Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Broadcasting Decision CRTC 2012-442

PDF version

Route reference: Part 1 application posted on 17 April 2012

Ottawa, 14 August 2012

Stingray Digital Group Inc.
Montréal, Quebec

Application 2012-0447-9

Complaint by Stingray Digital Group Inc. against the Canadian Broadcasting Corporation alleging undue preference and disadvantage, contrary to the provisions of the New Media Exemption Order

The Commission finds that the Canadian Broadcasting Corporation did not contravene the undue preference and disadvantage provision of the Amended Exemption order for new media broadcasting undertakings *set out in the appendix to Broadcasting Order 2009-660 when it launched its online music service CBC Music.*

The parties

1. Stingray Digital Group Inc. (SDG) is a broadcaster that owns and operates various services, including the national pay audio programming undertaking Galaxie and an online music service Stingray-music.com.

2. The Canadian Broadcasting Corporation (CBC) is Canada's national public broadcaster. The CBC provides various broadcasting services, including an online music service CBC Music.

The complaint

3. On 13 February 2012, the CBC launched its new music Internet portal CBC Music, an online service to which users can subscribe free of charge. The service provides access to 40 web radio stations, a selection of on-demand music, web-based streams of the CBC's over-the-air radio services and other audio content such as live concerts. The portal also includes editorial content about music and artists, blogs and forums where subscribers can exchange information and opinions about music.

4. On 17 April 2012, SDG filed a Part 1 application alleging undue preference/disadvantage by the CBC pursuant to Broadcasting Order 2009-660 (the New Media Exemption Order).[1]

5. In its application, SDG contended that the CBC benefits from two main preferences: its reliance on government funding that is not available to private enterprises and its reliance on preferential copyright licence fees. SDG alleged that the CBC used its government funding to launch and operate its new music portal, and that CBC Music is in direct competition with SDG and other private enterprises without sufficient regard to the CBC's mandate and specific programming objectives set out in the *Broadcasting Act* (the Act).

6. SDG argued that CBC Music displays only a few banner ads and that, as such, the initiative appears to be entirely supported by the CBC's internal resources, which are largely comprised of government funding. SDG further argued that the CBC does not account for its expenditures on new media initiatives separately from its expenditures on radio and television initiatives.

7. SDG also alleged that the CBC pays a reduced royalty rate compared to the private sector for its use of music on radio and online, which SDG submitted is a mere fraction (1.5%) of the already reduced rate that it pays for its radio services. SDG argued that this reduced rate is based on the non-commercial and public interest character of the CBC's radio service and does not reflect the nature of the CBC's online music service.

8. SDG stated that it does not know the terms on which the CBC has obtained contractual music licence rights but the fact that the CBC's online music service is offered free to subscribers is indicative that these rates have been obtained on a preferential basis.

9. SDG contended that the "CBC's streaming channels are not differentiated in any meaningful way from the streaming channels that SDG provides, or that other private enterprises, such as Astral or Archambault, are also starting to provide." SDG also asserted that the CBC's service will harm SDG's own online music service and may also harm its licensed pay audio service by, notably, causing it to lose listeners to the CBC. SDG argued that this harm is undue because it will arise directly from the unfair competitive advantage that the CBC enjoys.

The CBC's response

10. In its submissions, the CBC argued that every service that it offers relies to some extent on government funding but that, in the case of CBC Music, this reliance will decline as advertising revenues increase. The CBC noted that display advertising revenues on the site have already exceeded expectations.

---

[1] The New Media Exemption Order was again amended on 26 July 2012 in Broadcasting Order 2012-409. It is now known as the Exemption order for digital media broadcasting undertakings.

11. The CBC also submitted that it is not unique in offering online access to music free of charge to users, citing other services such as Iceberg Radio, Slacker, Jango and Wolfgang's Vault as other free services available in Canada. The CBC argued that its service is unique in its promotion of Canadian content, noting that CBC Music offers the stream to Radio 3 (a 100% Canadian service) as well as a number of 100% Canadian web radio services including several focused on Canadian composers, Canadian songwriters and Canadian jazz. It added that it also features 500 concerts, 90% of which are Canadian, 30,000 artists' pages created by musicians themselves, almost all of which are Canadian, along with a strong Canadian editorial focus on its blogs, interviews and other editorial content.

12. The CBC further submitted that, contrary to SDG's assertion, the Act imposes limitations on the extent to which the CBC may borrow money, and that its status as a Crown corporation necessarily constrains the CBC's ability to have "outside investors" participate in its activities.

13. The CBC also noted that SDG's application suggests that the CBC cannot pursue any initiatives that would compete in any way with private sector participants in the broadcasting industry unless those initiatives do not rely on government funding in any respect. The CBC submitted that this would mean, for example, that it is somehow inappropriate for the CBC to offer its Radio One, Radio Two or over-the-air television services to Canadians. The CBC argued that it is evident that none of these activities is inappropriate noting that it has competed against private sector participants – both domestic and international – since its inception in 1936.

14. With respect to copyright, the CBC stated that it pays the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and other copyright collectives pursuant to the different tariffs approved and certified by the Copyright Board as "fair and equitable" tariff rates. It stated that the Copyright Board has never used the CBC's unique mandate as the basis for approving preferential royalty payments. The CBC submitted that the Copyright Board established a tariff formula for the CBC and that there was nothing preferential in nature about setting this distinct formula.

