent to note that at this point in time of the negotiations, the rate of 1.5% proposed by COMPASS to SingNet was the rate being paid by StarHub, which is Singtel's only competitor in the market. While we have found that 1.5% does not in itself constitute the market rate for the purpose of assessment under the market rate approach (see paragraphs 41 to 53 above), it is nonetheless relevant, under the judicial estimation approach, for us to take in account that the rate of 1.5% had been paid by StarHub from FY2012 – 2019. On the basis that SingNet, StarHub and COMPASS must all be taken to be entities well capable of conducting negotiations on an arms-length basis, the fact of SingNet's initial acceptance of the rate of 1.35%, and that of the rate of 1.5% paid by StarHub, are strongly indicative to this Tribunal that the 1.5% rate that COMPASS sought from SingNet is reasonable in the context of its commercial setting.

(iv) COMPASS' treatment towards SingNet and StarHub

110. In its submissions, SingNet further argued that the history of negotiations demonstrates unreasonable and arbitrary behaviour on COMPASS' part. SingNet highlighted that when COMPASS eventually applied the rate of 1.5% to StarHub, it was twenty years after its predecessor, Singapore Cable Vision ("**SCV**") had commenced business. In contrast, SingNet was given

a concession only for the first six years of the operation of its pay television service from 2007 to 2013. Thus, COMPASS sought to impose on SingNet, the later entrant, the Licence Rate of 1.5% when COMPASS historically increased StarHub's licence fees very gradually to 1.5%.

111. We are unable to accept this argument. First, it does not matter that SCV had been in business for twenty years when the rate of 1.5% was eventually applied to StarHub. In our view, the more proper basis of comparison is instead the length of runway that COMPASS afforded StarHub and SingNet respectively. In this regard, we find that COMPASS had been even-handed and fair towards both pay television service providers. For StarHub, it was allowed a gradual increase in the licence rate from 0.5% to 1.5% over a period of 7 years from 2005 to 2012. For SingNet, COMPASS allowed SingNet's request to pay a flat fee of $1 million for the period of 6 years from 2007 to 2013. Thus, COMPASS had provided SingNet a similar length of runway to build up its pay television business. It is therefore, in our view, not unreasonable for COMPASS to thereafter seek the Licence Rate of 1.5% from SingNet.

112. SingNet also referred to the first draft licence agreement that COMPASS sent to in March 2012, where COMPASS proposed therein rates that were higher than what StarHub was paying between 2007 to 2011. In other words, SingNet argued that COMPASS kept the licence rate at 1.5% for StarHub while attempting to charge SingNet, a new entrant, more than 1.5%. However, as we had stated earlier, it is not uncommon for parties to open negotiations from their respective target rate and then work towards a middle ground. As we have observed in relation to the parties' negotiation history, COMPASS had in fact been willing to revise its offers in consideration of SingNet's circumstances as a new entrant into the market. The fact that COMPASS initially proposed the higher target rate of 2.5%

before eventually offering the discounted rate of 1.5% does not mean that the latter rate is unreasonable.

113. SingNet also took issue with COMPASS' representation in its negotiation correspondence that the 2.5% rate was the "implemented" or "prevailing" tariff rate for pay television service providers in Singapore, even though StarHub has never paid this rate. SingNet argued that COMPASS attempted to exploit the absence of transparency in the manner in which COMPASS fixed licence charges and lead SingNet to believe that the market rate was 2.5% and it was already being offered a substantial discount out of goodwill.

114. Having reviewed the relevant evidence and considered the parties' submissions on this point, we are of the view that SingNet's allegation of information asymmetry is overstated. It is apparent that both parties have comparable bargaining power and were negotiating on an arms-length basis. Notwithstanding that COMPASS used the term "implemented rate of 2.5%", it is patently obvious that SingNet did not readily or unquestioningly accepted the discounted rate of 1.5%.

115. In summary, having reviewed the evidence and the submissions relating to the negotiation history between COMPASS and SingNet, we come to the view that the negotiations were conducted on an arms-length basis and therefore we find SingNet's contention that COMPASS had sought to fix the Licence Rate in an arbitrary and capricious manner to be without merit. On the contrary, we find that COMPASS was even-handed in its conduct during negotiations with StarHub and SingNet, and the fact that SingNet had indicated its acceptance of the rate of 1.35% during negotiations is indicative to us that the Licence Rate of 1.5% sought by COMPASS from SingNet is reasonable in the circumstances.

SingNet's sports content

116. Having examined COMPASS' methodology for deriving the Licence Rate and the negotiation history between COMPASS and SingNet, we now turn to consider the question whether the circumstances of SingNet and StarHub are so different that the application of the same Licence Rate to SingNet would be unreasonable.

117. In this regard, the gist of SingNet's argument is that its sports content is an important differentiator with StarHub. To this end, SingNet advanced two propositions. First, the degree and value of music use in sports content are relatively low compared to other programming categories. Second, a larger share of SingNet's revenue from its pay television service is derived from sports content, unlike StarHub. The implication of both these propositions is that it is unreasonable for SingNet to pay the same Licence Rate as StarHub. We now examine these propositions in detail.

(i) *Degree of music use in sports content*

118. A key contention between the parties is regarding the degree of music use in sports content. As we have addressed earlier, SingNet's case is not that sports content does not utilise music at all (as initially suggested in SingNet's application in Form 13), but that sports content utilises *less* music. To support this proposition, SingNet relied on two of its witnesses.

