Copyright Board Canada

Commission du droit d'auteur Canada

[CB-CDA 2024-067]

ORDER OF THE BOARD

Proceeding: Online Audiovisual Services – Music (2014-2026)

August 21, 2024

I. OVERVIEW

A. CONTENT OF THIS ORDER

[1] This Order establishes, for the first phase of this proceeding,

- the issues the Board will consider;
- the schedule of proceedings; and
- the modalities of cross-examination.

[2] In summary:

- the issues to be considered in the first phase remain the same as those I proposed in Notice CB-CDA 2024-061;
- the schedule of proceeding remains largely the same, with additional time provided for Parties to negotiate a repertoire-use study;
- cross-examinations will be treated as a live cross-examination on affidavit, limited to 3 hours per objector; and
- objections during cross-examinations will be dealt with flexibly by the seized Panel, and may be brought to the Members' attention in a party's Case Record (or Response to Case Records, or Reply to Responses to Case Records).

B. PROCEDURAL BACKGROUND

[3] Following the Case Management Conference of July 11, 2024, I issued Notice CB-CDA 2024-061. The Notice provided, for comment by the Parties,

- a set of issues to be considered by the Board in the first phase of this proceeding;
- a schedule for the first phase; and
- guidance in respect of a possible repertoire-use study.

II. ORDER OF THE BOARD

A. ISSUES TO BE CONSIDERED IN PHASE I

[4] No party disagreed with any of the four issues I proposed be considered in the first phase of this proceeding (Notice CB-CDA 2024-061, Annex A). I therefore retain these issues. They are reproduced in Annex A to this Order.

[5] However, the McMillan Objectors[1], supported by Apple, submit that the following should be considered in phase I: What mechanism, if any, should the tariff (or each tariff family) use to adjust royalties for repertoire use?

[6] In Notice CB-CDA 2024-061 I expressed the view that

> [t]he selection of [the mechanism to adjust royalties for repertoire use] is likely to depend on the rate structure of the tariff, and possibly on how the Board addresses issues such as pre-clearance of rights or exceptions in the tariff.

[7] The McMillan Objectors submit that the Board can provide general guidance, without identifying a particular mechanism to adjust royalties for repertoire-use. Such guidance, they submit, would not depend on the rate structure or how the Board addresses pre-clearance and exceptions. Furthermore, any repertoire-use study would benefit from that guidance, as the parties would have a better idea of the kind of evidence that should be collected and adduced—as well as evidence that would not be necessary.

[8] SOCAN disagrees with the approach put forward by the McMillan Objectors. SOCAN submits that for the Board to provide the kind of guidance the McMillan Objectors seek, the Board would have to consider and rule out possible royalty structures as well as mechanisms to adjust for repertoire use.

[1] Netflix Inc., Buena Vista International Inc., TikTok Technologies Canada Inc., Warner Bros., and DAZN.

[9] Both of these submissions have merit. Undertaking a repertoire-use study prior to receiving guidance from the Board risks spending resources on the collection of evidence that may ultimately not be required.

[10] However, in my view, it would be difficult for the Board to provide the desired guidance without the very evidence that a repertoire-use study may bring. Even were the Board able to conclude during Phase I that there are services that have the characteristics enumerated by the McMillan Objectors in their submission (page 3, i), this may not show how different their respective repertoire-uses are (e.g., whether enough to justify per-user adjustments). A repertoire-use study may be able to show just that.

[11] Furthermore, I agree with SOCAN: even general guidance may make certain royalty structures more or less suitable.

[12] Ultimately, it is preferable that when the Board will consider the Parties' submissions on the appropriate rate-adjustment mechanism, these submissions be supported by evidence from a repertoire-use study. This is particularly true in these proceedings, which will consider certain proposed tariffs for the first time and includes users whose practices (such as with respect to use of repertoire, or pre-clearance) appear to vary widely.

[13] Therefore, in addition to what was suggested in Notice CB-CDA 2024-061 at para 16, parties are encouraged to design a repertoire-use study such that the data gathered would permit the Board to adopt the preferred mechanism of each party.

[14] If the Parties are unable to agree on the repertoire-use study then, as I had indicated in Notice CB-CDA 2024-061 at para. 19, I will return the issue for determination in Phase I. In such a determination, the Panel may consider the interplay between any study design and any mechanisms to account for repertoire use that would then be put forward by the parties. As such, Issue 7 may return to Phase I, in whole or in part.

[15] The Schedule I fix below at para. [39] sets the deadline for the Parties to agree.

B. CROSS-EXAMINATIONS

i. Cross-examinations will be *viva voce*

[16] The McMillan Objectors submit that written cross-examination should be the default examination mechanism. They point to the "primarily legal nature of the Phase I issues, and the potential logistical complexity of arranging live cross-examinations of multiple witnesses, many of whom are outside Canada."

[17] Apple supports this submission.

[18] SOCAN disagrees. According to SOCAN,

> [l]ive cross-examinations would ensure that the questioning party may ask proper follow-up questions or seek clarification based on a witness's response, in real time. In that way, live cross-examinations would support a more complete and clear record and would do so in an efficient manner. Conducting the live cross-examinations virtually would fully address the McMillan Objectors' concerns regarding the location of witnesses.

[19] I agree with SOCAN. The possibility to seek clarification is much simpler in a live cross-examination, and the possibility of conducting cross-examinations virtually will reduce logistical complexity, including that of scheduling.

[20] Cross-examinations will be conducted live. They will be conducted virtually, unless otherwise agreed to by the relevant parties.

ii. Cross-examination will be treated as cross-examination on affidavit

[21] The McMillan Objectors, SOCAN and Apple agree that the cross-examinations are to be treated as cross-examinations on affidavit—not for discovery. That is, the subject of the cross-examination is to be limited to the contents of the witness statement filed by the witness to be examined.