15. The CBC also argued that its private licence agreements were entered into on commercially competitive terms and that SDG had no basis for alleging that these were obtained on a preferential basis.

16. The CBC argued that, should the Commission find that there is a preference, this preference should not be considered undue. The CBC further asserted that there should be no material adverse impact on SDG since SDG competes with numerous free-to-user online music services that rely on sources of funding that may not be available to SDG. The CBC also argued that there is no evidence that SDG's subscribers will terminate their subscription as a result of using CBC Music and that CBC Music, as an additional choice to Canadians, enhances the marketplace rather than having an anti-competitive effect.

Interventions

17. The Commission received several interventions, mostly from members of the public and artists, the majority of whom opposed or commented on the application. The public record of this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

18. While very few addressed the substantive undue preference/disadvantage arguments advanced by the parties, a very large number of the interventions highlighted the uniqueness of the CBC's service, including its distinct emphasis on the promotion of Canadian artists and emerging Canadian talent.

19. SOCAN filed an intervention addressing the allegation that the CBC was receiving preferential copyright rates. SOCAN argued that the CBC's tariffs are established by the Copyright Board at public hearings only after an extensive consideration of a number of factors including the tariffs that are paid by the private sector and the relative audience shares, among other factors. Based on these factors, SOCAN submitted that the allegation that CBC receives a preferential copyright rate is incorrect.

SDG's reply

20. In its reply SDG insisted that it did not take issue with placing the CBC's own proprietary content online or with its establishment of online communities and social networks. Its concern rather rests with the streamed and on-demand music offerings, which SDG contended contain a substantial number of non-Canadian musical selections.

21. SDG argued that the CBC has failed to provide financial data to substantiate that it will eventually no longer rely on its government funding. SDG also specified that its own copyright royalties its pays to SOCAN are at 6.75% of all incremental revenue it generates from its online activities, which SDG argued is evidence that the CBC enjoys a clear advantage. Lastly, SDG asserted that, since the CBC has provided very little information regarding how the preferences that the CBC enjoys may be justified under the Act, the CBC has not established that the preferences and disadvantages are not undue.

Commission's analysis and decisions

22. The Commission considers that the issue it must address is the following: Is the CBC giving itself an undue preference and/or subjecting SDG to an undue disadvantage contrary to the Commission's New Media Exemption Order?

23. When examining a complaint alleging undue preference or disadvantage, the Commission must first determine whether an undertaking has given a preference or subjected another person to a disadvantage. If the Commission finds that a preference has been granted or a person has been subjected to a disadvantage, it must then

determine whether, under the circumstances, that preference or disadvantage is undue.

24. In order to determine whether a preference or disadvantage is undue, the Commission examines whether the preference or disadvantage had, or could have, a significant adverse effect on the applicant or any other person and the effect that the preference or disadvantage had, or will have, on the achievement of the Canadian broadcasting policy objectives set out in the Act.

25. Under the New Media Exemption Order, once an applicant has demonstrated that a preference has been granted or that a person has been subjected to a disadvantage, the burden of demonstrating that such preference or disadvantage was not undue rests with the undertaking having granted the preference or having subjected another person to a disadvantage.

Preference or disadvantage

26. The Commission notes that SDG's allegations of preference rest on two points:

- the receipt by the CBC of government funding; and
- payment by the CBC of different copyright rates than those paid by SDG.

27. With respect to the issue of government funding, the Commission notes that the CBC's government funding is set by Parliament and is not under the CBC's control. The Commission further notes that the CBC has, since its inception, used government funding to operate its broadcasting undertakings in conjunction with, and often in competition with, commercial broadcasting undertakings.

28. With respect to the issue of the copyright rates, the Commission notes that these rates were, as submitted by SOCAN, set by the Copyright Board following a public hearing.

29. SDG also raised concerns with respect to the terms on which the CBC has obtained contractual music rights. The Commission notes, however, that SDG provided no evidence beyond speculation that these terms are preferential.

30. The undue preference provision set out in the New Media Exemption Order provides as follows:

> The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

31. The Commission notes that in order to contravene this provision, an undertaking must take some action to give itself a preference or to inflict a disadvantage on another party. This action can include negotiating or agreeing to preferential terms in

a commercial negotiation[2]. In this case, the Commission finds that the CBC did not engage in any action to give itself a preference. As noted above, its government funding is set by Parliament and the copyright rates were set by the Copyright Board.

32. Based on the above, the Commission considers that SDG has not demonstrated that the CBC has given anyone, including itself, a preference, or that it has subjected anyone to a disadvantage.

33. In light of its decision with respect to preference and disadvantage, the Commission does not need to apply the test to determine whether a preference and/or disadvantage is undue.

Secretary General

Related documents

- Amendments to the *Exemption order for new media broadcasting undertakings* (now known as the *Exemption order for digital media broadcasting undertakings*) Broadcasting Order CRTC 2012-409, 26 July 2012

- Complaint by TELUS Communications Company against BCE Inc., Bell Canada or Bell Mobility Inc. alleging undue preference and disadvantage, contrary to the provisions of the New Media Exemption Order, Broadcasting Decision CRTC 2011-765, 12 December 2011

- *Amended Exemption order for new media broadcasting undertakings* set out in the appendix to *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the exemption order for mobile television broadcasting undertakings*, Broadcasting Order CRTC 2009-660, 22 October 2009

[2] See Broadcasting Decision 2011-765.