119. First, Mr Zecha, in his oral testimony, estimated, based on his 24 years of experience in the sports industry and knowledge of broadcast programming, that music use in sports content is approximately 5%.[41] However, this is a bare assertion that is unsubstantiated by any further evidence.

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[41] Transcript for 14 April 2021 at page 61 lines 21 – page 62 line 6

120. Second, Ms Booth conducted an analysis of the music cue sheets for various sporting programmes that were disclosed by COMPASS in these proceedings. Based on this sample of music cue sheets, the total music duration for those sporting programmes was about 11.87%.[42]

121. On the other hand, COMPASS relied on two music usage surveys. The first is the StarHub Survey conducted in 2004/5 that we have discussed above. According to the StarHub Survey, the average music in StarHub's sports content was 10% to 15%.[43]

122. The second survey is a music use survey carried out more recently on or around August 2019 on SingNet's pay television service (the "**SingNet Music Usage Survey**"). This survey was conducted by BMAT, an international company that provides monitoring, reporting and analysis of music usage across various media platforms globally. Based on this survey, the average music use for sports channels was 28.125%.[44]

123. Again, SingNet attacked the methodology of the SingNet Music Usage Survey. SingNet argued that, as a matter of design, the purpose of the SingNet Music Usage Survey was only to illustrate the similarities, and not the differences, between SingNet's and StarHub's pay television programming. First, the survey did not survey all channels on SingNet's pay television service. Second, like the StarHub Survey, this SingNet Music Usage Survey also only indicates the percentage usage of music in general and not specifically the usage of music within COMPASS' repertoire for only which COMPASS is entitled to charge licence fees. Further, COMPASS has not adduced any proof of the extent or proportion of music works covered by a licence granted by COMPASS.

[42] Affidavit of Evidence-in-Chief of Pauline Mowat Booth at [86]
[43] Affidavit of Evidence-in-Chief of Raymond Tan Hock Leong at [9]
[44] Affidavit of Evidence-in-Chief of Tan Hock Leong Raymond at [17]

124. In our view, similar to the earlier StarHub Survey, arguments can always be raised as to the limitations and shortcomings of the SingNet Music Usage Survey. However, the purpose of the SingNet Music Usage Survey was to assess the degree of music use in sports content, and in that connection, SingNet's objections do not affect the value of the results of the SingNet Music Survey, which reveal that there is music use on sports channels of 28.125%.

125. It is evidently clear that there is no question that sports content uses at least some music. SingNet itself does not deny this. It is also a matter of common sense that sports content generally feature less music as compared to other programming categories such as general entertainment channels. While the degree of music use in sports content in general may be limited, there is no evidence before this Tribunal that SingNet's sports content features less music than StarHub's sports content.

126. On this point, even if we accept Ms Booth's analysis of the cue sheets, her derived percentage usage of 11.87% still falls within the range of 10% to 15% music usage rate that was derived from the StarHub Survey. Therefore, in terms of music usage, SingNet's sports content does not differ significantly from that of StarHub's to warrant a departure from the Licence Rate.

(ii) Value of music use in sports content

127. SingNet also argued that the value of music use in relation to sports content on SingNet pay television service is comparatively low. This is based on the SingNet Subscriber Survey which we have discussed earlier. According to SingNet, the survey shows that many of the attributes identified by SingNet subscribers as most important are related to SingNet's service offering, rather than the programming provided by the content providers

themselves. In fact, the "Music" attribute was the lowest attribute in terms of relative importance for the "Sports and News" programming category.

128. In relation to the significance of the consumer's perception of the value of music, we reiterate paragraphs 82 to 84 above. As can be gleaned from the decisions of *Sunvic* (at [11.8]) and *Tiananmen KTV* (at [38]), what is relevant in the assessment of a reasonable licence fee is the value of music with respect to the user of the copyright (i.e. SingNet) and not SingNet's subscribers. The relative importance a subscriber would place on music in a programme is subjective. Thus, SingNet Subscriber Survey cannot be used as an indicator of the value of music. Even if music may not be an important element that attract consumers to SingNet's sports programming, the fact remains that sports content still use *some* music. As such, the bottom line is that SingNet cannot offer such sports programming without a licence from COMPASS. In this regard, the value of music in SingNet's sports content is the same as the value of music in other programming categories.

(iii) Revenue attributable to sports content

129. SingNet argued that, unlike StarHub, a large proportion of its pay television revenue is attributable to sports content. Due to this purported key difference from StarHub, SingNet argued that it is therefore unreasonable for SingNet to pay the same Licence Rate as StarHub. Essential to this argument is a comparison between SingNet's and StarHub's percentage of revenue from sports.

