Copyright Board Canada

Commission du droit d'auteur Canada

[CB-CDA 2022-025]

RULING OF THE BOARD

File: Online Music Services (SOCAN: 2007-2018)

May 3, 2022

I. INTRODUCTION

[1] Pandora seeks to disclose to its consultants, Messrs. Marks and Larson, the highly confidential versions of SOCAN's Statement of Case, Witness Statements of Mr. James Leacock and Ms. Jennifer Brown, and any further highly confidential information from SOCAN (such as in its Responding Statement of Case) that will be filed by SOCAN.

[2] As contemplated under the *Order Dealing with Information for Which Confidential Treatment May Be Claimed* (CB-CDA 2018-061) (the "Confidentiality Order"), Pandora delivered to external counsel of SOCAN, CSI and Re:Sound (the "Collective Management Societies") a confidentiality agreement executed by its consultants, which they had to sign before the information could be disclosed to them.

[3] As permitted under the Confidentiality Order, the Collective Management Societies objected to the disclosure.

[4] The Confidentiality Order (at paragraph 9) provides that: "If an objection is made, no documents or information subject to this order shall be disclosed to the person until the Board has ruled on the objection and, thereafter, only if permitted by the Board's ruling."

II. RULING

[5] The objections to disclosure are upheld and disclosure of the information to the consultants shall not be permitted for the reasons that follow.

III. BACKGROUND

[6] As contemplated under the Confidentiality Order, Pandora wish to retain Mr. Benjamin Marks and Mr. Todd Larson as consultants. They are presented as experienced and well-respected

copyright counsel in the U.S. They are with the firm Weil, Gotshal & Manges LLP. The Consultants are external counsel to Pandora in the United States (U.S.) and represent Pandora in U.S. Copyright Royalty Board proceedings. They would assist Pandora in the current proceeding as consultants, "primarily for their extensive experience relating to music licensing agreements and their understanding of the negotiating and operational implications of the structure and terms of such agreements".

[7] SOCAN opposes Pandora's request primarily for two reasons. First, the access that Pandora seeks for its U.S. counsel is not necessary for Pandora to make its case; and second, disclosure of SOCAN's highly confidential information to Pandora's U.S. counsel presents a substantial risk of harm not only to SOCAN, but also to the counterparties to SOCAN's agreements – namely, Pandora's competitors.

[8] CSI also opposes Pandora's request. In its view, many of the highly confidential information that SOCAN relies on were negotiated by SOCAN and CSI in parallel, in response to market dynamics that are described in that information. As such, CSI's information could be easily reverse engineered through SOCAN's and used to the detriment of SOCAN's and CSI shared members, who are currently represented and involved in copyright rate proceedings in the U.S., where the consultants are representing Pandora in an adversarial setting.

[9] Re: Sound did not file any submissions or make any representations.`

IV. ORAL ARGUMENTS

[10] In addition to the written arguments, oral arguments were presented at the hearing held via videoconference on April 25, 2022.

[11] Pandora seeks to reinforce the view that the Confidentiality Order sets up a reliable system for the protection of confidential or highly confidential information. According to it, the system has never been breached in the past even though Board proceedings regularly deal with highly confidential information. As such, Pandora submits that a balancing test is not required as the system that would result from a balancing test is already in place. Pandora adds that the consultants, as seasoned experts routinely subject to confidentiality orders, are the least likely to disclose the information and are the lowest risk.

[12] SOCAN, on the contrary, argues that its objection requires balancing the benefits that Pandora may draw from hiring the consultants and the risks associated with an inadvertent, inevitable, or unconscious use of the highly confidential information due to the tight relationship between Pandora and its U.S. counsel, the consultants. In its view, the more people that have access to this information the greater the risk of disclosure. SOCAN reiterated that in the event that Pandora was to operate in Canada, it is conceivable that it would seek to do so pursuant to an agreement with SOCAN. If Pandora had access to SOCAN's agreements with other online music service

providers, and had knowledge of SOCAN's main business concerns and negotiation strategies, it would have an unfair advantage in negotiating such an agreement.

