



April 26, 2017

[*CB-CDA 2017-032*]

File: SOCAN-Re:Sound – Pay Audio Services Tariffs, 2007-2016

HIGHLY CONFIDENTIAL – ORDER OF THE BOARD

Attention: [REDACTED]

Re: Interrogatory 9

PARTIAL HISTORY OF INTERROGATORY 9 TO RE:SOUND

On November 4, 2016, in Ruling 2016-091, the Board ordered Re:Sound to “answer Question 9 fully with respect to the same sample used to answer the question with respect to webcasts of pay audio; namely, itself, Connect, Sony Music, Universal Music, Warner Music as well as Connect’s 10 largest (based on distributions) indie label members. The answer shall be in relation to webcasts, regardless of whether such webcasts are of pay audio services or not.”

On December 6, 2016, the Objectors wrote to the Board, noting that it had been more than a month since Re:Sound was ordered “to disclose certain webcasting agreements.” The Objectors asked for two forms of relief. First, they asked “that Re:Sound be ordered to disclose the agreements without any further delay.” Second, they asked for “leave, if necessary, to file revised expert reports and a revised statement of case to deal with the information from the webcasting agreements.”

On December 7, 2016, Re:Sound wrote to the Board, noting that “it appears that there may be some agreements that are responsive to interrogatory 9, but that Re:Sound’s understanding is that there are confidentiality provisions in those agreements which prevent disclosure of the agreements to Re:Sound and/or the Objectors and further, that Re:Sound is continuing to explore this and expects to get back to the Objectors shortly.” Furthermore, it noted that it had mentioned these facts to the Objectors.

On December 8, 2016, the Board issued Order 2016-096, wherein it ordered Re:Sound to provide certain information regarding the agreements forthwith. It also stated that “if producing any of the Agreements requires a specific order, the Board is prepared to issue such an order.”

In response, the Board received Highly Confidential information from Re:Sound, from which the Board understands that one or more of Re:Sound's members have contractual obligations which, they assert, prevent them from disclosing those agreements of their own volition.

On March 29, 2017, the BDUs requested that the Board again order Re:Sound to disclose these documents "immediately and without further delay."

SUBMISSIONS REGARDING NEXT STEPS

On April 6, 2017, the Board issued Notice 2017-020 wherein it expressed the view that another order directed to Re:Sound will not be fruitful in this case, as Re:Sound cannot provide what it does not have, and what it cannot obtain. As such, the Board invited the Parties to make submissions as to what the appropriate course of action should be.

The Objectors submitted that

[REDACTED]

[...]

Re:Sound, [REDACTED] should not be able to hide behind their corporate structures to avoid complying with clear and direct Board Orders when it is obvious that [REDACTED] could simply produce the documents as Ordered by the Board, and could have done so at any time in the past seven months.

They argue that "the Board can issue a specific Order directing [REDACTED] and make that decision an Order of the Federal Court for the purposes of enforcement."

Re:Sound submits that an order compelling production is not appropriate given that

[REDACTED]

Further, Re:Sound claims that

[t]he Confidentiality Order in place in these proceedings is insufficient to protect the highly sensitive commercial information and confidential business terms contained in the agreements. As explained by [REDACTED], both in-house and external counsel to the parties in this proceeding may in the future be directly involved [REDACTED]. In the case of external counsel,

even if the information was kept confidential, having access to and knowledge of these privately negotiated agreements could be extremely detrimental to [REDACTED]

ANALYSIS OF THE SUBMISSIONS

The mere fact that information to be disclosed is confidential is not a reason for the Board not to order its disclosure. As the Objectors note, were such arguments to be accepted, the inevitable conclusion would be that no party should ever be required to disclose confidential information, and that a confidentiality order issued by the Board is never sufficient to protect any party's confidential information.

With regards to any provisions in the agreements [REDACTED] these are obligations on the parties, and have little or no bearing on whether it is appropriate to order disclosure.

In Ruling 2016-091, issued in the present proceeding, the Board stated that

[g]iven the breadth of information sought by the Collectives, including in relation to rights not licensed by the proposed tariffs – and held to be relevant by the Board – it is consistent to conclude that the information sought in Question 9 is also relevant to a matter at issue in these proceedings.

The Board sees no reason to diverge from this conclusion. The fact that the Objectors have not yet relied on the very information they seek does not have any bearing on this conclusion.

The fact that the Objectors, after having received certain information from Re:Sound in response to Order 2016-096, waited before asking the Board—again—to order Re:Sound to fully respond to Interrogatory 9, does not disentitle them to a response.

Lastly, while not addressed by Re:Sound directly, the Board concludes that [REDACTED] is not a disinterested party to these proceedings, as it benefits from the royalties collected by Re:Sound.

Given the above, the Board finds that the current instance is an appropriate situation in which to order the disclosure of information sought by the Objectors.

ORDER

Since [REDACTED] cannot provide the requested information voluntarily, the Board issues the following order:

[REDACTED] shall provide to the external counsel of the parties to these proceedings (cc'd in transmittal email), who are entitled to receive Highly Confidential information pursuant to the Board's Confidentiality Order of June 16, 2016 and shall file with the Board, by no later than

Friday, May 5, 2017, the agreements



A handwritten signature in cursive script, appearing to read "Gilles McDougall".

Gilles McDougall
Secretary General