Copyright Board Canada

Commission du droit d'auteur Canada

[CB-CDA 2019-061]

RULING OF THE BOARD ON OBJECTIONS TO INTERROGATORIES

Proceeding: Online Music Services [SOCAN: 2007-2018; Re:Sound: 2013-2018; CSI: 2014-2018]

August 21, 2019

I. OVERVIEW

[1] In this complex consolidated proceeding, the Parties proposed that the Board combine the objection and deficiency stages of the interrogatory process in the hope that doing so would expedite the proceeding. While the Board was initially open to this approach, it has proved to be unworkable in practice, given the cumulative scope of the objections and deficiency motions with which the Board has had to deal. Over 1000 such motions were filed.

[2] Accordingly, the Board has decided to separate the interrogatory process into distinct objection and deficiency steps, as per its usual practice.

[3] This is our Ruling on the objection motions to the interrogatory questions in this proceeding. It consists of this covering explanation document together with the following attached documents:

- Rulings on objections to interrogatories posed by Collectives to Objectors are found in the spreadsheet entitled **Annex A: Rulings on Objections to Interrogatories from Collectives to Objectors**; and

- Rulings on objections to interrogatories posed by Objectors to Collectives are found in the spreadsheet entitled **Annex B: Rulings on Objections to Interrogatories from Objectors to Collectives**.

[4] The Board is hopeful that future proceedings with motions of this magnitude will be managed more effectively, as supported by the legislative changes that came into effect on April 1, 2019. Notably, the *Copyright Act* now requires that "matters before the Board […] be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit".

[5] Implementation of case management in particular will help the Board ensure that proceedings are proportional to the matter at hand, including by setting parameters for the interrogatory

phase, and that unnecessary delays and significant and inefficient use of parties' and the Board's resources are avoided.

II. BACKGROUND

[6] In Notice 2017-105, issued on October 6, 2017, the Board notified parties to this proceeding that it intended to consolidate tariffs dealing with online music services into a single proceeding. The Board also informed the Parties that it intended to commence the hearing no later than June 2018 and asked the parties to propose a schedule of proceedings.

[7] On October 20, 2017, Re:Sound submitted that, given the significant number of parties in this proceeding, consolidated interrogatories should be implemented to reduce overlap and redundancies.

[8] On October 27, 2017, Mr. Kerr-Wilson filed proposed schedules for the *Online Music Services* proceeding, as well as for the concurrent *Online Audiovisual Services – Music* proceeding, prepared on behalf of 6 collectives and 19 objectors and intervenors. The parties proposed dealing with objections and responses to interrogatories at the same time. Their submission relied on "the very considerable experience of the Participants and their counsel" and represented what they believed would be "the most efficient set of timelines available in the circumstances". The Parties estimated that combined interrogatories would eliminate a month from the normal timeframes.

[9] In Notice 2017-139, issued on November 9, 2017, the Board adopted the schedule of proceedings proposed by the Parties without further comment, accepting the representations made by counsel to the parties.

III. RULINGS ON OBJECTIONS TO INTERROGATORIES

[10] As noted, the usual practice before the Board provides that objection motions are filed with the Board for ruling first. Then, subsequent to the Board's ruling, information is exchanged, and deficiency motions are submitted to the Board for ruling.

[11] However, the schedule in this proceeding combined the filing of responses to deficiency motions with the filing of responses to objection to interrogatories. Unfortunately, it has become clear to the Board that the combined approach is unworkable in practice in a proceeding such as this with its multiple parties and the large number of interrogatories – practically each one of which generated an objection, itself directed at multiple parties, and attracted a large number of deficiency responses.

[12] Among the challenges created by this approach was attempting to provide a uniform standard across thousands of separate rulings, as well as attempting to rule on deficiency motions where parties to motion did not yet know the result of the Board's ruling on the objection to the interrogatory itself.

[13] For example, attempting to determine whether a particular response was all the information the responding party had in relation to an interrogatory whose scope has been modified by a ruling of the Board would have to be based on suppositions and conjectures. As another

example, it would be unclear whether a deficiency would have been claimed if the interrogating party had known the ruling on the objection to the interrogatory.

[14] After having attempted to rule on all objections and deficiency motions at once, the Board has concluded that the only workable approach to this proceeding is to separate the objection and deficiency portions of the interrogatory process into two separate steps—as has been the practice of the Board.