130. SingNet sought to rely on its witnesses, Mr Zecha and Mr Dahiya, who gave evidence that sports content is an important differentiator for SingNet's SingTel TV as compared to StarHub TV. According to them, the key differentiation is the exclusive sports made available by SingNet, in particular, the exclusive English Premier League ("**EPL**") broadcast rights

that SingNet secured from 2010 to 2013, and from 2015 to 2022. Even when EPL matches are cross-carried on StarHub TV, StarHub subscribers will still need to subscribe to the relevant channels directly with SingNet, with the charges for these channels billed directly only by SingNet.[45] StarHub receives no revenue for these channels. Additionally, SingNet also has exclusive rights to the English FA Cup, Olympic Games and various FIFA competitions.[46] Mr Zecha further testified that the EPL and the FA Cup are the two best performing football properties with the highest viewership.[47]

131. In our view, the fact that SingNet has the exclusive broadcast rights of certain sports content such as the EPL, *without more*, is insufficient to substantiate its claim that a larger share of its revenue is derived from sports content, unlike StarHub. We note StarHub also has sports channels on its pay television service, and in fact used to carry the EPL too before 2010.[48] Conversely, it is not lost upon us that SingNet also carries other programmes and channels apart from sports content on its pay television service. It is clear that SingNet TV is not an exclusive sports-only or sports-centric pay television service. Out of its 163 channels, only 22% comprise news and sports channels.[49] Thus, on the evidence before this Tribunal, there is no basis to say that SingNet is of a different class of pay television service provider from StarHub.

132. Turning to specifically to the issue of revenue attributable to sports content, we first note that, based on SingNet's own documents, the top 5 genres among SingNet's and StarHub's viewers do not include sports.[50] In fact, the genre of "football" was the second to last popular genre for SingNet,

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[45] Affidavit of Evidence-in-Chief of Adam Cornell Lauw Roberts Zecha at [7]; Affidavit of Evidence-in-Chief of Anurag Dahiya at [30]
[46] Affidavit of Evidence-in-Chief of Adam Cornell Lauw Roberts Zecha at [8]
[47] *ibid*.
[48] Transcript of hearing on 16 April 2021 at page 120 lines 1 – 18
[49] Transcript of hearing on 16 April 2021 at page 55 lines 14 –16
[50] Affidavit of Evidence-in-Chief of Pauline Mowat Booth at page 4740 – 4741

and the least popular genre for StarHub. On this, Mr Zecha gave the following explanation:

> When it comes to viewership on sports channels, they are always at the bottom when it comes to the amount of viewership ratings that they can generate and achieve. The reason is, that's because sports fans like different things. One might like basketball, one might like tennis, one might like football, one might like boxing. **And they have to have it. And they will pay a large amount of money for it. And they will dip in just for that particular sport they like and then they will leave it, and then they will come back later, maybe the next weekend.** Whereas these other categories, people are going through all the time, but when it comes to how people pay for content, in terms of numbers of subscribers to the content, you know, you will see that there is sometimes a difference between how many people are paying for certain genres versus others and they cost associate with it and then the revenue. **For example, our sports pack at SingTel for the Premier League is 64.90 per month, whereas our family starter pack, which has basically a variety of these genres, 34.90. So it's a big difference. So the revenues that come for certain contents and the costs associated with certain contents are different and the viewership can be quite different. So yes, so it's a very -- all around the world, it's well understood that sports never will be put into the top five categories when it comes to viewership of the channels that contain the sports.**[51]
>
> (**emphasis added in bold**)

133. Even based on Mr Zecha's explanation, there is still no objective evidence showing the disparity in revenue attributable to sports content between SingNet and StarHub. Quite apart from the fact that SingNet was unable to

[51] Transcript of hearing on 14 April 2021 at page 48 line 10 – page 49 line 10

adduce any evidence to show StarHub's revenue from sports content, we note that SingNet has not even been able to show that its own pay television revenue is largely attributable to sports. Mr Zecha candidly testified that he had no knowledge of how much SingNet's revenue is attributable to sports content[52], while Mr Dahiya testified that the assertion that SingNet has a larger revenue from sports content is merely based on SingNet's own understanding based on its commercial strategy of being more sports-led compared to StarHub.[53]

134. In the course of the hearing, it become apparent that the reason SingNet was unable to show clearly the proportion of its revenue that is attributable to its sports content is that SingNet's pay television content is sold in bundles. These bundles consist of channels from different programming categories, such as entertainment, lifestyle and music, education, kids and sports. Thus, there is a need to apportion and allocate the revenue to individual programming components. The parties disagreed over the applicable allocation methodology. For SingNet, Ms Booth used a methodology based on the pricing of each bundle. According to Ms Booth, this methodology is typically used in licensing agreements. First, the pricing of the individual components is added to derive the aggregate price of the components. Then, the price of each component is calculated as a percentage of this total. Using this pricing-based methodology, the revenues attributable to sports programming as a percentage of total pay television revenue averaged 32.4% from 2013 to 2020.[54]

135. On the other hand, COMPASS' Mr Williams opined that Ms Booth's approach is inconsistent with the economic theory behind bundling because it assigns value to bundles based on values for individual components. Instead, he preferred a different method in which he constructed a series of

[52] Transcript for 14 April 2021 at page 52, lines 15-25 and page 53, lines 1-3
[53] Transcript for 16 April 2021 at page 116-119 lines 1-25 and page 119 lines 1-9
[54] Affidavit of Evidence-in-Chief of Pauline Mowat Booth at [41]

simultaneous equations to calculate the implicit price of each component within a bundle. Based on his method, the percentage of revenue attributable to sports is 23.7%.[55]

136. Both expert witnesses crossed swords over the technical merits and limitations of each methodology. When the dust settled, what they could at least agree on was that the allocation of revenues in situations where a licensed property is sold as a part of a bundle, as in the present case with SingNet's sports content, is ultimately a subjective exercise. In the end, it was clear that there is no perfect method in theory. Both methods involve assumptions and therefore limitations. In any case, regardless of whether the percentage of SingNet's pay television revenue attributable to sports content is 23.7% or 32.4%, we do not find that either proportion justifies a departure from the Licence Rate, which is the rate paid by StarHub.

