

Copyright Board
Canada



Commission du droit d'auteur
Canada

[CB-CDA 2019-070]

RULING OF THE BOARD ON OBJECTIONS TO INTERROGATORIES – SAMPLING METHODOLOGY

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

October 25, 2019

I. BACKGROUND

[1] On August 21, 2019, the Board issued Ruling CB-CDA 2019-061 on objections to interrogatories posed by Collectives to Objectors, and those posed by Objectors to Collectives. On the same date, the Board issued Notice CB-CDA 2019-062 seeking Parties' comments on a sampling methodology for a number of interrogatories posed by the Objectors that would require information from the Collectives' members (the "Rightsholder Interrogatories").

[2] On September 11, 2019, Re:Sound and CSI submitted their comments. On September 24, 2019, Pandora, Apple, Spotify, the Canadian Association of Broadcasters, and Stingray collectively provided their response. On October 1, 2019, Re:Sound and CSI submitted their replies. The Board rules on the points raised by the Parties below; the revised sampling methodology is stated in the Appendix to this Ruling, for convenience.

II. TWO PRELIMINARY MATTERS

[3] Before turning to the Parties' submissions, the Board would like to direct the Parties' attention to an inadvertent omission in the first paragraph of Notice CB-CDA 2019-062. The second sentence of that paragraph should read as follows:

[...] These are interrogatories 1(e), 5(c)(ii), 6, 21, 41, 42(a) and 42(b) (the "Rightsholder Interrogatories").

[4] Moreover, on October 8, 2019, Spotify informed the Board that it has withdrawn its objections to SOCAN Tariff 22.A and CSI Tariff – Online Music Services for the years up to and including 2018. As such, Spotify will not be continuing its participation in the above-referenced proceeding.

III. SUBMISSIONS REGARDING THE SAMPLING METHODOLOGY PUT FORTH BY THE BOARD

i. Listing by largest recipients rather than by largest cheques

[5] Parties were all of the view that Connect, SOPROQ, CMRRA and SODRAC should identify the largest recipients of royalties distributed in 2017, rather than the largest cheques issued during that time.

[6] **Ruling:** Having reviewed the explanation provided by the Parties regarding the frequency of royalty distributions in a year, the Board agrees.

ii. Shorter lists of recipients (the “universe”)

[7] The Collectives made submissions proposing shorter lists of recipients. Re:Sound proposed to provide a list of each of Connect’s and SODRAC’s top 500 recipients of royalties in 2017 given the size of their respective membership. CSI proposed to provide a list of each of CMRRA’s and SODRAC’s top 100 music publisher recipients of royalties in 2017 as they represent approximately 98 per cent and 93 per cent of the total amount distributed respectively. The Objectors agreed with both proposals, provided that the Collectives accept two conditions discussed below (see III (c)).

[8] **Ruling:** In view of the Collectives’ representations, the Board agrees as well. The Objectors’ conditions will be addressed under separate heading below.

B. SMALLER NUMBER OF RESPONDENTS (THE “SAMPLE”)

[9] The Collectives made submissions proposing a smaller number of respondents.

[10] (a) Re:Sound proposed to select a combined total of 20 recipients randomly, consisting of both Connect and SOPROQ members, from the smaller universes to address the interrogatories. The Objectors submitted that Re:Sound’s proposal unduly narrows its response and provides no guarantee that they will receive a reasonable number of responses from either Connect or SOPROQ. The Objectors in turn proposed for Connect and SOPROQ to select randomly 25 recipients each to address the interrogatories, provided that Re:Sound accepts two conditions discussed below.

[11] **Ruling:** Setting aside the Objectors’ conditions which will be addressed under separate heading below, the Board agrees with the remainder of the Objectors’ proposal. The proposal put forth by Re:Sound does not provide for a meaningful sample nor a reasonable allocation of responses by Connect and SOPROQ.

[12] (b) CSI submitted that approximately 80 per cent of the royalties distributed by CMRRA in 2017 were paid to 5 music publishers, with another 10 per cent paid to 15 other publishers. In the case of SODRAC, approximately 77 per cent of the royalties distributed were paid to 20 publisher members. In view of the distribution and taking into account some of the Objectors’ comments, CSI agreed that CMRRA and SODRAC would each randomly select 3 of the top 5

publisher members and 7 of the remaining top 20 publisher members to address the interrogatories. The Objectors agreed with the revised proposal, provided that CMRRA accepts two conditions discussed below.

[13] **Ruling:** Setting aside the Objectors' conditions which will be addressed under separate heading below, the Board agrees with CSI's revised proposal.

[14] (c) The Objectors' conditions

[15] The Objectors set out the following two conditions in exchange for accepting smaller universes and smaller samples. First, that the Collectives will not be entitled to raise these reductions in support of any submissions to the effect that the information provided is unrepresentative or otherwise unreliable. Second, that the Collectives will not rely later on information obtained from its members that was not provided in these responses but that was responsive to the interrogatories in question.

[16] The Collectives objected to the two conditions stating that they would improperly and unfairly predetermine and limit the scope of their case and their evidence. The Collectives further noted that if they were to rely on evidence that did not form part of the sample respondents' responses in their Statements of Case, the Objectors will have full opportunity to review and respond to all evidence furnished during the proceeding.