[13] CSI focuses on the U.S. proceedings and the heightened risk of inadvertent, inevitable, or unconscious disclosure to Pandora to the detriment of CSI and its members who are represented in those proceedings through the National Music Publishers Association. It contends that the risks outweigh the benefits given that Pandora is well represented by experienced external counsel in Canada and that amending the order would have little effect in mitigating the risk. CSI argues that the purpose of disclosure is questionable, and its utility is minor. It notes that the Confidentiality Order never contemplated – when discussed prior to its approval – the hiring of U.S. consultants involved in parallel U.S. rate-setting proceedings. Finally, CSI notes that while the highly confidential information also pertains to Pandora's competitors, their hypothetical consent to use their information would not be sufficient to alleviate the risk borne by SOCAN.

[14] All the parties are in agreement with respect to the highly confidential nature of the information at stake. They also agree that in terms of procedural matters, such as the one at hand, the Board is the master of its own procedure and retains a broad discretion in this respect.

V. ANALYSIS

[15] I wish to emphasize that the Confidentiality Order does not create a static set of rules, the purpose of which is to insulate sensitive commercial information, subject to limited disclosure. Rather, it sets a framework that can respond to dynamic situations. There is no absolute right to disclose (highly) confidential information to external experts or consultants. The Confidentiality Order is clear: highly confidential information can be disclosed to consultants, "[**S]ubject** to paragraphs 8 and 9". [Emphasis added]

[16] Paragraph 9 of the Confidentiality Order provides the following:

> […] The supplier [of (highly) confidential information] may, within that time, object to the disclosure of documents or information to the person who has signed the agreement. The supplier may waive the objection period by informing the recipient. If an objection is made, no documents or information subject to this order shall be disclosed to the person until the Board has ruled on the objection and, thereafter, only if permitted by the Board's ruling.

[17] The Confidentiality Order is therefore not self-sufficient. In certain circumstances, the framework requires an adjunct ruling of the Board. In this case, the Board must rule on the objection to disclose the information to the consultants. The first issue is to determine what test the Board should apply in ruling on the objection. The second issue concerns the application of that test to the case at hand.

A. WHAT TEST SHOULD DETERMINE THE DISCLOSURE (OR NOT) OF SENSITIVE INFORMATION?

[18] Counsel for Pandora, SOCAN and CSI were not able to identify a Board "precedent" in regard to such a ruling. SOCAN and CSI both favour a balancing approach, between benefits and risks of disclosure. SOCAN refers to the Federal Court, which employs a balancing test when considering whether to grant access to confidential information. Under that test, the Court balances any legitimate need for protection of a party's information against the equally legitimate need of the other party to properly instruct its counsel (*Guest Tek Interactive Entertainment LTD.* v *Nomadix Inc*., 2018 FC 818 at para 23).

[19] Of course, the Board is free to devise its own approach when dealing with rulings on disclosure of sensitive information since it "enjoys the discretion to set its own procedures and practices in each case, subject to its regulations as approved by the Governor in Council" (*Canadian Broadcasting Corp.* v *SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615 at para 94).

[20] The Board can nonetheless look to the practice at the Federal Court that deals with requests for protective orders in relation to commercially sensitive and confidential information, particularly in disputes concerning intellectual property matters (see *Canadian National Railway Company* v *BNSF Railway Company*, 2020 FCA 45 (CanLII), [2020] 3 FCR 124 (hereinafter "National Railway")).