137. In the final analysis, despite all the plethora of evidence adduced, SingNet has not proven that its revenue generated from its sports content is so different from StarHub as to warrant not paying the same licence rate. Notably, SingNet has offered no objective evidence to substantiate its fundamental assertion that its own pay television revenue is predominantly derived from sports content. The evidence also indicates that SingNet is not of a different class of pay television service provider from StarHub. In short, the circumstances of SingNet are not so different from StarHub as to warrant a different licence rate.

SingNet's proposed alternative licence rate

138. In view of our finding that the Licence Rate is reasonable and our dismissal of the Application, there is no actual need for us to go on to consider the alternative licence rate of 0.45% of Net Television Revenue proposed by SingNet. However, for completeness, we will address this alternative

[55] Supplementary Affidavit of Evidence-in-Chief of Philip Laurence Williams at [52]

licence rate, and the corresponding methodology set out in Ms Booth's expert report. As a preliminary note, SingNet, in proposing the application of the judicial estimation approach, predominantly took into account comparisons with other jurisdiction, in particular the United States. Although Ms Booth analysed in her expert report various factors including SingNet's capacity to pay, COMPASS' administrative costs and previous negotiations between SingNet and COMPASS, these were ultimately not factored into her derivation of the proposed rate of 0.45%. In essence, Ms Booth adapted the post-*Turner* rates in the United States with some adjustments for SingNet in Singapore, and ultimately concluded that a reasonable charge in the circumstances is <u>0.45%</u> of Net Television Revenue.

139. First, Ms Booth analysed a number of licence rates for the communication rights to musical works in the United States, Singapore and Australia. Of these rates, she ultimately selected the post-*Turner* rates applied in *In Re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010) ("***MobiTV***") in the United States as the most suitable comparable for the present case. By way of background, the post-*Turner* rates arose from a settlement between the American Society of Composers, Authors and Publishers ("**ASCAP**") and the cable television networks in the United States after lengthy litigation over the valuation of a public performance through-to-the-audience ("**TTTA**") licence (see *United States v. ASCAP (In re Application of Turner Broadcasting System, Inc.)*, 782 F. Supp. 778 (S.D.N.Y. 1991), aff'd, 956 F.2d 21 (2d Cir. 1992) ("***Turner***")). The parties eventually agreed on a three-tiered rate structure to be calculated as a percentage of cable television revenue:

Category of programming	**Percentage of Revenue**
Music intensive	0.9%
General entertainment	0.375%

News and sports	0.1375%

140. According to Ms Booth, the post-*Turner* rates applied in *MobiTV* provide the best economic fit because the parties to the negotiations, ASCAP and MobiTV, Inc. ("**Mobi**"), were similarly situated as the parties in the Application in that:[56]

(a) ASCAP had a monopoly over its repertoire of musical works and therefore Mobi was obliged to take a licence for the use of that repertoire;

(b) Mobi, like SingNet, purchased its programming from content providers for onward distribution. Neither Mobi nor SingNet had the ability to influence the music content of the programming purchased;

(c) The revenues earned by both Mobi and SingNet were generated not only from the provision of content but also from services which both parties provided, making the apportionment between revenues relating to music content from all other features and services a subjective exercise; and

(d) Both Mobi and SingNet entered into arm's length negotiations with content providers to set the price of such content.

141. Furthermore, Ms Booth observed that the post-*Turner* rates have been used in hundreds of licences in the cable television industry by both ASCAP and Broadcast Music, Inc. ("**BMI**") from 1991 onwards.[57] In support of this observation, Ms Booth referred to a legal submission in *ESPN, Inc., v. Broadcast Music, Inc.*, 16 Civ. 1067, where BMI had argued that its more

[56] Affidavit of Evidence-in-Chief of Pauline Mowat Booth at [170]
[57] *ibid*.

than 300 post-*Turner* licences were the best benchmark for a blanket licence with ESPN. Ms Booth also cited *MobiTV* which observed (at 222) that "[m]ore than 100 licences with the post-*Turner* rates have been issued by ASCAP".

142. Second, Ms Booth adjusted the post-*Turner* rates to account for the fact that the post-*Turner* rates applied by ASCAP do not cover the music in the repertoire of other collecting societies in the United States. The post-*Turner* rates were thus grossed up to represent the rate payable for a blanket licence for all musical works administered by the collecting societies in the United States.

143. Third, Ms Booth applied the adjusted post-*Turner* rates to the licensee's content costs – that is, the cost paid by the licensee to its content providers. Ms Booth took the position that content costs, as opposed to the licensee's gross revenue, is a more appropriate royalty base based due to the following reasons:

(a) In *MobiTV*, the post-*Turner* rates were applied to the revenue of Mobi's content providers.

(b) The applicable royalty base should reflect the fair market value of music. The use of SingNet's revenue as the applicable royalty base would be overinclusive as the revenue generated by SingNet through its pay television services also include the value of SingNet's own contributions in addition to the content, of which music is only a part.[58]

(c) In contrast, the use of content costs as the applicable royalty base excludes such value contributed by SingNet and allows the value of the right of communication of the musical works to be measured directly

[58] Affidavit of Evidence-in-Chief of Pauline Mowat Booth at [139]

at the content-provider level. Pricing the right at the time the content is first sold is the immediate and closest feedback about the value of that individual component to the overall product.[59]

(d) Applying a royalty rate directly to SingNet's pay television revenue, as a royalty base, is also problematic because SingNet's pay television services are sold in many different bundles, with each bundle consisting of a different selection of channels. Allocating revenue to individual channels with varying degrees of music intensity therefore requires subjective assumptions to separate and quantify the contribution of the various channels.[60]

(e) The content costs that SingNet paid to the content providers reflect the result of an arms-length negotiation based on a variety of factors, including viewership and popularity of the content, and the ability of the content to impact subscribers' purchase behaviour.[61]

144. Fourth, after calculating the licence rate based on content costs, Ms Booth converted the resulting rate to a percentage of SingNet's pay television revenue.