[17] **Ruling:** The Board is aware of benefits and shortcomings of the methodology it is now establishing. That being said, the goal is to establish a sampling methodology that would provide the Objectors with a representative sample of responses to a series of interrogatories that would have otherwise resulted in a disproportionate amount of work for the Collectives and their members (even if the distribution from which the representative sample is drawn is itself complicated by the Parties' agreement on oversampling from parts of the overall distribution). As such, the Board will not have regard to any challenge of the representativeness or reliability of the results of the sampling scheme that are based solely on smaller universes or smaller samples.

[18] Moreover, as stated in Ruling CB-CDA 2019-061, since the interrogatory process in this proceeding precedes the filing of Parties' respective Statements of Case, the Board does not have the benefit of those documents to help delineate the issues. As such, the Collectives should not be prevented from adducing evidence solely on the basis that the information did not form part of the responses provided by the randomly selected sample respondents. Of course, if a party is of the view that the information should have been provided in response to the interrogatories in accordance with the Board's rulings but was not, the party might seek directions from the Board in due course.

iii. Disclosure of amounts paid

[19] Re:Sound objected to the disclosure of the specific amounts paid by Connect and SODRAC to each of their top 500 recipients of royalties in 2017 on the basis that it is highly sensitive commercial information that is not relevant for the purposes of this sampling methodology for the Rightsholder Interrogatories. CSI made similar objections regarding the disclosure of the

specific amounts paid by CMRRA and SODRAC to each of their top 100 music publisher recipients of royalties in 2017. Both Collectives further submitted that the royalties paid are not limited to the equitable remuneration collected for reproduction by online music services but include royalties for a variety of reproduction licenses and other uses.

[20] The Objectors submitted that the payment information is relevant. Notably, the amount of royalties distributed to each of the recipients in the lists will contextualize the actual sample recipients whose specific responses will be provided. It will allow, according to the Objectors, the responses to be considered and weighted. They also pointed to the Board's Directive on Procedure [CB-CDA 2017-161] regarding the treatment of confidential information. Finally, the Objectors noted that neither Re:Sound nor CSI indicated that the responsive payment information was not readily available.

[21] **Ruling:** The Board agrees in part with the Objectors' submissions. Payment information is relevant and should be provided to permit the responses of each sample respondent to be weighed and for the calculation of the skewness of the distribution. However, the Board agrees with the Collectives that the data should be as relevant as possible. To that end, Re:Sound and CSI shall file payment information relating only to Tariff 8 and Online Music Services, respectively, if possible. However, the treatment of each recipient must be the same. That is, neither Collective should supply online-music payments for some recipients and all payments for others. If for some reason treatment of each recipient from a Collective cannot be the same, then that Collective should supply payment information relating to all payments made to each recipient in its universes.

[22] In terms of protecting sensitive commercial information, the Collectives may avail themselves of the terms of Confidentiality Order CB-CDA 2018-061 issued by the Board in the present proceeding. To the extent any party is of the view that there has been a change in circumstances that would require the Board to revisit this Order, it may ask the Board to do so and explain why.

v. Translation of the interrogatories

[23] Re:Sound requested that the Objectors provide a French translation of the questions that are directed to SOPROQ's Francophone members.

[24] The Objectors took issue with the translation request and pointed to section 10 of the Board's Directive on Procedure [CB-CDA 2017-161] which provides that participants and witnesses may address the Board, communicate with each other, and draft documents in the official language of their choice.

[25] **Ruling:** The Board agrees with the Objectors. Each party is entitled to participate in the present proceeding in the official language of its choice. As such, since the Objectors have elected to provide their questions to Re:Sound and its members in English, they are not required to provide them in French as well. Similarly, Re:Sound and its members are entitled to provide their responses in the official language of their choice to the Objectors, with no requirement to translate them into the other official language.

IV. NEXT STEPS

[26] Exchange of responses to the interrogatories in question no later than **Friday, November 22, 2019**.

[27] Exchange of motions re: incomplete/unsatisfactory responses no later than **Friday, November 29, 2019**.

[28] Filing of responses to motions re: incomplete/unsatisfactory responses no later than **Friday, December 6, 2019**.

[29] The Board will then rule on the deficiency motions and subsequently establish a calendar for the remainder of the process as set out in Ruling CB-CDA 2019-061.

Lara Taylor
Secretary General

Appendix – Revised Sampling Methodology

In view of the foregoing, the sampling shall occur as follows:

For any Rightsholder Interrogatory addressed to Re:Sound, Re:Sound shall ask Connect and SOPROQ to each identify the top 500 recipients of royalties distributed in 2017, and to supply the Objectors with a list of recipients thereof, and the amounts paid for Re:Sound Tariff 8, if possible, and the amount paid for all purposes, if not. Then Connect and SOPROQ shall each randomly select 25 of their largest recipients, and address the questions to those recipients.

For any Rightsholder Interrogatory addressed to CSI, CSI shall ask CMRRA and SODRAC each to identify the top 100 recipients of royalties distributed in 2017 and to supply the Objectors with a list of recipients, their addresses, and the amounts paid for the CSI Online Music Tariff, if possible, and the amount paid for all purposes, if not, where the SODRAC sample should be restricted to non-individuals. Then CMRRA and SODRAC shall each randomly select 3 of the top 5 publisher members and random 7 of the remaining top 20 publisher members, and address the questions to those recipients.

In both cases, in the event that a recipient has many documents responsive to these interrogatories, the recipient is not required to supply more than 10 documents per interrogatory.