[21] Such protective orders set up "Counsel's Eyes Only" ("CEO") or "Counsel's and Expert's Eyes Only" ("CEEO") regimes (see *Arkipelago Architecture Inc.* v *Enghouse Systems Limited*, 2018 FCA 192 (hereinafter "Arkipelago")) that are similar in essence to the Board's Confidentiality Order. As explained by the Federal Court:

> A protective order is in the public interest by preventing or limiting access to competitive information (as is some of the information at issue here) and in maintaining a proper competitive environment. The protective order, and other orders like it, are frequently issued by the Competition Tribunal to preserve this public interest in proper competition.(*Paid Search Engine Tools, LLC* V *Google Canada Corporation*, 2019 FC 559 at para 55 (hereinafter "Paid Search")).

[22] In the present case, the basis for the Confidentiality Order is not disputed, nor is the characterization of the information as highly confidential in dispute. Access to the Board's record is not at issue (see the distinction between protective orders and confidential orders in *National Railway*).

[23] What is in dispute is whether Pandora's consultants should be provided with the highly confidential information. In such situations, the test for granting CEO or CEEO orders or dealing

with a challenge of a confidentiality designation or restriction in the Federal Courts can be informative, and used in this proceeding, with or without adaptations (such as one that would exclude experts or consultants: See for ex., *Merck & Co.* v *Apotex Inc.*, 2004 FC 567).

[24] In *National Railway*, the Federal Court of Appeal noted that the Federal Court jurisprudence was inconsistent in terms of test and criteria for protective orders (which can be in the form of a CEO order) and used the appeal as an opportunity to provide guidance. The Appellate Court essentially reaffirmed the test regarding the availability of protective orders referred to as the "AB Hassle" test. The latter provides that a protective order may be issued if the Court is satisfied that "the moving party believes that its proprietary, commercial and scientific interests would be seriously harmed by producing information upon which those interests are based".

[25] Furthermore, "[i]n the event a party challenges a confidential designation made by the other party, in determining whether information is confidential, the Court must be satisfied that it "has been treated by the party at all relevant times as confidential", and that "on a balance of probabilities, [the disclosing party's] proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of information" (the "*AB Hassle* test")". (*National Railways* at para 14)

[26] The Federal Court of Appeal distinguishes the *AB Hassle* test from the more stringent *Sierra Club* test (*Sierra Club of Canada* v *Canada (Minister of Finance)*, 2002 SCC 41 (CanLII), [2002] 2 SCR 522 at para 53) (hereinafter "*Sierra Club* test"):

> [The latter] cannot be said to apply in the context of protective orders, notwithstanding the reference to the *AB Hassle* test and the Supreme Court's comment recognizing a similarity between protective orders and confidentiality orders earlier in the decision (*Sierra* at para. 14). (*National Railways* at para *23*)

[27] The *Sierra Club* test provides that a confidentiality order may be issued if:

a. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

b. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[28] Both the *Sierra Club* and the *AB Hassle* tests include a risk assessment, and while there may have been some uncertainty until *National Railway* in terms of which risk standard applies to protective orders, even under the more onerous *Sierra Club* test, the Courts were ready to account

for risk associated with the subconscious or inadvertent misuse of the sensitive information. Such risk would not constitute a lower risk standard and is considered as sufficient to warrant a CEEO order (See *Arkipelago* at para 15-16).

[29] In conclusion, the underlying approach is about balancing the legitimate need for protection of a party's sensitive information against the equally legitimate need of the other party to properly prepare its case (see by analogy *Depura Partners LLC's* v *Desjardins General Insurance Inc*., 2020 FC 261 at para 12).

B. DOES THE RISK OF HARM WARRANT BARRING THE CONSULTANTS' ACCESS TO THE INFORMATION?

[30] In terms of risk of disclosure, SOCAN is not suggesting any untrustworthiness on the part of Messrs. Marks and Larson. SOCAN recognizes that U.S. counsel are bound by the same ethical standards as Canadian counsel are. Moreover, the confidentiality agreement signed by Messrs. Marks and Larson binds them to the jurisdiction of the Federal Court should any breach occur. However, in SOCAN's view the risk lies elsewhere: The close relationship between Pandora and Messrs. Marks and Larson – particularly with respect to Pandora's participation in rate-setting proceedings before the U.S. Copyright Royalty Board and presumably Pandora's licensing deals – give rise to a significant risk of inadvertent, unconscious, or inevitable disclosure in the course of that work.