145. Fifth, Ms Booth used the *SBC rates* as a downward adjustment of the derived post-*Turner* rates. In *SBC*, the Tribunal established the following licence rate framework:

Percentage of music use	**Licence rate for television**	**Licence rate for radio**
Not more than 25%	0.1%	0.3%
25% to 50%	0.2%	0.6%

[59] Applicant's Closing Submissions at Paragraph at [131(f)]
[60] Affidavit of Evidence-in-Chief of Pauline Mowat Booth at [138]
[61] Affidavit of Evidence-in-Chief of Pauline Mowat Booth at [141]

50% to 75%	0.3%	0.9%
More than 75%	0.4%	1.2%

Using the *SBC* framework, Ms Booth calculated a blended rate based on SingNet's programming mix.[62] She then added the two rates that were derived from the post-*Turner* rates and the *SBC* rates respectively, and divided the sum by two to arrive at the final proposed licence rate of 0.45% of SingNet's Net Television Revenue.[63]

146. Having reviewed Ms Booth's expert report and having considered the parties' submissions, we are unable to agree with Ms Booth's methodology and therefore are not persuaded that SingNet's proposed licence rate is a viable alternative to the Licence Rate. We detail our reasons below.

(i) The post-Turner rates is an unsuitable comparable

147. We do not think the post-*Turner* rates are a suitable comparable for the present case. In assessing whether the position in the United States serve as a suitable comparable for the present case, we take heed of the caution in *Tiananmen KTV* (at [36]) that the positions in other jurisdiction "would need to need to be regarded with circumspection as the prevailing conditions in those jurisdictions may be very different from those in Singapore." In this regard, we note that the context and circumstances in the United States and Singapore are considerably different.

148. In the United States, ASCAP is mandated to issue licences to cable television networks upon request, due to an extensive history of litigation and court orders. The court in *MobiTV* (at 228–229) provided a helpful overview of the historical context in the United States. In 1941, the United States Department of Justice's antitrust division sued ASCAP due to its

[62] Affidavit of Evidence-in-Chief of Pauline Mowat Booth at [165]
[63] Affidavit of Evidence-in-Chief of Pauline Mowat Booth at [172]

market power in licensing. The result was a consent decree, which *inter alia* required ASCAP to grant a licence to any applicant who requested one. Subsequently, in the 1990s, ASCAP and Turner Broadcasting System, Inc., a cable programme supplier, entered into disputes over the valuation of a public performance TTTA licence. The court in *MobiTV* observed (at 229) that:

> The upshot of the 1991 *Turner* decision and ensuing litigation was a lengthy period of negotiation and ultimately the issuance of a host of TTTA licences to cable television networks. Those licences were entered pursuant to the success to AFJ, that is, in the wake of AFJ2.

149. The court further noted (at footnote 31) that:

> The *Post-Turner* Licenses were entered after the issuance of the antitrust consent decree known as AFJ2… Not all cable networks are licensed under *Post-Turner* Licenses. In fact, HBO has a license that is based on per-subscriber charges. Some other cable networks and the three broadcast networks—NBC, ABC, and CBS—pay fixed fees.

150. It is thus clear that the historical context and circumstances in the United States are vastly different. Due to the consent decrees, ASCAP is mandated to grant a licence to any applicant who requested one. Additionally, the post-*Turner* rates were a result of a *settlement* between ASCAP and the cable television networks after a decade of costly litigation and negotiation. Thus, the post-*Turner* rate, being a result of litigation settlement, arose from very different circumstances in the United States.

151. Furthermore, the licensing landscape in the United States is also very different from that in Singapore. The number of licensors, licensees and subscribers differs vastly. In the United States, there are many cable

television networks requiring a licence. In Singapore, the pay television industry is a duopoly comprising StarHub and SingNet. Additionally, given the difference in population size, the number of subscribers in the United States naturally dwarves that of Singapore. The sheer market size in the United States makes a huge difference to the revenue of the licensors. This Tribunal was presented with evidence showing the comparative revenue of ESPN and SingNet for 2014, and it was evident that the former far exceeded the latter due to the sheer size of the respective markets in the United States and Singapore.

152. With regards to the disparity in revenue, COMPASS submitted that the licence rates in the United States *must* remain low because of the size of the royalty base. Given that there are more licensees in the United States, the total licence fees collected by ASCAP are correspondingly higher than what is collected by COMPASS in Singapore. Thus, the licence rate must be low to compensate for the high royalty base in the United States. To illustrate this, COMPASS highlighted the disparity in the licence rate charged for public performance of light or popular music. In the Singapore case of *Sunvic*, the Tribunal held that the reasonable licence rate in Singapore is 2.5% of gross ticket receipts. In contrast, based on an extract from ASCAP's website[64], the rate charged in the United States is 0.1% of gross receipts. Evidently, the licence rates in Singapore differ greatly from the rates that are being charged in the United States.

