Copyright Board Canada

Commission du droit d'auteur Canada

Date 2009-10-08

Citation Files: Public Performance of Musical Works; Reproduction of Musical Works

Re: CSI Online Music Services Tariff (2008-2010) and SOCAN Tariff 22.A (Internet – Online Music Services) 2007-2010

Reasons for decision

[1] On February 21, 2008, the Board denied a request on the part of CSI to set in motion the examination of its proposed online music services tariff, preferring instead to deal with CSI's tariff at the same time as SOCAN's, who was not prepared to proceed at that time.

[2] On August 25, 2009, CSI renewed its request that the examination of its tariff proceed, jointly with SOCAN's, and proposed a timetable leading to a hearing beginning on May 18, 2010. CSI relied on the following arguments.

[3] First, the main reason for postponing the examination of the CSI tariff no longer exists. SOCAN is now willing to proceed with the examination of its tariff as long as issues related to previews are left in abeyance.

[4] Second, the fact that SOCAN's tariff is the object of applications for judicial review is not reason enough to postpone the examination of the proposed tariffs. The one issue that might have a direct impact on the tariff, previews, can be segregated by leaving in abeyance anything having to do with it.

[5] Third, further delays would prejudice CSI and SOCAN. Retroactive collection of royalties may prove to be problematic, since the relevant market evolves very rapidly. Extended delays would make evidence gathering and valuation more difficult. Difficulties are compounded if the matter is not heard until some time in 2011, which is highly probable if scheduling is postponed until the Federal Court of Appeal disposes of the applications for judicial review.

[6] All objectors opposed CSI's request for the following reasons. First, CSI's application for scheduling is the same proposal, based on the same arguments that the Board already rejected. Second, examining the tariffs before the Federal Court of Appeal disposes of the applications for judicial review filed against the Board's SOCAN 22.A decision would be wasteful. Third, CSI has failed to show that a delay would be prejudicial. Fourth, holding issues relating to previews in

abeyance makes no sense. Fifth, all of SOCAN Tariff 22, not just item 22.A, ought to be examined at the same time as CSI's online music services tariff.

[7] CSI replied that it is not required to show prejudice for the Board to put the examination of its tariff in motion and that there is little or no overlap between online music services and the other users targeted in SOCAN Tariff 22.

[8] On September 25, 2009, the Board granted CSI's application, for the following reasons.

[9] First, whether a delay would prejudice CSI is largely irrelevant. As CSI explained in its reply, prejudice may be relevant in dealing with an application for interim measures, but is of little importance when deciding whether to proceed with the examination of a proposed tariff. Subsection 68(1) of the *Copyright Act* provides that the Board must do so as soon as practicable.

[10] Second, while awaiting the outcome of judicial review proceedings is sometimes advisable, it is not in this instance. The issues raised in the six applications for judicial review are: (1) whether the Board can decline to certify a tariff; (2) whether an Internet transmission involves a communication to the public; (3) the meaning of fair dealing and research; (4) issues relating to the rules of evidence and the burden of proof; and, (5) the methodology the Board used to set Tariff 22.A. The first issue does not arise with respect to online services. The Federal Court of Appeal has already ruled on the second [1] and there is no need to wait for a second opinion. The third can be addressed by segregating the examination of previews. The fourth is relevant to all matters before the Board. If the examination of the tariffs under consideration were postponed until the Court disposed of the issue, the same should be done for all other tariffs, thereby bringing the Board's business to a standstill. The fifth involves the core of the Board's mandate. The application will be successful only if the Board acted unreasonably. To postpone the examination of tariffs based on that sole consideration would only serve to encourage judicial review applications as a delaying tactic.

[11] Third, the Board prefers to examine SOCAN Tariffs 22.A and 22.B-G separately. The online music services market is quite different from that of all other users targeted in Tariff 22. Tariff 22.B-G actually provides that it does not apply to 22.A uses.

[12] Fourth, segregating previews is not as difficult as objectors contend. CSI does not charge for previews and does not intend to do so. If the Federal Court of Appeal asks the Board to reexamine the issue of previews, SOCAN Tariff 22.A will have to be reopened for 1996 to 2006 in any event. The issue can then be addressed conveniently for that period as well as for subsequent years. If, on the other hand, the application for judicial review fails, little more will need to be added, unless

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[1] *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539.

SOCAN wishes to lead new evidence. Consequently, how SOCAN proposes to deal with the issue is reasonable.

[13] The objectors complained that a schedule leaving eight months before the start of hearings is too short. This is a gross exaggeration. Parties are represented by counsel who are used to dealing with matters at least as complicated as this one within tighter time frames before ordinary courts of law. Furthermore, as CSI noted in its reply, the Board has addressed other matters according to shorter schedules than the one proposed.

[14] For all the above reasons, the application is allowed.

Lise St-Cyr
Senior Clerk of the Board