[31] SOCAN explains that the risk of inevitable disclosure arises when a party who possesses knowledge of confidential information is engaged in such a close relationship with a party that inadvertent disclosure is essentially inevitable. This situation occurs in circumstances where an agent of the receiving party who has obtained knowledge of confidential information could not help but be influenced by this knowledge in making business decisions for the receiving party as part of his or her regular duties, in a manner prejudicial to the disclosing party (*Pliteq, Inc.* v *Wilrep Ltd*., 2019 FC 158 at para. 7, citing *Rivard Instruments, Inc.* v *Ideal Instruments Inc*., 2006 FC 1338 at para. 39).

[32] There are several considerations I take into account in determining whether the consultants should be allowed to access the sensitive information.

[33] Firstly, I am not persuaded that the consultants' role is essential and that excluding them would prevent Pandora from preparing adequately its case. In fact, Pandora has not convincingly explained what superior advice the consultants would provide in comparison to the advice provided by Pandora's Canadian external counsel. Furthermore, the Board has frequently held that foreign contracts, including licensing practices taking place in the U.S., have very little relevance in Canada, which is subject to a different regulatory framework and presents very distinct market characteristics. The assistance of experts on U.S. licensing practices is therefore questionable.

[34] Secondly, while Pandora is not a competitor of SOCAN and CSI, it would obtain an advantage over its online music service providers competitors if it gained indirect access to commercially sensitive information concerning them (including business models and strategies, price formulas and structures, and commercial data). This concern can be amplified by the fact that some prominent online music service providers operate both in the Canadian and American markets. In fact, most of the licensing agreements with key online music service providers operating in Canada filed by SOCAN in the case record contain confidentiality clauses bearing an obligation to seek protective orders or similar tools to limit disclosure and protect its content should the information be required in the context of litigation proceedings.

[35] Thirdly, the combination of the following three facts sheds an unfavourable light on the purpose of Pandora's request: (i) Pandora is not a SOCAN tariff user for the years concerned (ii) a U.S. rate-setting process is taking place at the time of the request for access to SOCAN's highly confidential information by Pandora's U.S. counsel representing Pandora in that proceeding, and (iii) SOCAN members' interests are not aligned with Pandora's. While the confidentiality agreements executed by the consultants require that the highly confidential information only be disclosed to people authorized under the Confidentiality Order, and that the information only be used for the purpose of this proceeding and not for any other purpose, the risk of inadvertent disclosure for another purpose and the associated harm cannot be ignored. As Pandora's counsel explain in their request to the Board dated April 20, 2022, that "Messrs. Marks and Larson will advise Pandora and its external counsel (McMillan LLP) in this proceeding," the risk of inadvertent disclosure to Pandora cannot be excluded.

[36] Based on the foregoing, I am not convinced that the benefits of providing access to the consultants outweigh the risks of harm associated with the potential subconscious or inadvertent misuse of the sensitive information, particularly given the need to maintain "proper competition" in the online music services market. As the Federal Court noted: "Courts recognize that even with the best faith, it can be impossible for a person to delete from their memory some particularly valuable competitive information" (*Paid Search* at para 54). Accordingly, Pandora's request is denied.

VI. SCHEDULE OF PROCEEDINGS

[37] Procedural deadlines need be adjusted in fairness and in light of the fixed dates for the hearing and for the final submissions.

[38] It is noted that, graciously, Pandora is prepared to file its Statement of Case within 7 days of the Board's ruling in case its request was rejected.

[39] An updated Schedule of Proceedings will be provided very shortly.

The Honourable Luc Martineau
Chair of the Copyright Board