153. In response, SingNet argued that, as a matter of principle and methodology, the size of the royalty base ought to be irrelevant in the assessment of a reasonable licence rate. Instead, a licence rate, expressed as a percentage of a royalty base, must be assessed by reference to the value of the performance right. This value does not change whether it is applied to a smaller or larger royalty base. It therefore does not follow that the licence

[64] RD-5

rate should be adjusted upwards in Singapore to account for the fact that there is lower revenue for COMPASS due to the smaller market.

154. Having considered both sides' arguments, we come to the position that both the market size and, by extension, the licensee's revenue are important considerations when comparing the rates in different jurisdictions. We acknowledge SingNet's argument that the percentage licence rate should reflect the value of the performance right. However, the licence rate cannot be *solely* determined by reference to the value of the copyright material. Besides the value of the copyright material, the licensee's revenue was also held to be relevant in *Tiananmen KTV*:

> 60 No expert witnesses were called. This was in contrast to the other cases brought before the Tribunal (referred to above), as well as cases before the Copyright Tribunals in Australia and UK, where extensive expert evidence was called and tendered to support the case of the respective parties, particularly to address, inter alia, **considerations in relation to the local market rate and conditions, notional bargain rate, the rates and practices in other jurisdictions with a similar market, capacity of the licensee to pay, <u>evidence on revenue</u> and other accounts of the respective parties, and the value or worth of the copyright material in question**.
>
> …
>
> 81 It merits re-iteration that nothing was brought before the Tribunal to show how the rates were derived in other jurisdictions, how they were applied in practice, **what the turnover of business was in other comparable businesses abroad, and what proportion of such turnover the charged rates would have been**. Within Singapore itself, there was no evidence given of what comparable businesses would have been charged, nor whether these

> charges would have constituted a disproportionately high cost of business compared to other costs, taking into account the fact that these venues were primarily focused on music performance of some kind.
>
> (**emphasis added in underline and bold**)

155. Similarly, in *Sunvic*, the Tribunal (at [11.20]) rejected the rates in different jurisdictions as the comparison failed to take into account the difference in cost of living which in turn affects the licensee's revenue:

> The comparison is, however, in one sense rather artificial. It does not take into account different conditions in the countries. It assumes that the conditions are broadly the same. **The cost of living might be quite different in the different territories.** For example, actual ticket prices in Australia or Hong Kong may not be the same as in Singapore. Given the same number of tickets sold, say in Hong Kong, for the three named concerts, **the gross could be quite different**. Likewise, the costs of holding concerts could differ dramatically from country to country…
>
> (**emphasis added in bold**)

156. In our view, the size of the licensee's revenue is an important factor because the total licence fees payable are a product of the rate and base. In other words, the licence rate (i.e. the percentage) and the royalty base (i.e. what the percentage is to be applied to) together determine the payable licence fee. The licensee's revenue is therefore an equally important part of the equation. The assessment of reasonableness cannot take into account one without the other. Thus, given the difference in magnitude in the revenues in the United States and Singapore, we do not find the post-*Turner* rates to be a helpful comparable.

157. Moreover, as was the case in *Tiananmen KTV*, we do not have sufficient information on the operating and business environment in the United States or the considerations behind the post-*Turner* rates to be able to make an objective and meaningful comparison with the circumstances in Singapore. Based on the evidence before the Tribunal, the post-*Turner* rates applied in *MobiTV* are standard rates in the United States only, and are not standard rates applicable in any other country. In fact, the court in *MobiTV* (at 222) observed that:

> Beginning in late 2007, ASCAP began to issue interim fee agreements with cable television networks, rather than renewing or executing new *Post-Turner* Licenses. ASCAP apparently intends to enter into a new round of negotiations with the cable television network industry regarding the licensing of ASCAP rights.

It is thus unclear to us whether the post-*Turner* rates are still applicable rates in the United States, and even more so whether the post-*Turner* rates should apply in Singapore given the material differences in market conditions. Although Ms Booth had made broad adjustments to the post-*Turner* rates to reflect the Singapore market (which we further address below), there are no justifications to apply the post-*Turner* rates as the starting reference point in the first place, as opposed to the rates of say, another Asian or European country which may have more similar market conditions.

158. In light of the above, we are unable to conclude that the circumstances in the United States are sufficiently similar to those in Singapore, and thus unable to apply the post-*Turner* rates as a useful comparable for the present case.

(ii) *The applicable royalty base – revenue or content costs?*

159. We next address the use of content costs as the applicable royalty base in Ms Booth's methodology. Ms Booth relied on the case of *MobiTV* for the proposition that the applicable royalty base for the post-*Turner* rates are content costs. However, the decision in *MobiTV* can be distinguished as it is a different situation as compared to the present case. Instead, we take the view the applicable royalty base should be the licensee's revenue.