[22] I agree with this clarification.

iii. Objections will be dealt with flexibly

[23] The McMillan Objectors submits that any objections to questions to requests for undertaking should be dealt with flexibly by the Board:

> [T]he Board should take the flexible approach of considering the evidence provided, in light of any objections made, and give the evidence the weight the Board believes it deserves.

[24] Apple supports this submission.

[25] SOCAN agrees in principle, but states that the particular remedy the Board grants should be decided "on a case-by-case basis, which may in appropriate circumstances require something other than the drawing of an adverse inference."

[26] I agree that any objections should be dealt with flexibly. However, determining the appropriate weight to be given to any evidence is a matter for the Panel. For this reason, the discretion not to use such an approach (and, for example, order production of particular information) is also more appropriate to be left with the Panel.

[27] As such, if any party wishes to bring an objection to the attention of the Panel, it may do so in their Case Record (or Response to Case Records, or Reply to Responses to Case Records). In such a case, the party must include a complete transcript of the cross-examination, and list of all objections it wishes to bring to the Panel's attention, including their location in the transcript. The purpose of this is to ensure that the Panel has a complete record of both the objection and any reply, as well as the complete context of any objection.

iv. Cross-examinations will be 3 hours per objector

[28] In Notice CB-CDA 2021-061, I proposed that cross-examinations of any witness shall not exceed 3 hours.

[29] The McMillan Objectors, with the support of Apple, submit that the limit of 3 hours should apply per objector, as opposed to per witness.

[30] SOCAN submits that this would be unnecessarily restrictive, as the number of witness statements that any individual objector might file is not yet known.

[31] Given the expected limited scope of fact evidence in the first phase of this proceeding, I do not expect that objectors will present affidavits for more than a few witnesses each. As such, 3 hours per objector is appropriate.

[32] As such, the time permitted will be 3 hours per objector, except on leave to address unexpected circumstances, such a significant number of witnesses for a single objector.

[33] In the event that SOCAN relies on one or more witnesses that the objectors wish to cross-examine, they will have 3 hours total. If the objectors cannot agree on how to allocate that time, the parties may seek direction either by filing written submissions or requesting a case conference.

v. No per-witness time limitations

[34] The McMillan Objectors, supported by Apple, request that there be a per-witness limit, proportional to the length of their witness statement. SOCAN opposes such a limit.

[35] Given my decision that the 3 hours will be a total per-objector, this additional limitation is not necessary. A short witness statement may have high significance to the examining party, and it is up to them how to allocate their available time.

vi. Additional guidance

[36] Parties are permitted a redirect after cross-examination of each witness, not to exceed 15 minutes per witness.

[37] As a reminder, any redirect must be limited to matters that were raised during cross-examination; new issues cannot be introduced.

C. SCHEDULE OF PROCEEDINGS

[38] In SOCAN's submissions on Notice CB-CDA 2024-061, it requested that the Parties have 6 (instead of 4) weeks to negotiate a repertoire-use study. The practical effect of this would be to move other steps by 2 weeks. Other parties did not object to SOCAN's submissions.

[39] This request is reasonable, and I make the modifications accordingly.

Event	**Date**
Parties to confirm agreement on repertoire-use study	Wednesday, October 2, 2024
All parties to file their Case Record	Wednesday, October 30, 2024
Cross-Examinations	Wednesday, November 27, 2024
All parties to file their Response to Case Records	Wednesday, January 15, 2025
Cross-Examinations	Wednesday, February 5, 2025
All parties to file their Replies to the Responses to the Case Records	Wednesday, February 26, 2025
Board rules on Phase I issues	TBD
Case Management Conference for Phase II	TBD

Lara Taylor
Case Manager

ANNEX A

Issue	**Source(s)**
1. Does the Supreme Court decision in *CBC v SODRAC*, 2015 SCC 57, apply to tariff proceedings before the Board? If so, how should the Board apply the principles of this decision (including technological neutrality and contributions by copyright owners) in the context of a tariff with more than one user?	JSI I.1
2. For each of the following exceptions, is it at all possible for the exception to apply to a class of services covered by the Proposed Tariffs: • s. 29.21 (non-commercial user generated content); • s. 29.24 (backups); • s. 30.7 (Incidental Inclusion); • s. 30.71 (Temporary Reproductions for Technological Processes); and • s. 31.1 (Network Services)? This issue **does not** extend to the consideration of i) whether a particular service is covered by any exception; ii) the extent to which a service's activities are covered; iii) the effect, if any, on the royalties payable by that service this should have; iv) the mechanism the tariff should have to account for this effect; nor v) any conditions in the tariff that will specify what a service has to do in order to benefit from such a mechanism.	JSI I.2

Issue	**Source(s)**
3. What is the interpretation of paragraph 66.501(*a*) of the *Copyright Act RSC, 1985, c. C-42*? In particular, • Does "competitive market" refer to a perfectly competitive market, a monopolistically competitive market, or a market with other features (e.g., a market that is as competitive as possible, given the parameters of the *Copyright Act*)? • How should the requirement of being "free of external constraints" be interpreted in the presence of the tariff-setting regime administered by the Board? • What effect do the three conditions "with all relevant information, at arm's length and free of external constraints" have on the meaning of "a willing buyer and a willing seller" or "competitive market"? This issue **does not** extend to the consideration of whether any particular transaction has the characteristics enumerated in paragraph 66.501(*a*).	Related to JSI III.A.1
4. When offline viewing copies are offered, created, and used, which rights are triggered? This issue **does not** extend to the consideration of the value, nor relative value, of these rights.	Related to JSI III.B.3 and III.C.12