[15] Because of the complexity of the process and the scope of the rulings, it would be unduly cumbersome and unnecessarily repetitive to provide a full explanation in each instance of the reasons for our ruling on particular objections. For that reason, we set out below a fuller explanation of the terms and phrases that are employed frequently in the Board's individual rulings in the attached spreadsheets.

[16] We recognize that in a considerable number of instances the party responding to the interrogatory in accordance with the ruling is left with a certain independent decision-making capacity in determining its response. We expect the Parties to fulfill this role correctly and in good faith. A failure to do so will undoubtedly encumber the deficiency process with additional unnecessary motions, thereby defeating the purpose of streamlining the process, which the Parties endeavoured to achieve with their original proposal.

IV. COMMON OBJECTIONS

Relevance

[17] Since the interrogatory process in this proceeding precedes the filing of the Parties' Statements of Case, the Board does not have the benefit of those documents to help define the issues. We have therefore adopted the following approach to relevance.

[18] A question is relevant if it has a rational connection to the proceeding. For example, if it relates to the activities targeted by the tariff, either their technical considerations, financial considerations, or otherwise; or if it relates to an activity that can serve as a proxy for the activities targeted by the tariff, then it is considered relevant. Given this broad scope, relevance, on its own, could not be determinative in our assessment of the interrogatories.

[19] Where relevance was raised as a ground for objection to a question, rather than completely permitting or dismissing the objection, the Board compared the relevance of that question, as assessed in the foregoing fashion, in light of the principle of proportionality and our estimate of the burden necessary to respond thereto.

[20] As a result, in many cases, the Board has amended the interrogatory question to address the issue of proportionality—for the question itself, and for the interrogatory process as a whole. Such amendments include restrictions on the period to which the question applies, the country to which the question applies, or the number of documents to be produced in response to the question.

[21] In other cases, where even restrictions would result in a disproportionate amount of work to answer the interrogatory, the Board has ruled that the question does not need to be answered at

all. In such case, the Board indicated that "The relevance of the information sought is outweighed by the burden to respond. The respondent need not answer this interrogatory."

Proportionality

[22] Where proportionality or scope are themselves raised as grounds for objection, in most cases, the Board has amended the questions in issue in the same manner as the Board has done in the case of an objection relating to relevance.

AOV – Answer overview

[23] A variant of the proportionality objection was labelled "AOV" by the Objectors; almost 400 questions include such an objection. In so doing, the Objectors submitted that the question was too broad and required too lengthy a response. On that basis, the Objector has offered an overview instead of providing the details sought by the question. Unless otherwise stated, the Board agrees in part with the objection, enumerating the specific requirements for the response in the detailed rulings document attached.

Vagueness

[24] Unless otherwise stated in a ruling, wherever vagueness of a term was alleged in an objection, the respondent may adopt a reasonable meaning of the disputed term in answering the interrogatory, keeping in mind that unreasonable responses in this regard may be subject to deficiency motions.

V. COMMON RULINGS

Nomenclature – "respondent"

[25] For the purposes of interrogatories, the Board uses the term "respondent" to indicate the party to whom an interrogatory was put.

Ruling for multiple interrogatories

[26] Unless otherwise specified, a single ruling in respect of multiple interrogatories indicates that the ruling applies separately to each interrogatory.

Readily-Available

[27] There may be a significant number of documents that are directly or indirectly responsive to an interrogatory. A respondent is only required to provide documents that are readily-available. While this may be emphasized in certain rulings, it is applicable to all rulings.

Best-Responding Document

[28] There may be a significant number of documents that are directly or indirectly responsive to an interrogatory. In view of the overall burden of these interrogatories, and in view of overall efficiency, the respondent is often required to only provide the best-responding document.

[29] To the extent that there are many responsive documents, and it is not readily apparent which among a set is "best," it is acceptable for a respondent to provide any document from that set. A document which answers all or most aspects of the interrogatory or interrogatory group, can meet this requirement. Ideally, such a document will have been prepared for or by senior management.

[30] Where there is no responding document, the respondent shall so indicate.

[31] Narratives

[32] Where a ruling permits a respondent to provide either a document or narrative, the respondent may provide one or the other. If there is no responding document, the respondent need not provide either. Whether to provide a document or narrative is the choice of the respondent.