160. By default, the post-*Turner* rates are applied to the licensee's revenue. As observed in *MobiTV* (at 222), when the post-*Turner* rates were first agreed between ASCAP and the cable television networks following the *Turner* litigation, the rates were "calculated as a percentage of cable television network revenue". This was reflected in ASCAP's form post-*Turner* licence (see *MobiTV* at 224), where the licence is fee is based upon the cable television network's revenues which were defined as:

> (i) monies or other consideration received by LICENSEE from Distribution Systems and directly from subscribers to LICENSEE's Programming Service; (ii) advertising revenues or other monies received by LICENSEE from sponsors if any…

161. Furthermore, it was observed in *MobiTV* (at 234, citing in *Music Choice II*, 316 F.3d at 195) that the default royalty base should be revenue:

> …what retail customers pay to receive the product or service in question (in this case, the recorded music) seems to us to be an excellent indicator of its fair market value. While in some instances there may be reason to approximate fair market value on the basis of something other than the prices paid by consumers, in the absence of factors suggesting a different measure the price willing buyers

> and sellers agree upon in arm's-length transactions appears to be the best measure.

162. This is also consistent with the observation made by the Tribunal in *SBC* (at [11.7]):

> The overall weight of the evidence of the practices in overseas countries leans towards a percentage of revenue as being the proper basis of assessment. This Tribunal shares the views expressed by the Australian Tribunal in the APRA re ABC case that –
>
>> "The evidence suggests a discernible balance in favour of a percentage of revenue as being the accepted measure of the value of the public performance and broadcast rights used by various broadcasting and television organisations in the world, whether commercial or governmental."…

163. The aforesaid is indicative that the general position is that the applicable royalty base is the licensee's revenue and not content costs. The decision in *MobiTV* appears to be an exception to the rule confined to the facts of its case. In our view, it does not stand for the general proposition that the applicable royalty base is content costs. Neither Ms Booth nor SingNet was able to produce any other authorities suggesting so. In fact, the decision for the rate to be based on contents cost in *MobiTV* was made because Mobi was situated differently in the distribution chain. In the appeal of *ASCAP v. MobiTV, Inc.,* No. 10-3161 (2d Cir. 2012) ("***ASCAP Appeal***"), the court (at 5) described Mobi as follows:

> Mobi acts as a middleman between "content providers" – television networks, record labels, and radio broadcasters – and wireless phone carriers. To do that, Mobi aggregates content – television programs, music videos, and the like – into a number of "channels" (with

> themes such as "news," "music," and "comedy") that wireless carriers then offer to their customers as part of their phone subscription plans…

Put simply, Mobi is a middleman that purchases content from content providers, assembles the content into channels, and then sell them to wireless phone carriers. It does not have its own screening platform and does not directly cater to the end consumers. Instead, it is the wireless carriers that screen the content to subscribers by offering the programming as an a la carte product, or part of a bundle of services that also includes Internet access and text messaging.

164. It is in this context that the court in *MobiTV* rejected the use of the revenue received by the wireless carriers from their customers as the royalty base. The court observed (at 239) that the large revenue base of US$54 billion of the wireless carriers included revenues unrelated to the value of Mobi's programming. The court therefore refused to accept this as the royalty base as this would not reflect the service provided by Mobi. This reasoning was upheld on appeal in the *ASCAP Appeal* (at 22 and 23):

> **The wireless carriers typically offer Mobi's television products as part of a bundle of services that also includes Internet access and text messaging, and then charge a single data plan fee for the whole bundle.** As ASCAP's fee proposal to the District Court illustrated, separating out the relative value of each individual product is fraught with methodological difficulty. ASCAP's proposal was premised on the notion that the value of different products in the bundle could be determined based upon how much data each product used. As the District Court noted, this proposal made the essentially arbitrary assumption "that a consumer would pay the same amount of money to receive a kilobyte of text messaging as a kilobyte of television programming, even though a kilobyte might give a consumer several back-and-forth exchanges

> of text messages but only the briefest glimpse of an image from a television program." MobiTV, 712 F. Supp. 2d at 241. **ASCAP's failure to develop a rational formula for valuing the component parts in the bundle of products sold by the wireless carriers confirms the wisdom of the District Court's decision to reject the use of a retail base in this case**…

165. It is pertinent to note that this is not the case here. SingNet is a pay television provider that purchases content from content providers and screens the content on its pay television service to its subscribers directly. Thus, the services provided by SingNet and Mobi are not comparable. More importantly, unlike the case in *MobiTV*, the revenue in question here is SingNet's pay television revenue, which does not include other revenue which SingNet receives for their other telecommunication services. The same objections present in *MobiTV* are not applicable in the present. The factual background in *MobiTV* is different and can easily be distinguished.

166. In the premises, we find that there are no compelling reasons to depart from the general position that the applicable royalty base is the licensee's revenue and not content costs. Hence, in this present case, the applicable royalty base to be used is SingNet's Net Television Revenue.

(iii) Treatment of SBC

167. We note that SingNet has not proposed to directly apply the *SBC* rates to the present case. Instead, the *SBC* rates are applied as a downward adjustment of the post-*Turner* rates. While we have already rejected the adoption of the post-*Turner* rates, we shall nevertheless briefly address SingNet's treatment of the *SBC* rates.

168. In her expert report, Ms Booth observed that post-*Turner* rate she calculated is over 2.5 times the highest blended rate applicable to SingNet's

programming under the *SBC* framework.[65] This suggests that a downward adjustment is required. She then explained how she adjusted the post-*Turner* rates to derive at the final proposed rate of 0.45%:

> To account for the downward adjustment suggested by the SBC rates, I note that the mid-point between the royalty rate expressed as a percentage of Gross Revenues based on the Turner rates (0.61 percent) and the highest blended rate I have calculated using the SBC rates (0.235 percent) is 0.42 percent. It is my opinion that 0.42 percent of SingNet's Gross Revenues, as defined in the draft licence agreement between the parties, or 0.45 percent of Net Revenues, as described in the 9 January 2019 letter from COMPASS to SingNet, is a reasonable royalty for a performance right licence to the Musical Works administered by COMPASS in the Singapore market.[66]

169. In simple terms, Ms Booth added the applicable post-*Turner* rate and *SBC* rate, and then divided the sum by two. The basis for such an adjustment is unclear. No explanation was provided as to why this method of adjustment would be appropriate in the present case. It has been held in *Tiananmen KTV* (at [36]) that an assessment of reasonableness "cannot be arrived at through the application of a rigid mathematical formula". In fact, by simply taking the mid-point, Ms Booth's methodology essentially accords equal weight to the post-*Turner* rates and the *SBC* rates in deriving the proposed rate that SingNet considers to be reasonable. This theoretically assumes that the positions in both jurisdictions are equally similar and/or relevant to the present case.

170. SingNet has not provided a satisfactory justification for such an assumption. We have earlier discussed why the position in the United States is not an appropriate comparable. Similarly, we hesitate to accord

[65] Affidavit of Evidence-in-Chief of Pauline Mowat Booth at [166]
[66] Affidavit of Evidence-in-Chief of Pauline Mowat Booth at [173]

significant weight to *SBC* rates as a relevant benchmark to be applied in the present case for the following reasons.

171. At the time of *SBC*, the protected works in the repertoire of the Performing Right Society ("**PRS**") was only around 4 million works (*SBC* at [13.2(a)]), as compared to COMPASS' current repertoire of 23 million.[67] The extent of coverage of the repertoire of the CMOs thus differs substantially.

172. COMPASS also pointed out the obvious difference that the licensee in *SBC* was a public broadcaster with only 3 television channels, whereas SingNet is a commercial pay television service provider with 163 channels. SingNet disagreed that the fact that SingNet is a private broadcaster means that it should pay a different rate from a public broadcaster like SBC.

173. Pertinently, the Tribunal in *SBC* cited (at [11.2]) the Australian decision of *Reference by APRA re ABC* (1986) AIPC 90-282 which clearly stated that:

> (ii) The ABC should pay a fair commercial price for the right which the licence confers unaffected by the consideration that it is providing a public service. In other words it should pay a price for the right which the licence confers which is fair in commercial terms just as the prices it pays for other commodities and services are fair.

In that case, although the Australian Tribunal eventually decided not to apply the same commercial rates to the Australian Broadcasting Corporation, the decision was made in consideration of other factors, such as the different size of ABC's audience. The fact that a licensee is a public broadcaster does not *in itself* mean that it should pay a different rate than a commercial broadcaster.

[67] Affidavit of Evidence-in-Chief of Lam Kin Hong Edmund filed on 19 April 2021 at [6]

174. In this regard, the crux of the inquiry is still whether the prevailing circumstances in the present case are different from those in *SBC*. In our view, the answer is yes. *SBC* was a case decided 30 years ago. Since then, the landscape of pay television services has emerged and evolved substantially. The circumstances of business operating in Singapore, cost of living, use and prevalence of music, state of technology and television consumption habits among consumers have changed drastically. We therefore do not think that the *SBC* rates are applicable to the current circumstances of SingNet.

175. For these reasons, we are of the view the rates as decided in *SBC* should not be applicable to the licence for SingNet, whether used as benchmark in itself or as a downward adjustment. Accordingly, we unable to agree with Ms Booth's methodology and therefore are not persuaded that SingNet's proposed licence rate of 0.45% of Net Telvision Revenue is a viable alternative to the Licence Rate.

Conclusion

176. In summary, this Tribunal adopted the judicial estimation approach to assess the reasonableness of the Licence Rate in the present case. After reviewing the evidence and considering the parties' extensive submissions, we come to find that:

(a) COMPASS's methodology in deriving the Licence Rate is one that is principled, objective and logical.

(b) COMPASS had been even handed in its treatment of StarHub and SingNet during negotiations on the license rate. SingNet's contention that COMPASS had sought to fix the Licence Rate in an arbitrary and capricious manner is without merit.

(c) SingNet had failed to show that its pay television revenue is largely attributable to its sports content or that sports content is a differentiator between it and StarHub to warrant paying a different licence rate.

177. In view of our findings above, the various planks of SingNet's case fall away and we find SingNet's claim not to be well-founded for the purposes of its application under section 163(3) of the Act.

178. Accordingly, we dismiss the Application, and, pursuant to section 182 of the Act, we order that costs of these proceedings be paid by SingNet to COMPASS on a standard basis. Parties are to agree on the quantum of costs or costs will be taxed if not agreed.

179. On a final note, this Tribunal takes the opportunity to commend both sets of solicitors, namely, Dr Stanley Lai, Ms Gloria Goh, Ms Melissa Mak, Ms Amanda Soon and Mr David Lim for SingNet; and Mr Anthony Lee, Mr Wang Liansheng and Ms Aileen Chua for COMPASS, for the conduct of their respective cases. Both sides were tenacious but fair in their treatment of the other party's witnesses, and the depth, detail and quality of the respective submissions on the numerous issues and sub-issues underlying the Application were of great assistance to this Tribunal. Last but not least, this Tribunal records its deep appreciation to Mr Lim Jun Rong for his invaluable and considerable assistance to this Tribunal throughout the course of these proceedings.

Edwin San (Deputy President)	Lee Ai Ming (Member)	Low Chai Chong (Member)

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