[33] The purpose of any length-guideline for a narrative response is to indicate that the Board believes a meaningful response to the interrogatory is possible within the number of words indicated. For that reason, a response will not be judged deficient solely by not being longer than the word-count specified in the ruling. To be clear, these responses may be deficient for other reasons.

The provision of samples in response to an interrogatory

[34] The Board is aware that the selection of a "representative" sample can be a very challenging task. Creating a representative sample requires a number of difficult decisions. For example, identifying the sample "universe," the set of all elements from which the sample is drawn, is not an obvious exercise. In addition, sampling is always in reference to characteristics of the data, such as province, language, age, etc. For which characteristics the sample should be representative is also not likely to be self-evident.

[35] The Board wants to avoid a situation where, subsequent to a response to an interrogatory requesting a representative sample, there arises a dispute among the respondent and interrogator as to whether or not the methodology for selecting the sample was sufficient to generate a representative sample.

[36] Therefore, respondents are not being asked to generate representative samples. Most frequently, they are asked to provide a varied sample. The goal of this is to provide samples that can offer a qualitative sense of the elements present in the sampled set, as opposed to a sample that can be directly used for quantification.

[37] Given the diverse nature of the data to be sampled, the Board cannot provide meaningful, generic guidance as to which characteristics should be varied. This is best left to the parties that know the domain; the Board relies on them to meet this requirement in good faith.

Time of response

[38] With a view to limiting the total burden of the interrogatory process, and keeping in mind that not all proposed tariffs under consideration are for the same period, unless otherwise

specified, a respondent only needs to provide information pertaining to the period starting in 2014, through to the end of 2017.

No Calculations, Costing, Allocation, or Analysis

[39] Respondents are not required to perform calculations, costing, allocation, or other analysis to respond to an interrogatory.

[40] However, the respondent may be asked to provide data that would permit the interrogator to perform such calculations.

Questions not relevant to Respondent's Activities

[41] Where an interrogatory, or a portion thereof, is not relevant to a respondent's activities, or not documented/categorized/tracked in the manner sought by the interrogatory; the respondent may reply to the interrogatory, or the respective portion thereof, by indicating that the interrogatory is not relevant to its activities, and must provide a brief explanation why this is so.

Information from Third Parties & Interrogatories re. Repertoire

[42] CSI, CMRRA, and SODRAC objected to the requirement that they be required to provide Information or Documents "within the knowledge, access, possession or control of any entity on whose behalf the Collective collects or administers royalties." Re:Sound made a similar objection to specific interrogatories. Unless a ruling provides otherwise, this objection is sustained, and these parties do not have to seek such Information or Documents from these third parties.

[43] The Board also notes that, in respect of certain interrogatories from the Objectors to the Collectives, as circumscribed by respective rulings in the spreadsheet **Annex B: Rulings on Objections to Interrogatories from Objectors to Collectives**, the Board is requiring the Collectives to seek information from third parties. A Notice dealing with this aspect in detail is being issued today [CB-CDA 2019-062].

[44] Lastly, the Board notes that a number of interrogatories from the Objectors to the Collectives (**CSI** 1(d)(iv), 5(c)(i), 6-1, 7-1, 7-2, 7-3, 10, 11, 13, 14; **Re:Sound** 1(b), 1(d)(iv), 1(d)(iv)-1, 5 [except 5(c)(iv)], 7-1, 7-2, 7-3, 9, 12) attempted to obtain information apparently for the main purpose of conducting some form of a repertoire-use study/analysis. Rulings on these interrogatories are held in abeyance, pending the possible establishment of a repertoire-use study by the Board.

VI. NEXT STEPS

[45] Exchange of responses to interrogatories no later than **Friday, October 11, 2019**.

[46] Exchange of motions re: incomplete/unsatisfactory responses no later than **Friday, November 8, 2019**.

[47] Filing of responses to motions re: incomplete/unsatisfactory responses no later than **Friday, November 22, 2019**.

[48] The Board will then rule on the deficiency motions and subsequently establish a calendar for the remainder of the process.

Repertoire-Use Study

[49] Parties shall indicate whether they intend to conduct a repertoire-use study, and whether it is appropriate to do so for these proceedings no later than **Friday, November 22, 2019**.

Lara Taylor
Secretary General